



**Asia/Pacific Group  
on Money Laundering**

ASIA/PACIFIC GROUP ON MONEY  
LAUNDERING



OFFSHORE GROUP OF BANKING  
SUPERVISORS

COOK ISLANDS ME3

# Mutual Evaluation Report

Anti-Money Laundering and Combating the  
Financing of Terrorism

# Cook Islands

9 July 2009

The Cook Islands is a member of the Asia/Pacific Group on Money Laundering (APG) and an observer of the Offshore Group of Banking Supervisors (OGBS). This evaluation was conducted jointly by those bodies and was adopted as a 3rd mutual evaluation by the APG at its Plenary on 9 July 2009.

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## ACRONYMS

AG	Attorney General
AML/CFT	Anti-Money Laundering and Combating the Financing of Terrorism
APG	Asia/Pacific Group on Money Laundering
BCP	Basel Core Principles
BCR	Border Cash Report
BTIB	Business Trade and Investment Board
CCAM	Coordinating Committee on Combating Money Laundering and Terrorist Financing
CDD	Customer Due Diligence
CIC	Cook Islands Customs
CIFIU	Cook Islands Financial Intelligence Unit
CIP	Cook Islands Police
CLO	Crown Law Office
CTR	Cash Transaction Report
DNFBP	Designated Non-Financial Businesses and Profession
EFTR	Electronic Funds Transfer Report
FAI	Foreign Affairs & Immigration
FATF	Financial Action Task Force
FI	Financial institution
FIU	Financial Intelligence Unit
FSAP	Financial Sector Assessment Program
FSC	Financial Supervisory Commission
FSRB	FATF-style Regional Body
FT	Financing of terrorism
FTRA	Financial Transactions Reporting Act
IAIS	International Association of Insurance Supervisors
KYC	Know your customer/client
MACMA	Mutual Assistance in Criminal Matters Act
MOJ	Ministry of Justice
MOU	Memorandum of Understanding
ML	Money laundering
MLA	Mutual legal assistance
NPO	Non-profit organization
OGBS	Offshore Group of Banking Supervisors
PEP	Politically-exposed person
POCA	Proceeds of Crimes Act
RI	Reporting institution
ROSC	Report on Observance of Standards and Codes
SG	Solicitor General
SRO	Self-regulatory organization
STR	Suspicious Transaction Report
TCSP	Trust and Company Service Provider
UN	United Nations Organization
UNSCR	United Nations Security Council Resolution

## **PREFACE - INFORMATION AND METHODOLOGY USED FOR THE EVALUATION OF THE COOK ISLANDS**

1. The evaluation of the anti-money laundering (AML) and combating the financing of terrorism (CFT) regime of the Cook Islands was based on the Forty Recommendations 2003 and the Nine Special Recommendations on Terrorist Financing 2001 of the Financial Action Task Force (FATF), and was prepared using the AML/CFT Methodology 2004. The evaluation was based on the laws, regulations and other materials supplied by the Cook Islands, and information obtained by the evaluation team during its on-site visit to the Cook Islands from 2 – 16 February 2009, and subsequently. During the on-site visit, the Evaluation Team met with officials and representatives of all relevant Cook Islands government agencies and the private sector. A list of the bodies met is set out in Annex 2 to the mutual evaluation report (MER).
2. The evaluation was conducted by a team of assessors composed of Asia/Pacific Group on Money Laundering (APG) and Offshore Group of Banking Supervisors (OGBS) experts in criminal law, law enforcement and regulatory issues. The Evaluation Team consisted of: Ms Carolyn Davy, Senior Assistant Director (Branch Head), Criminal Assets Branch (Melbourne Office), Commonwealth Director of Public Prosecutions, Australia (legal expert); Ms Sylvia Sirett, Assistant Director, Policy and International Affairs Division, Guernsey Financial Services Commission (OGBS financial expert); Ms Woon Hooi Shyen, Deputy Director, Financial Intelligence Unit, Bank Negara Malaysia (APG financial expert); Detective Sergeant Craig Hamilton, New Zealand Police Force (law enforcement expert); Mr Michael Ha'apio, Head of Solomon Islands Financial Intelligence Unit (additional law enforcement expert); and Mr Eliot Kennedy, Deputy Secretary, APG Secretariat.
3. The experts reviewed the institutional framework, the relevant AML/CFT laws, regulations, guidelines and other requirements, and the regulatory and other systems in place to deter money laundering (ML) and the financing of terrorism (FT) through financial institutions and Designated Non-Financial Businesses and Professions (DNFBPs), as well as examining the capacity, the implementation and the effectiveness of all these systems.
4. This report provides a summary of the AML/CFT measures in place in the Cook Islands as at the date of the on-site visit or immediately thereafter. It describes and analyses those measures, sets out the Cook Islands' levels of compliance with the FATF 40+9 Recommendations (see Table 1), and provides recommendations on how certain aspects of the system could be strengthened (see Table 2).
5. The Evaluation Team would like to express its gratitude to the Cook Islands authorities for their open and proactive cooperation throughout the entire evaluation process.

## Executive Summary

### Key Findings

- 1. The primary money laundering (ML) and terrorist financing (TF) risk in the Cook Islands remains its offshore financial sector.** The Cook Islands has however taken some important additional steps in recent years to reduce but not eliminate the risks presented by the offshore sector, and the small domestic sector.
- 2. The Cook Islands has demonstrated commitment to enhancing its anti-money laundering (AML) and counter-terrorist financing (CFT) systems over the past few years.** It has participated actively within the Asia/Pacific Group on Money Laundering since 2001 and the Egmont Group of Financial Intelligence Units since 2004, has undertaken several reviews of its AML/CFT system, and has responded to the numerous recommendations, including for legislative amendments, to improve its AML/CFT systems contained in two previous mutual evaluations (2001 and 2004), as well as enhancements arising as a result of the FATF's Non-Cooperative Countries and Territories (NCCT) process. The Cooks Islands was removed from the NCCT list in February 2005 and from monitoring by the FATF in June 2006.
- 3. While further improvements are still required, particularly in relation to the significant risks posed by the offshore trust sector, the Cook Islands has significantly enhanced the supervision of its onshore and offshore sectors** over the past two to three years, and the competent authorities conduct annual on-site examinations of all financial institutions, including domestic and offshore banks and trust and company service providers.
- 4. The Cook Islands Financial Intelligence Unit (CIFIU) is well resourced and is the lead agency in the Cook Islands for AML/CFT matters.** The Cook Islands' AML/CFT system relies on the CIFIU's work on financial intelligence, AML/CFT supervision, training of obliged entities, policy, reform, national co-ordination and international co-operation, but the Financial Supervisory Commission (FSC) also plays an important role in the AML/CFT system, both as prudential regulator and specifically for AML/CFT matters under delegated authority from the CIFIU pursuant to the *Financial Transactions Reporting Act 2004* (FTRA)..
- 5. The ML offences, first introduced in 2000 and subsequently amended in 2003 and 2004, are largely in line with international requirements but penalties available for natural persons are not sufficiently proportionate or dissuasive and there is a lack of focus on ML investigations.** Opportunities for ML investigations have been limited however there have been several opportunities that were not pursued. There have been several recent investigations of domestic drug and fraud/misappropriation crimes that have generated relatively substantial amounts of proceeds of crime. No ML charges have been laid. Recommendations have been made in the report to improve the capacity of law enforcement agencies to investigate ML.
- 6. There have been no investigations of TF and there continues to be no evidence of a terrorism threat in the Cook Islands. TF offences, introduced in 2004 and updated in 2007, are largely in line with international requirements** but a penalty is required to be specified for corporations convicted of TF and other related offences. The regime for the freezing of terrorist assets is also largely in line with the international standards.

7. **There is a legislative framework for conviction-based confiscation, however, its effectiveness is limited by certain definitions and a lack of cohesion or consistency.** There have been no proceeds of crime investigations conducted in the Cook Islands, with the exception of certain assistance provided to a foreign country. The relevant agencies do not have a well developed awareness of their functions under the legislation and investigations of this nature have not been accorded high priority.

8. **The Cook Islands has reasonably comprehensive customer due diligence (CDD) obligations which apply to equally to all reporting institutions, however important shortcomings remain in relation to legal requirements to identify and verify principal owners and beneficiaries. There is no explicit requirement for a reporting institution (RI) to determine who are the natural persons that ultimately own or control the customer when it is a legal person or legal arrangement.** Although Prudential Statements issued by the FSC and guidelines issued by the CIFIU are not “enforceable”, the banking sector does include the requirements in their policies and procedures as if they were mandatory requirements.

9. **Steps have been taken in recent years to ensure that excessive secrecy provisions cannot impede the performance of competent authorities in combating ML or TF. Record-keeping requirements generally comply with the standards but requirements for wire transfers need enhancement.** Requirements for monitoring unusual and suspicious transactions are generally adequate, though not all predicate offences are covered and there are low reporting levels from some sectors. The financial sector is generally well supervised, although supervision needs to be extended to the insurance sector (which is very small) and powers of enforcement and sanction are not effective, proportionate and dissuasive. Preventative measures have been extended to DNFBPs under the FTRA, but more guidance and effective implementation is required.

10. **Trust law in the Cook Islands, particularly international trust law, is complex. There are inadequate safeguards in the international trust system to mitigate the risk that it may, or will, be exploited by criminals.** While the current practices of TCSPs to collect beneficial ownership information when registering trusts, and regular on-site inspections of TCSPs by the authorities, go some way to meeting some of these concerns, serious risks remain, particularly in relation to some of the more complex trust structures on offer.

11. **National policy and operational coordination mechanism are generally adequate, as are measures in place for international cooperation.** The Cook Islands has sought to satisfy a large number of its obligations under the relevant UN Conventions and resolutions and has made significant progress in this area since 2004. Mutual legal assistance and extradition arrangements generally comply with the standards, though some deficiencies in offence provisions may limit effectiveness.

12. Key recommendations made to the Cook Islands include to:

- Ensure that all designated categories of predicate offences are covered;
- Consider increasing the relevant penalty for ML for natural persons to ensure that it is proportional and dissuasive;
- Develop a strategy to ensure that appropriate ML and proceeds of crime matters are identified and investigated and action taken in a consistent manner;
- Continue to improve capacity and capability in the police for specialist investigative skill development, in particular, for financial investigators.
- Provide a definition of “principal owners” and “beneficiaries” for the purposes of CDD requirements and explicitly require RIs to identify and verify principal owners and beneficiaries;
- Bring the insurance sector fully within the AML/CFT regime;

- Provide the competent authorities with the power to impose disciplinary and financial sanctions and the power to withdraw, restrict or suspend an institution’s licence where applicable;
- Review the structure of the supervisory authorities (CIFIU and FSC) to ensure that the available resources are being utilized in the most effective and productive manner and ensure that supervisors, both in the CIFIU and the FSC, have the necessary knowledge and training in order to conduct effective examinations of the offshore sector;
- Prescribe a threshold for dealers under the FTRA and provide more guidance to DNFBPs to address specific business operations that may require either simplified or, especially for TCSPs, enhanced CDD.
- Establish measures requiring TCSPs (including international trusts) to collect full identification information on the beneficial owners of trusts and establish mechanisms to mitigate the clear ML/TF risks in the offshore trust sector.

## 2. Legal Systems and Related Institutional Measures

13. The ML offence provisions contained at section 280A of the *Crimes Act 1969* follow closely the terminology employed in the Vienna and Palermo Conventions. The legislation seeks to cover the various forms of required physical conduct and in respect of the mental element has provided for proof of knowledge”. The definition of “property” is broad and is not limited by any reference to value. A threshold approach has been adopted under which all offences falling within the definition of “serious offence” are predicate offences for the offence of ML. Whilst the FATF designated categories of predicate offences have been well represented, competent authorities should ensure that each designated category is fully addressed, in particular that offences of trafficking in firearms, counterfeiting and piracy of products, and smuggling (other than of people) exist as serious offences, and to consider relevant forms of environmental crime beyond illegal fishing. Competent authorities should also consider increasing the relevant penalty for ML for natural persons to ensure that it is proportional and dissuasive.

14. There have been no prosecutions for ML. While there have only been limited opportunities to pursue possible ML offences (and/or proceeds of crime action), the Evaluation Team was made aware of several predicate crimes involving relatively substantial amounts of proceeds of crime. Cook Islands authorities appear to have missed several opportunities to pursue ML offences, due in part to capacity issues in both the Cook Islands Police (CIP), in terms of investigative capacity, and the Crown Law Office, in terms of the provision of advice as what additional investigations should be conducted and charges laid. The CIP and CLO should consider consultation at an early stage to ensure ML offences are given adequate consideration in appropriate cases, awareness is heightened and a consistent approach to charging and sentencing submissions is developed.

15. The *Terrorism Suppression Act 2004 (TSA)* as amended by the *Terrorism Suppression Amendment Act 2007* provides for the criminalization of certain offences relating to terrorism including the financing of terrorism (TF), and for the forfeiture of terrorist property. Section 11 of the TSA effectively addresses the UN TF Convention requirements in the criminalization of TF, though there are some minor departures from the terminology used in the Convention.

16. Sub-section 4(2)(c) of the TSA imposes a requirement in the definition of “terrorist act” which is not otherwise required by the convention, namely, that the act or omission “*must be made for the purpose of advancing a political, ideological or religious cause*”. As such, it affects proof of the TF offences which involve the collection or provision of property intending, knowing or having reasonable grounds to believe that the property will be used in full or in part to carry out a “terrorist act”. Other TSA offences

which apply the term “terrorist act” are similarly affected. Competent authorities should consider whether this additional limb of the definition of “terrorist act” should be deleted.

17. The absence of any specific penalty for corporations and any ability to calculate or otherwise set a penalty may mean that a Court has no ability to impose a sanction on a corporation found guilty of a TSA offence or that there is doubt as to the scope of that penalty. Competent authorities should consider specifying a monetary penalty (together with the ability to cancel relevant licences) for corporations for offences under the TSA which are sufficiently high to be regarded as proportionate and dissuasive.

18. The Evaluation Team accepted that the risk of TF in the Cook Islands is low and that the absence of any investigations is not a relevant factor in determining effectiveness.

19. Confiscation in the Cook Islands is governed by the *Proceeds of Crime Act 2003* as amended by the *Proceeds of Crime Amendment Act 2004* (POCA). The POCA is a conviction-based regime which provides for the forfeiture of tainted property and assessment of pecuniary penalty orders, seizure and restraint of property and creates additional information gathering powers for investigators. All actions are dependent upon the commission of a “serious offence” as defined by the POCA which is defined as offences punishable by imprisonment of more than 12 months or a fine in excess of \$5,000, both committed in the Cook Islands or which would have constituted such an offence had they been committed in the Cook Islands. The POCA’s effectiveness is limited by the definitions of “proceeds” and “realizable property” and inconsistencies in the provisions. Agencies do not have a well developed awareness of the POCA and there has been no practical domestic application of the POCA provisions.

20. The Cook Islands has implemented measures to freeze and confiscate terrorist assets under the TSA. While UN Consolidated Lists of designated entities are distributed, clearer, more formal processes are required to ensure information (including the consolidated list of terrorist entities) is communicated to reporting institutions. Statutes enable the freezing and confiscation of “terrorist property” but do not extend to property jointly owned or indirectly controlled by relevant entities nor for access to frozen property for basic expenses.

21. The Cook Islands FIU is well resourced and generally performing effectively. The effectiveness of the CIFIU’s analytical function is however undermined by constraints with its database. Despite the existence of various co-ordination mechanisms, the day to day quality of key working relationships with law enforcement and other government agencies, in particular the CIP, needs to be further developed to enhance engagement and to ensure clear understanding of function and the importance of an effective AML regime in the jurisdiction, and the role of the CIFIU in that system.

22. Three agencies enforce the legal framework for the detection and prosecution of ML, TF and the recovery or confiscation of criminal proceeds: the Cook Islands Police (CIP) – the principal investigating agency (also having prosecution functions); the Crown Law Office (CLO) – the prosecuting agency; and the CIFIU – supporting the CIP in its investigative role. While the resources of the CIP are limited, the CIP Commissioner is of the belief that after recent reforms and training there is now sufficient capacity within the police to address most financial crimes. A number of relevant powers are available in various laws including the POCA but the effectiveness of the powers has not been tested.

23. Despite there being only limited opportunities, the failure to consider the application of the ML offence and the POCA provisions reflects an overall lack of engagement in these areas. However, recent reforms and recruitment of additional experienced staff in both the CIP and CLO should provide a stronger foundation for the future application of the ML offence and the POCA legislation, and investigation of serious crime generally, though further training and recruitment of a forensic accountant are recommended. In addition, it is critical that the CIP and the CIFIU work closely and support of each

others' function, though there needs to be clear separation of duties between the CIP and the CIFIU to ensure transparency and integrity of the CIFIU.

24. There is a declaration system in place for cross border movement of currency and negotiable bearer instruments (NBI). The *Proceeds of Crime Amendment Act 2003*, No.19 provides a prescribed Border Currency Declaration Report (BCR) which must be completed if a person intends to take into or out of the Cook Islands NZD\$10,000 or more or the equivalent in foreign currency. The level of reporting is however very low (34 BCRS in total between 2004 and 2008), considering the number of passenger movements. There have been no out bound declarations. All the BCRs received relate to cash and there have been no BCRs relating to NBIs. No detections have been made of, or sanctions imposed for, false or failed declaration between 2004 and 2008. During this time approximately 350,000 persons have entered the border.

25. The cross-border system is enforced by the Cook Islands Customs Service (CICS). While there are sanctions for failure to declare and false declarations and some powers to search and seize, the search provisions only relate to persons and accompanying luggage; they do not relate to cash that may be moved across the border unaccompanied such as via post or cargo. There is no express provision to search cargo or postal items for the purpose of interdiction of cash or NBI. There are also a number of serious constraints in the form of resources and training which are limiting the effectiveness of the CICS at the border but reforms and additional training are under way.

### **3. Preventive Measures—Financial Institutions**

26. The Cook Islands considers banks (domestic and offshore), offshore insurers and trustee companies to be part of the financial sector for the purposes of AML/CFT preventive measures. From 1 January 2009, with the commencement of the *Insurance Act 2008*, all insurers became part of the regulated financial sector. While the one money changing and remittance operator in the Cook Islands is not regulated and supervised by the FSC for prudential purposes (pending enactment of the *Money Changing and Remittance Businesses Bill 2008*), for AML/CFT purposes it falls within the definition of "reporting institution" (RI) in section 2 of the FTRA.<sup>1</sup>

27. The Financial Supervisory Commission (FSC) is the sole prudential regulator of the financial sector. The *Financial Supervisory Commission Act 2003* (FSC Act) establishes the Financial Supervisory Commission and sets out its functions and powers. Under delegation from the CIFIU, the FSC carries out annual inspections on all banks and trustee companies for compliance with Part 2 of the FTRA. Part 3 inspections remain the responsibility of the CIFIU. To date, risk-based supervision has not been applied by the FSC or CIFIU.

28. The CIFIU has issued six sets of Guidelines under the FTRA which provide background information and assistance to RIs so as to aid them in meeting their obligations under the FTRA. These Guidelines cover (i) Background information; (ii) Suspicion Transaction Reporting; (iii) Cash Transaction Reporting; (iv) Electronic Funds Reporting; (v) Record Keeping and Customer Identification; and (vi) Implementing a Compliance regime.

29. In addition to adhering to the FTRA, banks are also expected to comply with the requirements of the *Banking Act 2003* and Prudential Statements which are issued by the FSC in accordance with the provision in section 14(3) of the Banking Act 2003. In particular, Prudential Statement No. 08-2006

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<sup>1</sup> This Bill was passed on 26 June 2009.

outlines the principles and recommendations which the FSC requires all domestic and international banks to incorporate into their risk management policies with the objective of ensuring that banks have in place know your customer (KYC) policies and procedures.

30. On 11 February 2009 the Cook Islands introduced the Banking Act Amendment Bill 2009 to amend the *Banking Act 2003* which will have the effect of abolishing offshore banks in the Cook Islands. Once the amendments come into effect, only a bank licensed as a domestic bank will be permitted to carry out offshore banking activities. Existing offshore banks will be given nine months from the date the amendments come into effect to obtain a domestic licence, wind up their operations or move to another jurisdiction. One of the existing offshore banks has had its licence revoked by the FSC and is required to cease business in the Cook Islands by 31 December 2009.

31. The Guidelines issued by the CIFIU and the Prudential Statements issued by the FSC cannot be considered as either law or regulation or as “other enforceable means”. Although the Guidelines and the Prudential Statements have indirectly led to enforcement action being taken, they are not directly enforceable as there are no sanctions which can be applied should RIs not meet their provisions. Although not “enforceable” under the FATF definition, the compliance culture of the banking sector is such that they include the requirements of the Prudential Statements and the guidelines in their policies and procedures as if they were mandatory requirements.

32. The adoption of the FTRA has provided the Cook Islands with an Act which provides not only for comprehensive CDD obligations which apply to equally to all RIs but it also provides for the reporting obligations and for the establishment of the CIFIU. Due to the size of the financial sector, the FSC and the CIFIU are able to undertake on-site examinations of each of the RIs on an annual basis, including a strong focus on RIs’ levels of compliance with their CDD obligations. The FSC undertakes examinations of the institutions’ compliance with Part 2 of the FTRA, which includes CDD requirements – this process takes 3 and 5 days. The CIFIU reviews compliance of Part 3 of the FTRA, which takes 1-2 days.

33. Domestic banks appear to receive reasonable results in their on-site examinations, with recommendations being mainly limited to improvement of their systems particularly with regard to reviewing the identification documents held in respect of customers taken on prior to the coming into force of the FTRA in 2004. The on-site examinations of several of the international banks do not produce the same level of comfort. The FSC had particular concerns over the effectiveness of the policies and procedures in place in the area of CDD and obtaining information on the source of funds. The products and services offered by the international banking sector provide the opportunity of setting up large, complicated structures which due to their complexity offer a high risk for misuse by money launderers. The offshore insurance sector has not been subjected to any on-site examinations and has not been provided with any training or guidance as to its obligations under the FTRA.

34. Although section 4(2)(b) of the FTRA requires that if the customer is a legal entity RIs must obtain information on the control structure, there is no explicit requirement for RIs to determine who are the natural persons that ultimately own or control the customer. The FTRA should also require RIs to obtain information on the purpose and intended nature of the business relationship rather than relying on the requirements of Prudential Statement 08-2006 which are not enforceable. If the customer is a trust, section 4(2)(d) of the FTRA requires RIs to obtain, inter alia, adequate information on ‘the nature of’ the trust and its beneficiaries, rather than the beneficiaries per se. The FTRA should be amended to include an explicit legal requirement to collect information on beneficiaries of trusts. Other amendments are required to the FTRA to ensure that CDD information is kept up to date, that RIs are required to perform enhanced due diligence for higher risk categories of customer, business relationship or transaction, and to address identified deficiencies in relation to correspondent banking and non-face to face relationships.

35. Although the FTRA allows RIs to place reliance on an intermediary or third party to undertake CDD, RIs do not in practice take advantage of this provision. RIs undertake the CDD procedures themselves, even when the business had been obtained through an intermediary or third party. Neither the CIFIU nor the FSC provide the RIs with a list of countries or territories which the competent authorities consider do not adequately meet the FATF Recommendations.

36. The Cook Islands has taken steps in recent years to ensure that excessive secrecy provisions cannot impede the performance of the functions of competent authorities in combating money laundering or terrorism financing. Amendments have been made to a number of Acts to ensure that investigative assistance and supervisory functions are not limited by secrecy provisions.

37. Section 6 of the FTRA requires RIs to maintain records in respect of transactions, correspondence relating to the transactions, records of identification and verification, reports made to the CIFIU and records of all enquiries made by the RI or to the RI by the CIFIU and other law enforcement agencies. Overall, the record keeping requirements are being implemented effectively. However, there are no specific provisions that address the requirements in relation to wire transfers (SRVII). The competent authorities should issue detailed regulations, consistent with international standards, to ensure that wire transfers are accompanied by accurate and meaningful originator information through the payment chain.

38. Section 8 of the FTRA provides for the procedures which a RI must have in place in order to meet the requirements for the monitoring of transactions. FTRA Guideline No. 2 provides examples of situations and transactions which may be unusual or complex. Section 8(2)(a) of the FTRA requires RIs to examine as far as possible the background and purpose of the transaction, record its findings in writing and report its findings to the CIFIU. There are however no provisions in legislation which provide for the competent authorities to apply counter-measures to jurisdictions which have been identified by the FATF as not sufficiently applying the FATF Recommendations and insufficient information is provided to reporting institutions on countries of concern to the CIFIU and the FSC.

39. The suspicious transaction reporting framework is generally effective. The reporting level for STRs is generally satisfactory, considering the small size of the financial sector. However, as noted by the authorities, the level of reporting by the domestic and, in particular, the international banks is low and the FSC has itself come across transactions it regarded as suspicious during its audits of reporting institutions. In addition, as the authorities also acknowledge, the level of reporting from the DNFBP sector (other than TCSPs) is very low.

40. In relation to internal controls and compliance, the FTRA provides for the general requirements for all RIs to undertake CDD, maintain records, monitor transactions, report cash transactions and make STRs. The Guidelines issued by the CIFIU provide comprehensive guidance on relevant topics. Prudential Statement 08 -2006, issued under section 14 of the Banking Act, also provides guidance to the banking sector on the required standards. The Prudential Statement mirrors the Basel Committee on Banking Supervision's paper, CDD for banks and sets out clearly the obligations of banks in this area. The insurance sector has not however been provided with guidelines and nor has training specific to this industry been provided.

41. The banking legislation does not contain an outright prohibition on shell banks. However, section 23 of the *Banking Act 2003* provides for the physical presence requirements for banks to be an ongoing obligation on licensees. The provision contains a definitive list of matters about which the FSC must be satisfied in concluding that the bank has a physical presence in the Cook Islands. In addition, Practice Note 1a – 2004 sets out more detailed guidance on the criteria that the FSC uses in determining a bank's compliance with the physical presence requirements provided in section 23 of the *Banking Act 2003*.

Because of the history surrounding offshore banking licences in the Cook Islands (this was an issue of concern to the FATF under its NCCT process), the FSC is very diligent about enforcing the physical presence requirements as an ongoing matter and also for new applicants. The vigorous enforcement by the FSC of the physical presence requirements contained in the Banking Act effectively prohibits the operation of shell banks in the Cook Islands. However, the Banking Act does not prohibit banks in the Cook Islands from undertaking correspondent banking relationships with shell banks, nor does it require banks to satisfy themselves that respondent financial institutions in a foreign country do not permit their accounts to be used by shell banks. These shortcomings should be addressed.

42. Under the FTRA, all reporting institutions are supervised by the CIFIU for AML/CFT purposes. However, the CIFIU has delegated under section 30 of the FTRA to the FSC responsibility for annual on-site inspections of banks and TCSPs for compliance with Part 2 of the FTRA. The CIFIU is fully responsible for supervision of other RIs for AML/CFT purposes. The FSC's primary role is to licence financial institutions and monitor their compliance with the relevant legislation, namely the Banking Act, the FSC Act, the Offshore Insurance Act and, from 1 January 2009, the *Insurance Act 2008*, though it was too early for the Evaluation Team to assess the effectiveness of the provisions of the *Insurance Act 2008*.

43. The CIFIU and the FSC are generally well resourced and, as noted above, conduct annual on-site inspections of all RIs. Generally, the RIs are well supervised. However, given the potential for overlap, consideration should be given to reviewing the structure of the supervisory authorities in order to ensure that the available resources are being utilized in the most effective and productive manner. The supervisory authorities should consider whether joint on-sites to the banking and insurance sector leads to or will lead to duplication of effort in some areas of the examination or whether there is the possibility for particular areas of business relationships to be overlooked completely. Whatever approach is taken to AML/CFT supervision, the Cook Islands must ensure that the relevant supervisory staff are adequately trained and understand the individual financial sectors and the products and services offered by them.

44. Civil sanctions are provided under the FTRA, though none have been applied to date. There are no administrative sanctions available to the CIFIU where a RI has contravened any of the provisions of the FTRA. Existing sanctions are not considered to be effective, proportionate and dissuasive. This needs to be addressed..

45. Currently, there is no requirement for money value transfer service business to be licensed or registered. The Cook Islands has however drafted the Money Changers and Remittance Businesses Bill 2008 which, when enacted, will provide the legislative framework to regulate and supervise money or value transfer service business in the Cook Islands. In the meantime, the AML/CFT compliance requirements in the FTRA are adequately applied by the sole money transfer and exchange business and it has been subject to regular on-site examinations by the CIFIU.

#### **4. Preventive Measures—Designated Non-Financial Businesses and Professions**

46. All forms of DNFBPs exist in the Cook Islands, other than casinos. DNFBPs are included as 'reporting institutions' under the FTRA. In defining the various types of DNFBPs for the purposes of the FTRA, the Cook Islands has adhered very closely to the definitions contained in the glossary to the FATF Recommendations. The requirements applied to FIs in the FTRA are thus similarly applied to DNFBPs. The FTRA requirements have also been extended to pearl dealers and motor vehicle dealers, although at

the time of the on-site visit, the CIFIU was still in consultation with the relevant industries to determine the appropriate thresholds and had not prescribed a threshold to capture those entities.

47. In June 2008, the CIFIU issued all DNFBPs with a copy of the FTRA Guidelines Nos. 1-6. Each DNFBP has been given six months from the date of its on-site examination visit by the CIFIU to comply with the FTRA. Awareness training on the requirements of AML/CFT was also provided by the CIFIU to all DNFBPs. Generally, the DNFBPs are fully aware of their obligations, though there is a lack of effective implementation of the FTRA among lawyers, real estate agents and dealers. The CIFIU should consider as a matter of priority issuing sector-specific guidelines for certain categories of DNFBPs to provide more guidance to address specific business operations that may require either simplified or enhanced CDD. The Cook Islands should also explicitly provide in the FTRA the requirement to collect information on the beneficiaries and to ascertain the beneficial owners of trusts, and that enhanced and ongoing CDD be conducted for more complex trust arrangements, such as “flee trusts” or those that involve using a trust account from which payment of a mortgage of real estate is made where the source of funds cannot be adequately ascertained.

48. No STRs have been submitted by DNFBPs with the exception of trust companies. DNFBPs would benefit from more guidance and feedback from the CIFIU with regard to ML trends and techniques as well as implementing an effective monitoring system to detect unusual transactions.

## **5. Legal Persons and Arrangements & Non-Profit Organizations**

49. The *Companies Act 1955* provides the legislative framework to register domestic companies, including those with foreign ownership in the Cook Islands. The *International Companies Act 1981* provides the legislative framework for the registration and operation of international companies. The Ministry of Justice (MOJ) maintains the registry for domestic companies; the Business Trade and Investment Board (BTIB) maintains the registry for domestic companies where greater than one-third of shareholders are foreigners; and the Financial Supervisory Commission (FSC) maintains the registry for international companies, LLCs and partnerships.

50. Section 7 of the *International Companies Amendment Act 2004* overrode a number of secrecy provisions relating to international companies. Competent law enforcement authorities can seek a search warrant pursuant to the *Criminal Procedures Act 1980-81* or in relation to proceeds of crime a Production Order pursuant to the POCA to obtain access to information relating to beneficial ownership of international companies. Bearer shares are permitted for international companies (including banks with an international banking licence) as provided for in section 3 of the *International Companies Amendment Act 2003* No. 5. However, the International Companies Act provides that the international company is not allowed to deliver bearer instruments to any person other than a Custodian and no Custodian shall hold any bearer instrument unless the Custodian has first received satisfactory evidence on the identity of the bearer of the bearer instrument.

51. In relation to domestic companies, the largely manual system of recording and updating information in relation to domestic companies at the MOJ is an impediment to ensuring timely access to records in relation to domestic companies. Other concerns are that there is no requirement in the Companies Act to disclose nominee shareholders, and there is no express prohibition in the Companies Act in relation to bearer shares. It cannot be ascertained that records kept at the MOJ, in particular on

directors and shareholders, are up to date as the onus is on companies to submit updates and MOJ has not implemented a system that is able to monitor non-submission.

52. Trust law in the Cook Islands is sharply divided into two areas: (i) domestic trust law - the common law of trusts in the Cook Islands is substantially similar to the law of trusts in New Zealand, which is based upon British common law. As in most common law countries, domestic trusts are not required to be registered; and (ii) international trust law - the *International Trusts Act 1984* (as amended 2004) applies to international trusts which are defined in the Act as requiring non-resident beneficiaries. This statute makes substantial changes to the otherwise applicable common law of trusts. There are currently six trustee companies authorized under the *Trustee Companies Act 1981-82* that may act in the role of trustee or trust and company service provider (TCSP), and, therefore, provide services such as trust formation, registration of international trusts, international partnerships and limited liability companies and other related services.

53. Trust law in the Cook Islands, particularly international trust law, is complex. There are inadequate safeguards in the international trust system to mitigate the risk posed by the regime that it may, or will, be exploited by criminals. While the current practices of TCSPs to collect beneficial ownership information when registering trusts, and on-site inspections of TCSPs by the FSC and CIFIU under the FTRA, go some way to meeting some of these concerns, serious risks remain, particularly in relation to some of the more complex trust structures and trusts containing 'flee clauses' on offer. As noted above, the FTRA does not specifically and clearly require that the trust company collect identification information on the beneficial owners (or ultimate beneficial owners) of a trust – it refers only to "the nature of the beneficiaries" (i.e. whether the beneficiaries are natural persons, legal persons, limited partnerships, etc). The Cook Islands should establish measures requiring trusts (including international trusts) to collect full identification information on the beneficial owners of trusts; implement measures to ensure that adequate, accurate and timely information is available to law enforcement authorities concerning the beneficial ownership and control of trusts; and establish mechanisms to mitigate the clear ML/TF risks created by many of the measures in the *International Trust Act 1984*.

54. The risk of TF (and ML) through the NPO sector in the Cook Islands is very low and there is no evidence to suggest that any NPO in the Cook Islands has been used as a vehicle for TF or ML. Notwithstanding the very low level of risk, the Cook Islands has taken some important steps to meet the requirements of SRVIII. A review of the NPO sector has been undertaken and NPOs have been included as 'reporting institutions' under the FTRA (although possible problems with the use of the term 'friendly society' to capture NPOs should be addressed). The FTRA Guidelines have been issued to the NPO sector and outreach to the sector has occurred. On the other hand, it is clear that the authorities still lack comprehensive and meaningful formal data on the size and activities of NPOs in the Cook Islands, with many NPOs not being registered and with many of those which are registered as incorporated societies having ceased to operate and/or to have submitted the required financial and other information. While the small size of the Cook Islands means that the activities of the NPO sector are generally well known, it is difficult for authorities to know with any precision the true extent of the sector and those NPOs which account for a significant proportion of its resources.

## **6. National and International Co-operation**

55. Generally, there is a good level of cooperation and coordination in the Cook Islands, with appropriate mechanisms at both the policy and operational levels. The Coordinating Committee on

Combating Money Laundering and Terrorist Financing (CCAM) in particular has acted as an important coordination mechanism, and there is a strong working relationship between the CIFIU and the FSC in the implementation of the FTRA. There is however some duplication between the Cook Islands Financial Intelligence Network (CIFIN - CIFIU chair) and Combined Law Agency Group (CLAG - Police chair), both of which have an operational focus. Despite the formation of these groups to share and co-ordinate information and intelligence, there has in practice been a lack of co-ordination which has inhibited an effective response to referrals from the CIFIU. Commitment from all partners involved in ML, TF and POC recovery is required to enable effective and timely response to matters when appropriate.

56. The Cook Islands has enacted a suite of legislation directed at addressing its obligations under the relevant UN Conventions and Security Council Resolutions, namely the *Proceeds of Crime Act 2003*, *Mutual Assistance in Criminal Matters Act 2003*, *Extradition Act 2003*, *Terrorism Suppression Act 2004* and *Financial Transactions Reporting Act 2004*, together with amendments made to the *Crimes Act 1969*. The Cook Islands has sought to satisfy a large number of its obligations under the UN Conventions and Security Council resolutions and has made a great deal of progress in this area since 2004. Many of the provisions are yet to be tested and whilst there may be a very low risk of TF, scope to apply and test the ML offence provisions and POCA regime exists.

57. The *Mutual Assistance in Criminal Matters Act 2003*, as amended by the *Mutual Assistance in Criminal Matters Amendment Act 2003* and the *Mutual Assistance in Criminal Matters Amendment Act 2004* (MACMA), provides the framework for requesting and the provision of mutual assistance. The competent authority is the Attorney General (AG), who has delegated his functions to the Solicitor General (SG) pursuant to s58 of the MACMA. The MACMA enables the Cook Islands to provide a broad range of assistance to requesting countries in the investigation and prosecution of criminal matters and in respect of proceeds of crime investigations and proceedings. Important steps have been taken to remove obstacles to provision of assistance created by excessive secrecy provisions. Some deficiencies arise as a result of offence definitions and provisions in the POCA.

58. The *Extradition Act 2003* sets out the procedures for the extradition of individuals from and to the Cook Islands in respect of the commission of an “extradition offence”. Relevant decisions under the Act are required to be made by the AG. The Extradition Regulations (No 2 of 2004) prescribe certain time limits and the form of endorsement for an original arrest warrant. The *Extradition Act 2003* permits the Cook Islands to cooperate in respect of extradition with a large number of countries and enables additional countries to be classified as extradition countries for the purposes of the Act. The applicable procedures may be simplified in certain circumstances and time limits are applied to ensure that persons do not remain in custody for extended periods during the extradition process. Nationals of the Cook Islands may be extradited, but may also be subject to prosecution in the Cook Islands provided certain conditions are met.

59. Provisions exist in other legislation, including the FTRA, the FSC Act, the TSA and the Extradition Act, which permit other forms of international co-operation. Cook Islands authorities (enforcement and regulatory) are able to provide a wide range of international cooperation to their foreign counterparts and generally have clear and effective gateways to facilitate the prompt and constructive exchange of information, both spontaneous and upon request. These arrangements appear to be working well. Given the lack of statistical data, however, the Evaluation Team was not able to determine that the mechanisms for international cooperation are fully effective.

## **7. Resources and statistics**

60. • There is a need for greater commitment of resources, training and awareness-raising to be provided to relevant agencies to address the lack of money laundering investigations and action under the POCA. Law enforcement agencies need additional resources to effectively perform their functions in the AML/CFT system – the CIP has identified the need of a forensic accountant function; the CICS requires an IT platform and additional equipment resources; and the CIP, CICS and CLO all identify training deficiencies.

61. Statistics provided were generally satisfactory, though shortcomings in the CIFIU's database prevent it from generating year by year statistics for CTRs and EFTRs; there was a lack of statistics regarding informal international co-operation; and some uncertainty as to completeness/accuracy of statistics for formal international cooperation.

## **1. GENERAL**

### **1.1. General Information on the Cook Islands**

#### *The Cook Islands and its economy*

1. The Cook Islands consists of 15 islands scattered over some two million square kilometres of the Pacific Ocean, approximately half way between New Zealand and Hawaii. It lies in the centre of the Polynesian Triangle, flanked to the west by the Kingdom of Tonga and Samoa and to the east by Tahiti and the islands of French Polynesia.

2. The total land area of the Cook Islands is 240 square kilometres. Its total population, as enumerated in the 2006 census was 19,569, an increase of 1,542 over the 2001 count. However, in that period, the resident population declined from 14,000 to 11,800, indicating an increasing proportion of non-residents. The working age population consists of 3,973 males and 3,747 females.

3. The country is ranked 215 out of 227 countries in the CIA World Fact Book 2007-08 ranking on GDP (\$US183,200,000 - 2005 est.). In terms of GDP per capita, the Cook Islands is ranked 104<sup>th</sup> at \$US9,100 per capita (2005 est.). GDP is derived principally from the services sector (tourism, financial services) 75.3%, and 24.7% is represented by the other sectors (2004).

4. The economic growth of the Cook Islands has been consistent over recent years. Past fiscal management policies have seen the Cook Islands' Standard and Poors rating improve from 'BB-' to 'BB' with a positive outlook. This indicates that Government is succeeding in its goal of providing a stable fiscal platform to ensure an enabling environment for private sector growth. According to the Cook Islands government, continued strong oversight of fiscal policy development and delivery in conjunction with robust budgetary process are intended to help the Cook Islands achieve its long term national goals (Budget Policy Statement 2008-09).

5. The Cook Islands has operated an offshore financial centre since the early 1980s. The industry developed on the foundations set by legislation in 1981 – 82 providing for international companies and trusts including offshore banks, insurance companies and international trusts. All offshore business carried on from the Cook Islands must be channeled through registered trustee companies. Currently there are six registered trustee companies and four international banks, and one of the domestic banks also has an international licence. The industry provides a wide range of trustee and corporate services to offshore investors with the attraction that the tax rate for all offshore entities is zero, guaranteeing tax neutrality. The offshore financial sector is important to the Cook Islands economy and in 2007 the industry's revenue was US\$8.1 million by way of trustee company income and regulatory charges.

6. The gross turnover of the Cook Islands Finance and Business Services Sector (domestic and offshore) in 2006 was \$NZ30.255 million which, while being an 8.5% increase over the previous year, was only slightly higher than the figure in 2004.

#### *Parliament*

7. The Cook Islands is a parliamentary democracy, which became self-governing in free association with New Zealand on 4 August 1965. The Cook Islands is fully responsible for internal affairs, while New Zealand retains responsibility for defence and external affairs, in consultation with the Cook Islands.

The Cook Islands has the right at any time to move to full independence by unilateral action. The Cook Islands uses the New Zealand dollar as its unit of currency<sup>2</sup>.

8. The Constitution vests the executive authority of the Cook Islands in Her Majesty the Queen in right of New Zealand. The Constitution provides for a Cabinet of Ministers, comprising the Prime Minister and not fewer than six nor more than eight other Ministers, "which shall have the general direction and control of the executive government of the Cook Islands, and shall be collectively responsible to Parliament".

9. The Cook Islands has a unicameral Parliament of 24 seats. Members are elected by popular vote to serve four-year terms. Following legislative elections, the leader of the party that wins the most seats usually becomes Prime Minister. Subject to the Constitution, Parliament "may make laws (to be known as Acts) for the peace, order and good government of the Cook Islands" (Article 39(1)), including "laws having extra-territorial operation" (Article 39 (2)).

### ***The Cook Islands legal system***

10. The Cook Islands' legal system is based on New Zealand law and English common law. The Constitution establishes a "Court of record, to be called the High Court of the Cook Islands, for the administration of justice throughout those islands". The High Court has Civil, Criminal and Land Divisions with the Ministry of Justice being responsible for administration of the Courts.

11. Pursuant to Section 52 of the Constitution, the Chief Justice and Judges of the High Court are appointed by the Queen's Representative, "acting on the advice of the Executive Council tendered by the Prime Minister"; other Judges, "by the Queen's Representative, acting on the advice of the Executive Council tendered by the Chief Justice of the High Court and the Minister of Justice". The standard practice is for Judges to be appointed from senior members of the New Zealand judiciary and Bar. The current Chief Justice is the Honorable David Williams C.J.

12. Justices of the Peace of the High Court are appointed pursuant to Section 62 of the Constitution. Appointments are usually non-lawyers who are well respected in the local community.

13. Pursuant to the Judicature Act 1980, the following jurisdictions are provided:

#### Civil matters

\$0 – 1,500	One Justice of the Peace
\$1,501 – 3,000	Three Justices of the Peace
Land matters	Certain applications and uncontested matters by one Justice. Matters can be referred to the High Court (Land Division) and heard before a Judge familiar with Cook Islands land matters.

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<sup>2</sup> All dollar amounts in this report are expressed in New Zealand dollars, unless otherwise indicated.

### Criminal matters

Imprisonment of a term not exceeding 2 years or fine not exceeding \$500	One Justice of the Peace
Imprisonment of a term not exceeding 3 years or fine of \$1000	Three Justices of the Peace

14. From the High Court it is possible to obtain leave to appeal to the Cook Islands Court of Appeal presided over by three High Court Judges. Appeals also exist to the Privy Council.

15. While the Cook Islands authorities indicated that they have been very well served by the New Zealand justices of the High Court, from a practical perspective, difficulties may be encountered in the prosecution of a complex financial case in the Cook Islands as the judiciary visit on circuit from New Zealand for periods currently fixed at two weeks.

16. The CIP has a broad prosecutorial discretion and is the primary prosecuting agency in the Cook Islands. The CLO becomes involved in jury trials pending elections under the *Judicature Act 1980-81* or where complex legal issues are involved. Prosecutions within the CLO are conducted under the direction of the Solicitor General. There is regular liaison and consultation between the CIP and CLO.

### ***Good governance***

17. The Cook Islands Government intends to institute a coordinated Governance Framework that encompasses medium term planning, budgeting, monitoring and evaluation of the entire public service. This framework will ensure the effective implementation of Government Policy, thus operationalising the National Sustainable Development Plan (*Budget Policy Statement 2008-09*).

18. Good governance is one of the Cook Islands Government's Policy Objective for the 2008-09 fiscal year. The Government's aim is to enhance good governance practices including the performance and productivity of all government including agencies that uphold justice, law and order. The implementation of the recommendations contained within the Robinson Police Review<sup>3</sup> will continue in 2008-09, primarily focusing on addressing the inadequacies in human resources, information technology and outdated legislation. Other government ministries such as the Ministry of Health and the Ministry of Works that have recently been subjects of reviews are an indication and commitment by government to ensure that the principles of transparency and good governance are implemented by all ministries for a greater public confidence.

19. In addition, the Cook Islands passed the *Official Information Act 2008* ("the OIA") which came into force on 11 February 2009 (during the on-site visit). The OIA establishes a freedom of information regime in the Cook Islands and is administered by the Office of the Ombudsman. The OIA establishes the right of the public to request access to Government information, which the Government is required to provide unless there is or are reasons to withhold such information in accordance with the withholding

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<sup>3</sup> A review of the Cook Islands Police conducted in 2006 by C&M Associates Limited, Wellington, New Zealand, led by the former Commissioner of the New Zealand Police, Mr Rob Robinson.

provisions of the OIA. Furthermore, should a request be declined, the requester has a right to lodge a complaint with the Ombudsman.

20. The Cook Islands is also a member of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific's *Asia-Pacific Action Plan* having signed up to it in November 2001. Through its membership, the Cook Islands has implemented and continues to implement the Pillars of Action identified in the Plan:

- (i) developing effective and transparent systems for public service;
- (ii) strengthening anti-bribery actions and promoting integrity in business operations; and
- (iii) supporting public involvement.

21. The Cook Islands has taken part in several thematic reviews carried out under the Action Plan including one on the existence and effective enforcement of anti-money laundering and proceeds of crime legislation. The Cook Islands has also attended the Regional Anti-Corruption Conference which is held every two years in the Asia-Pacific region. Through its participation in these activities, the Cook Islands stated that it has been able to learn from experts and other member jurisdictions in terms of their respective anti-corruption measures and also to raise awareness of and seek possible solutions to the specific problems facing small island jurisdictions when implementing anti-corruption measures.

22. The Evaluation Team was provided with a number of examples of corruption within Government agencies in the past few years together with instances of conflict of interest within Departments by Audit Office staff. The information highlighted the importance of the independence of the Audit Office and the practical need for a generic Code of Conduct for public servants.

#### ***Removal from FATF's NCCT list***

23. The Cook Islands has previously been evaluated by the APG/OGBS (in November 2001) and the International Monetary Fund (IMF) with APG participation (in February 2004). At the time of the 2004 evaluation, the Cook Islands remained on the FATF's list of 'Non-Cooperative Countries and Territories' (the NCCT list), having been placed on the list in June 2000.

24. In February 2005, the FATF removed the Cook Islands from the NCCT list after enactment and substantial implementation of AML reforms, in particular a suite of AML legislation passed in the 2003 and various amendments passed in 2004. At that time, the FATF indicated that it would continue to monitor the Cook Islands for a period of time, as part of the FATF's standard monitoring process for de-listed NCCTs, to ensure continued adequate implementation. The FATF indicated that it would pay particular attention to the close monitoring of international banks to ensure continued effective compliance with the physical presence requirement, and the development of a comprehensive program for staff training and maintenance of adequate staffing levels for AML bodies. The Cook Islands was removed from the FATF's monitoring process in June 2006, following further improvements in the AML/CFT regime and its implementation.

## **1.2. General Situation of Money Laundering and Financing of Terrorism**

### ***Overview***

25. Given the small size of the Cook Islands' domestic economy and financial sector, the primary ML/TF risk in the Cook Islands remains its offshore financial sector. As is noted below, however, the Cook Islands has taken some important additional steps in recent years to reduce the risks presented by the offshore sector.

26. There have been no investigations of TF and there continues to be no evidence of a terrorism threat in the Cook Islands. There has been no evidence of the Cook Islands' offshore sector having been used for TF, but a customer of one financial institution is under investigation for possible links with a terrorist.

27. While there is one investigation of possible ML offences involving the proceeds of domestic offences currently under way, there have been no prosecutions for ML in the Cook Islands. From the Evaluation Team's discussions with the Cook Islands authorities, it is evident that the Cook Islands does not have major organised crime, serious crime or serious drug problems. Most crimes that would generate proceeds within the Cook Islands would be those in the categories of petty theft, low-level fraud and misappropriation of government funds, although some examples of the latter involved very large amounts.

28. In 2004, the IMF noted that "While the risk of domestic money laundering is small, there continues to be a potentially significant risk of the Cook Islands offshore banking sector and trustee companies being abused by criminal elements." While the domestic risks appear not to have changed significantly, there have since 2004 been several investigations of domestic drug and fraud/misappropriation crimes which generated reasonably significant amounts of proceeds of crime. While there have only been limited opportunities to pursue possible ML offences, the Evaluation Team was made aware of several predicate crimes involving relatively substantial amounts of proceeds of crime.

### ***Laundering of domestic proceeds domestically***

29. As noted above, the Cook Islands is a very small economy. The proceeds of domestic crime are in absolute terms small, but some drug and misappropriation cases have involved relatively significant amounts for a small economy. The Cook Islands has a generally well-supervised financial industry. Cook Islands authorities and private sector representatives indicated that any large cash transaction involving locally generated funds would be immediately noticed and reported to the CIFIU if it appeared to be suspicious. There is however some evidence of laundering of domestic proceeds in country in the drug and misappropriation cases referred to previously.

### ***Laundering of domestic proceeds abroad***

30. The CIFIU has received one suspicious transaction report (STR) that was disseminated to the Cook Islands Police for investigation. The estimated proceeds of NZ\$300,000 generated in the Cook Islands from the drug offences were allegedly laundered through a money changer business to a foreign jurisdiction. The investigation was assisted by the STR and led to a successful prosecution and

conviction of two people for the drug offences and the police are still pursuing a money laundering investigation. The proceeds generated from this drug trafficking matter were apparently substantial over a period of time.

31. Other possible fraud/misappropriation offences currently under investigation also appear to have involved the laundering of funds overseas, rather than in the Cook Islands.

### ***Laundering of foreign proceeds - amounts generated abroad and laundered domestically***

32. As noted above, the Cook Islands has operated an offshore financial centre since the early 1980s which currently comprises six registered trustee companies and four international banks. The industry provides a wide range of trustee and corporate services to offshore investors (primarily from the United States, but also from Asia). Concerns about the offshore sector were behind the FATF's decision to list the Cook Islands on its NCCT list in 2000, and both the APG/OGBS (2001) and IMF (2004) assessments noted the significant risk of the Cook Islands' offshore banking sector and trustee companies being abused by criminal elements.

33. There have however been some significant changes in this situation since 2004. The Cook Islands has tightened its legislation and regulations to better meet the international standards and significantly strengthened its supervisory regime for both the domestic and offshore sectors.

34. According to Cook Islands authorities, the remaining risks in this area come from other countries - particularly Asian countries - having lower standards of KYC, and providing false information to CI finance houses. However, in addition to such risks, the Evaluation Team has identified a number of deficiencies which also pose AML/CFT risks that can be addressed by the Cook Islands through further improvements to its AML/CFT systems. Overall, the Evaluation Team is of the view that the risks presented by the Cook Islands' offshore sector have been reduced, but not eliminated, by the introduction of a new and strengthened supervisory regime and active enforcement of its provisions.

### ***National Risk Assessment of the ML/FT threat in the Cook Islands***

35. In October 2008, the Cook Islands FIU, with the assistance of an academic, undertook a study to identify the risk or threat of ML and TF to the Cook Islands (referred to hereafter as the "ML Risk Analysis Report"). The Cook Islands is to be commended for commissioning a comprehensive study of this sort.

36. In 2004, the IMF noted that "The general crime rate of the Cook Islands remains low. General crimes are burglary, petty theft and low-level fraud with an insignificant amount of property involved." The ML Risk Analysis Report noted that there has been no significant change in the crime situation since 2004. No STRs have been reported relating to burglary, petty theft and low-level fraud. According to The ML Risk Analysis Report, the risk presented by general crime in the Cook Islands is therefore low.

37. While the Evaluation Team would generally agree with this overall conclusion, there are currently several criminal investigations and/or prosecutions under way into drug offences and possible money laundering and the misuse of government funds which have involved relatively significant amounts, so the risks presented by general crime in the Cook Islands cannot be completely discounted and should not be ignored.

38. The ML Risk Analysis Report study also looked specifically at the crime situation relating to the FATF's 20 'designated categories of offences' (predicate crimes) and the risks presented by each crime type to the Cook Islands. The ML Risk Analysis Report found the risk presented by 19 of the 20 categories of offences to be low, and the risk of insider trading and market manipulation to be nil due to the lack of a securities market in the Cook Islands. Generally, there was little or no evidence of crime, and no STRs, in relation to the various categories of offences.

39. For many categories of predicate offences, the risk assessment was essentially a nil response, with no or very low levels of offending, no STRs and a low level of risk. Issues of some note arising from the risk assessment included:

- Terrorist financing - In 2004, the IMF noted that the Cook Islands was not a party to the Vienna Convention and it had not signed, nor ratified the Palermo Convention. The Cook Islands had signed the UN International Convention for the Suppression of the Financing of Terrorism on 24 December 2001, but had not ratified it. As noted above, there continues to be no evidence of any terrorism problem in the Cook Islands. However, the *Terrorism Suppression Act 2004*, conforming to the regional "Counter Terrorism and Transnational Organized Crime Model Provision 2003," a model law provided by the Pacific Islands Forum Secretariat, was implemented in 2004. The Cook Islands ratified the UN International Convention for the Suppression of the Financing of Terrorism on 4 March 2004.
- Drug trafficking - In 2004, the IMF noted that "There continues to be no evidence suggesting that the Cook Islands has problems of any major organized crime, drug trafficking or serious fraud, crimes which would generate large amount of revenue and create a domestic demand of money laundering services." There continues to be no evidence of any serious drug trafficking problem in the Cook Islands. Possibilities exist with both airline traffic and visiting sea cruises, but as transiting traffic, rather than bringing large quantities of drugs into the Cook Islands for sale. There continues to be no large scale market in the Cook Islands. As noted above, one case of drug trafficking was reported to police, resulting in one STR received by the CIFIU in 2006-07, which was disseminated to the Cook Islands Police for investigation. In addition, 13 other drug offences, mostly possession, use, or growing cannabis, were recorded by police in that year. From 2006-2008 a total of 38 drug cases were dealt with by prosecution. As noted above, proceeds generated from one drug trafficking matter were apparently substantial over a period of time.
- Corruption/bribery - There was no adverse reference to high levels of corruption/bribery in the 2004 IMF Assessment. Two cases in recent years involved fraud by government Ministers profiting from government purchases. No STRs were received by the CIFIU in either case. Convictions have been obtained against one Minister of the Crown for a fraud offence amounting to a total of \$450. He was convicted with a six months suspended sentence. A trial is currently taking place involving a former Minister/current Member of Parliament in respect of the misappropriation of government funds. No process has been undertaken as yet to recover the funds in either case. The ML Risk Analysis Report found the risk presented by corruption/bribery in the Cook Islands to be low, however evidence provided to the Evaluation Team suggests that the risk posed in this area is relatively higher than in other predicate crime areas. The Evaluation Team was also informed about another case involving the alleged misappropriation of Government funds by officials involving up to \$1.8m. In addition, no STR

was made in relation to the alleged misappropriation of \$1.8m, which seems to indicate a need for the CIFIU to conduct further education and/or to issue guidance as to what might constitute an unusual or suspicious transaction, including the fact that such transactions may not involve cash.

### ***Money laundering typologies and trends***

40. The relatively low level of underlying predicate crime and lack of ML investigations and prosecutions and proceeds of crime action makes it difficult to identify any ML trends. As for suspected ML methods/typologies, the few cases investigated to date have involved use of alternative remitters, structuring of transactions, use of wire transfers and foreign bank accounts, possible trade related money laundering and possible use of an offshore bank.

### **1.3. Overview of the Financial Sector**

41. The Cook Islands financial sector is divided into two parts: domestic and offshore. The Financial Supervisory Commission (FSC) regulates and supervises those financial institutions (both domestic and offshore) that fall within the regulatory framework. There is no Central Bank and the country uses New Zealand currency. There is no securities sector in the Cook Islands.

42. Due to the small size of the Cook Islands, not all types of financial activity covered by the FATF Recommendations operate. The following table sets out the types of financial institutions that carry out the activities listed in the Glossary to the 40 Recommendations.

**Table 1: Financial Institutions in the Cook Islands**

<b>Financial Activity (based on the Glossary for the 40 Recommendations)</b>	<b>Description</b>
Acceptance of deposits and other repayable funds from the public	<ul style="list-style-type: none"> <li>• Banks</li> <li>• Offshore banks</li> </ul>
Lending, including consumer credit, mortgage credit, factoring and the finance of commercial transactions	<ul style="list-style-type: none"> <li>• Banks</li> <li>• Offshore banks</li> <li>• Commercial corporations</li> <li>• Payday loan company</li> </ul>
Financial leasing	<ul style="list-style-type: none"> <li>• Nil</li> </ul>
The transfer of money or value, both in the formal and informal sector	<ul style="list-style-type: none"> <li>• Banks</li> <li>• Offshore banks</li> <li>• Remittance businesses</li> </ul>
Issuing and managing means of payment (e.g. credit and debit cards, cheques, traveller's cheques, money orders and bankers' drafts, electronic money)	<ul style="list-style-type: none"> <li>• Banks</li> <li>• Offshore banks</li> </ul>
Financial guarantees and commitments	<ul style="list-style-type: none"> <li>• Banks</li> <li>• Offshore banks</li> </ul>
Trading in: <ul style="list-style-type: none"> <li>(a) money market instruments (cheques, bills, CD, derivatives etc);</li> <li>(b) foreign exchange;</li> <li>(c) exchange, interest rate and index instruments;</li> </ul>	<ul style="list-style-type: none"> <li>• Banks</li> <li>• Offshore banks</li> </ul>

<b>Financial Activity (based on the Glossary for the 40 Recommendations)</b>	<b>Description</b>
(d) transferable securities; (e) commodity futures trading	
Participation in securities issues and the provision of financial services related to such issues.	<ul style="list-style-type: none"> <li>• Nil</li> </ul>
Individual and collective portfolio management	<ul style="list-style-type: none"> <li>• Trustee companies</li> </ul>
Safekeeping and administration of cash or liquid securities on behalf of other persons	<ul style="list-style-type: none"> <li>• Banks</li> </ul>
Otherwise investing, administering or managing funds or money on behalf of other persons	<ul style="list-style-type: none"> <li>• Trustee companies</li> </ul>
Underwriting and placement of life insurance and other investment related insurance, including insurance undertakings and the operations of insurance intermediaries	<ul style="list-style-type: none"> <li>• Insurance companies</li> <li>• Insurance intermediaries</li> </ul>
Money and currency changing	<ul style="list-style-type: none"> <li>• Banks</li> <li>• Money changers</li> </ul>

### ***Banking sector***

43. All banks are licensed and supervised by the FSC under the provisions of the *Banking Act 2003*.

44. The domestic banking sector comprises three banks, two of which are branches of Australian banks, and one government-owned bank. The Australian banks account for more than 85% of the banking sector. Total domestic bank assets at 31 December 2008 were NZ\$445.2 million.

45. The offshore banking sector comprises four international banks, plus one of the domestic banks that also has an international licence. Total offshore bank assets at 31 December 2008 were NZ\$448.5 million.

### ***Insurance industry***

46. The insurance industry is very small. The total value of the very low number of premiums held as at 31 December 2008 was US\$284,000. There is one domestic general insurance company and three offshore insurers. Offshore insurers were until recently regulated under the *Offshore Insurance Act 1981*. However, this Act was repealed on 1 January 2009 and replaced by the *Insurance Act 2008*, which came into effect on that date and which covers both domestic and offshore insurance. Until passage of the new Insurance Act, domestic insurers were not licensed or regulated in the Cook Islands but the introduction of the new insurance legislation introduced a complete licensing and supervisory regime from 1 January 2009. The new regime encompasses domestic and offshore insurers, insurance intermediaries (agents and brokers) and insurance managers, who will act as managers of offshore insurers. As at the time of the on-site visit, the new legislation was yet to be implemented and its effectiveness could not therefore be assessed. While entities providing underwriting or placement of life insurance and other investment related insurance, including insurance intermediation are captured as reporting institutions under the *Financial Transactions Reporting Act 2004* (FTRA), in practice the life insurance sector has not been subjected to any on-site examinations and has not been provided with any training or guidance as to its obligations under the FTRA.

47. Due to the small size of the insurance sector, a visiting insurance broker acting for a reputable global company places large risks with insurers in markets outside the Cook Islands, as the local company does not have capacity to assume all risks in the Cook Islands.

48. There is no life insurance company established in the Cook Islands. Life insurance is sold by visiting agents for two New Zealand life insurance companies. This is a long-standing arrangement and has operated satisfactorily, but from 1 January 2009 the agents will be supervised by the FSC.

#### ***Moneychangers and remittance businesses***

49. There is one money exchange/remittance business that is part of a global chain. This business is not currently regulated; however, the Government has decided that there should be licensing and regulation of money changers/remittance businesses and legislation is being drafted to effect this. The draft Bill is being reviewed by the FSC which is also undertaking stakeholder consultations. The Bill will be introduced into Parliament early in 2009. Administration of the legislation will be the responsibility of the FSC. It should be noted that, while not regulated, money exchange/remittance businesses are captured as reporting institutions under the FTRA and have in fact submitted STRs and been subject to on-site examination for the purposes of the FTRA.

#### ***Superannuation Fund***

50. The Cook Islands National Superannuation Fund (CINSF) was established after the passing of the Cook Islands National Superannuation Act on 24 November 2000. The fund is being administered and managed by the Cook Islands National Superannuation Office for Cook Islanders resident in the Cook Islands. Administration is performed by a company in New Zealand. The Fund currently has a total membership of 4515 members, with NZ\$20 million funds under management with a turnover NZ\$4.8 million per annum. All assets are invested offshore but consideration is being given to allowing a proportion of assets to be invested in the Cook Islands.

### **1.4. Overview of the Designated Non Financial and Business Professions (DNFBP) sector**

51. There are no casinos in the Cook Islands, but the remaining five categories of DNFBP, as defined by the FATF, are found in the Cook Islands. There are:

- six trust and company services providers;
- 47 lawyers, most of whom are employed in the offshore sector, and seven legal firms operating as businesses;
- six accountancy firms;
- five dealers in precious metals and stones (pearl dealers); four motor vehicle dealers; and
- four registered real estate agents.

52. All DNFBPs are captured under section 2(t) of the *Financial Transactions Reporting Act 2004* (FTRA) as “Reporting Institutions” (RIs). As noted in section 4.1 of this report, section 2(t) of the FTRA provides that RIs include persons dealing in motor vehicles or high-value items above a prescribed threshold. At the time of the on-site visit, the CIFIU was still in consultation with the relevant industries to determine the appropriate thresholds and the regulations required to prescribe the threshold had yet to be effected. Therefore, there is some doubt as to whether, technically, section 2(t) of the FTRA is in effect. In practice, however, the CIFIU and these entities are applying the general \$10,000 threshold for

CDD and cash transaction reporting contained in the FTRA itself. It should also be noted that while the FTRA closely follows the FATF definitions of the various DNFBSs, the Cook Islands Law Society has raised issues concerning the exact application of the definition in practice, including as to whether “managing funds” includes the mere receipt of funds into an account and payment out of those funds at the client’s direction, which usually occurs in a buying and selling of real estate. This issue is still being discussed by the CIFIU and the Law Society.

***Trust and company service providers (TCSPs)***

53. There are currently six trustee companies authorized under the *Trustee Companies Act 1981-82*. These companies provide services such as the incorporation of international companies, the registration of international trusts, international partnerships and limited liability companies and other related services. Asset protection trusts, often for high net worth clients from the United States and, more recently, Asia, remain a major area of business for the TCSP sector, but several are reducing their reliance on this type of business.

54. Trustee companies are authorized by the FSC and the registration function for international companies, international trusts and limited liability companies is performed by the Registrar’s Office, which is located in the FSC.

55. As at 31 December 2008, there were 890 international companies, 2440 international trusts and 25 limited liability companies registered in the Cook Islands. The following table shows the relevant statistics for the last four years.

**Table 2: Current registration of offshore entities as at 31 December 2008**

	<b>2008</b>	<b>2007</b>	<b>2006</b>	<b>2005</b>
<b>International Companies</b>	880	833	800	744
<b>International Trusts</b>	2,440	2,368	2,286	2,252
<b>Limited Liability Companies</b>	25	N/A	N/A	N/A

***Lawyers***

56. Cook Islands practising lawyers are administered by the Cook Islands Law Society pursuant to the *Law Practitioners Act 1993/94*. The Chief Justice hears complaints and deals with applications for admission to the Cook Islands Bar.

57. The Evaluation Team was informed that although the Law Practitioners Act provides for the audit of solicitors’ trust accounts, no such audits had taken place. An independent auditor has now been appointed by the Chief Justice to commence that process.

58. There are 47 lawyers registered and admitted to practice law in the Cook Islands. A majority are being employed in the offshore sector and there are only seven law firms operating as businesses. The sector is small by comparison to other jurisdictions, with each law firm generating an estimated annual turnover of over NZ\$200,000 each. Most business activities are domestic with one law firm having about 5% non resident customers.

### ***Accountants***

59. Six accountancy businesses are listed in the Cook Islands. Three accounting firms have small scale operations for small businesses and non profit organisations with an annual turnover ranging from NZ\$10,000 to \$25,000pa. The other firms take care of the bigger business clientele with an annual turnover ranging from NZ\$250,000 to \$480,000. Transactions are mostly by cheques and cash payments. International transactions are very rare; 1-2% of customers are non-residents which therefore suggests that any large or unusual transaction will attract attention.

### ***Dealers in precious metals and precious stones***

60. There are no dealers in precious metals and stones in the Cook Islands, other than some pearl dealers who sell small amounts of jewellery. The bulk of the total exports in the Cook Islands since 1990 to 2006 were from pearls, with pearl exports ranging from 29.5% to 92.1% of total exports. While pearls are mainly cultivated in the northern islands of the Cook Islands, there are five pearl dealers operating as businesses on the main island with a combined turnover of \$NZ622,800 per annum. Purchases are mainly by cash and credit card with only 1% estimated for international sales and 70% by non-resident buyers. Large cash transactions are rare.

### ***Real estate sector***

61. Land, and the “things growing on or attached to land”, cannot be “alienated” for a period of more than 60 years, according to the *Cook Islands Act 1915* (NZ), section 469-471 . This means that there can be no permanent transfer of ownership to non-Native Cook Islanders. The *Leases Restrictions Act 1976* imposes further oversight of real estate dealings in the Cook Islands. This significantly reduces the risk of ML through real estate dealings.

62. The real estate sector is very small and is mostly involved in the construction and sale of holiday accommodation. Transactions are predominantly by credit card, cash and bank transfers, 80% of business is international, 20% local business. According to the ML Risk Analysis Report (2008), the risk of ML presented by the real estate sector in the Cook Islands is low.

## **1.5. Overview of commercial laws and mechanisms governing legal persons and arrangements**

63. ***Companies:*** Company registration is performed by the Office of Registrar of Companies under the *Companies Act 1955*. The Registrar is part of the Ministry of Justice (MOJ) and is situated at the High Court. There are currently 110 active companies registered with the MOJ, primarily small, private domestic companies. Standard arrangements relating to Shareholders and Directors apply. Records are available for public search.

64. Foreign ownership of companies is governed by the *Development Investment Act 1995-96* and administered by the Business Trade & Investment Board (BTIB) pursuant to the Investment Code of the Cook Islands. The BTIB is responsible for the registration of companies with more than one third foreign ownership and there are approximately 350 companies registered with the BTIB. Records are available upon written request.

65. International company registration is permitted by the *International Companies Act 1980* at the registry of International and Foreign Companies administered by the FSC. As noted above, there are 880 international companies and 25 limited liability companies (LLCs) currently registered with the FSC.

Records are available to search for related parties and on consent from the relevant trustee company for non-related parties. In practice, consent is granted. A fee is charged for searches.

66. **Trusts:** The Cook Islands' legal system is based on New Zealand law and English common law which recognises a wide range of trusts, including express, discretionary, implied, and many other forms of trusts. The legislation governing legal arrangements are primarily the *Trustee Companies Act 1981-82*, the *International Companies Act 1981-82*, and the *International Trusts Act 1984*; however, as with all common law jurisdictions, case law is also relevant to trust legal issues.

67. There is limited information on the number of domestic trusts that have been formed or are administered in the Cook Islands. International trusts are all registered with the Registrar of International Companies (in the FSC) and are required to be registered by one of the six trustee companies. Trustee companies are required to maintain a registry of all international companies, trusts, partnerships, and LLCs that they form and administer.

68. **Non Government Organisations (NGOs):** The Cook Islands has a relatively large and diverse NPO sector, given its small size. Most NGO activities are for domestic purposes only though on a few occasions funds are raised to assist countries suffering from natural disasters. Two NPOs are branches of internationally recognised organisations and several NPOs receive substantial external funding through aid donor organisations. There is no evidence to suggest that an NGO in the Cook Islands has been used as vehicle for ML or TF.

69. The *Incorporated Societies Act 1994* provides the legislative framework to make provisions for the incorporation of societies which are not established for the purpose of pecuniary gains. The Registrar of Incorporated Societies is housed in the Ministry of Justice (MOJ). It is not however compulsory for NGOs to register as incorporated societies, and registration as an incorporated society is not required in order to obtain tax benefits. The CIFIU supervises the NGO sector for the purposes of the FTRA (though, as noted in section 5.3 of this report, there is some doubt as to whether NPOs are properly captured by the term 'friendly society' used in the FTRA. In practice, however, informal supervision is taking place).

70. A review of the Cook Islands NPO/NGO Sector was undertaken in October 2008 by the CIFIU and it revealed about 300 NPOs were registered with the MoJ and 70 with the Cook Islands Association of Non Government Organisations (CIANGO). Over 200 NPOs were unregistered. Most NPOs were found to be inactive.

## **1.6. Overview of strategy to prevent money laundering and terrorist financing**

### **a. AML/CFT Strategies and Priorities**

#### ***Overview***

71. The Cook Islands has been a member of the APG since 2001 and actively participates in the APG's work.

72. There have been a number of significant developments in the Cook Islands AML/CFT regime since the IMF-led mutual evaluation of the Cook Islands in early 2004. These include:

- enactment of further amending legislation and regulations: the *Crimes Amendment Act 2004*, the *Financial Transactions Reporting Act 2004*, the *Terrorism Suppression Act 2004*; the *International Companies Amendment Act*, the *Proceeds of Crime Amendment Act 2004*, the *Financial Transactions (Offering Company (No. 2)) Regulations 2004*, and the *International Companies (Evidence of Identity) Regulations 2004*;
- the CIFIU became a member of the Egmont Group in June 2004;
- enhanced scrutiny of the domestic and offshore financial sector, including annual on-site examinations of all financial institutions by the FSC and CIFIU;
- issuing of six Guidelines under the FTRA;
- establishment of the Coordinating Committee against Money Laundering and Terrorist Financing (CCAM) in March 2004 to bring together government ministries and agencies that have a role in preventing, detecting, investigating and prosecuting ML and TF activities in the Cook Islands.

73. Recent AML/CFT priorities for the Cook Islands have been to address legislative deficiencies identified during the implementation of existing legislation (most of which was drafted in 2003 and 2004) and to draft new legislation to regulate entities where the nature of their business activities falls under the activities of a “reporting institution” under the *Financial Transactions Reporting Act 2004* (FTRA). This includes new legislation for the insurance industry and for money changers and remittance businesses. While not aimed specifically at AML/CFT issues, recent initiatives have also been undertaken to improve the effectiveness of both the police and customs services.

74. As noted above, the Government has also supported, through the CIFIU’s budget for the current fiscal year (2008-09), the undertaking of a National AML/CFT Risk Assessment Study (the ML Risk Analysis Report) as well as an independent review (completed in August 2007) of the Cook Islands AML/CFT regime.

75. Technical assistance provided by donor agencies and regional bodies on AML/CFT relating to personnel capacity development, legislative drafting, supervision and other technical skills on behalf of the CIFIU, FSC and law enforcement agencies continue to be an important aspect to assist in implementing and improving the Cook Islands’ AML/CFT regime. The Evaluation Team notes that it is important for the Cook Islands to ensure that any legislative amendments proposed and accepted for the future are suitable for the Cook Islands and the nature of the risks it faces.

76. Significantly, the FSC now undertakes an annual audit examination of all banks (both domestic and international) and trustee companies for Part 2 of the FTRA (customer due diligence, record keeping, maintaining accounts in true name, monitoring of transactions, originator information) under a delegated authority from the CIFIU. This responsibility was delegated at a time when the CIFIU had insufficient resources to undertake the entire on-site examination. The CIFIU is responsible for Part 3 of the FTRA (reporting of cash, electronic and suspicious transactions, systems, policies and procedures) to measure the effective implementation of the requirements of the FTRA by each institution. The CIFIU is solely responsible for the AML/CFT supervision of the DNFBP and NPO sectors.

77. The FSC sets its work program on an annual basis and this is then conveyed to the CIFIU. Usually there is joint attendance at on-site visits, although the FSC is present for a longer period than the CIFIU. During the inspection, the two agencies work separately but discuss issues and compare notes. After the inspection, findings are discussed and separate reports are prepared and exchanged, and sent to the RI. Consideration is currently being given, firstly, to the preparation of a single consolidated report

for each RI (RI) covering both Parts 2 and 3 of the FTRA and, secondly, to possibility of the CIFIU conducting the entire FTRA examination itself.

78. General awareness and specific training sessions on AML/CFT have been provided to RIs and the NGO sector by the CIFIU including an outreach to the other islands, both the southern group and the northern group.

79. According to Cook Islands authorities, the compliance level within the financial sector has improved considerably since the 2004 evaluation for most trustee companies and domestic banks, while some concerns with the offshore banks continue to be addressed. These concerns include physical presence issues, customer due diligence, verification of source of funds and suspicious transaction reporting. While the offshore sector continues to be vulnerable to ML/TF, the Cook Islands Government believes that the effective and consistent supervision of the sector by the FSC and the CIFIU has resulted in a decline in problems with the offshore business over recent years, including the opportunity to utilise the sector as a vehicle for ML/TF.

80. On 11 February 2009, during the on-site visit, the Cook Islands introduced to Parliament a Bill (the Banking Act Amendment Bill 2009) which contained amendments to the *Banking Act 2003* which will have the effect of abolishing off-shore banks in the Cook Islands. Once the amendments come into effect, only a bank licensed as a domestic bank will be permitted to carry out offshore banking activities. Existing offshore banks will be given nine months from the date the amendments come into effect to obtain a domestic banking licence, wind up their operations or move to another jurisdiction. At this stage, it is expected that the Bill will be passed in the June 2009 sittings of Parliament.

81. Implementation of the transaction reporting regime required under the FTRA continues to improve, however the low reporting of STRs in certain sectors continues to be addressed, in particular in the DNFBP sector. The CIFIU has over the past year conducted training sessions with most of the various industries that make up DNFBP sector, including the pearl industry, legal profession, motor vehicle companies, real estate companies and accountants.

#### **b. The Institutional Framework for Combating Money Laundering and Terrorist Financing**

##### ***National Coordination***

##### **Coordinating Committee on Combating Money Laundering and Terrorist Financing (CCAM)**

82. On 4 March 2004, the Cabinet approved the establishment of the Coordinating Committee on Combating Money Laundering and Terrorist Financing (CCAM) in the Cook Islands. CCAM is chaired by the Cook Islands Financial Intelligence Unit (CIFIU) and it includes:

- (i) Airport Authority – Assist customs with border security
- (ii) Audit Office – Auditor of government ministry accounts.
- (iii) Cook Islands Investment Corporation – Management of all government properties including any seized/confiscated assets.
- (iv) Crown Law Office – Prosecution and the administration of any mutual legal assistance or extradition requests.
- (v) Development Investment Board – Foreign Investment registration, licensing and supervision.

- (vi) Financial Intelligence Unit – Administration of the Financial Transactions Reporting Act.
- (vii) Financial Supervisory Commission – Regulator and supervisor of financial institutions.
- (viii) Ministry of Finance & Economic Management – Financial Management and budgetary support.
- (ix) Customs Services – Border security, intelligence and investigation.
- (x) Ministry of Foreign Affairs & Immigration – Foreign Policy and International Requests.
- (xi) Ministry of Justice – Judicial and domestic Company registration and licensing.
- (xii) Ministry of Police – Investigation, proceed of crime action, prosecution and extradition.
- (xiii) Ombudsman (included on 15 June 2007).

83. CCAM has the following Terms of Reference:

- CCAM must ensure that its members have sound understanding of the anti-money laundering and counter terrorism financing (AML/FT) legislation, including the correlation of the respective statutes comprising the AML/CFT legislation.
- CCAM must ensure that its members are fully aware of their respective responsibilities under the AML/FT legislation.
- CCAM must encourage and support its members in meeting their respective responsibilities under the AML/FT legislation;
- CCAM must ensure that its members share information and training received from the members own respective regional and international networks or bodies;
- CCAM must, where necessary, promote and encourage coordination and assistance among its members in the implementation of the AML/TF legislation;
- CCAM must ensure efficient and effective coordination of Technical Assistance and training in respect of AML/TF;
- CCAM shall be authorised to form any sub-committee from among its members, to carry out any work identified by the CCAM;
- Members of CCAM shall assume responsibility for conducting relevant research, provision of information, reporting on progress and implementation of CCAM decisions within their areas of expertise;
- The Chairperson of CCAM, must submit an annual report to Cabinet on the progress and work of CCAM;
- CCAM shall, where requested by Cabinet, assist Cabinet in the formulation of Government policy on any issues relating to AML/CFT;
- CCAM shall establish its own procedures and program in carrying out any of the above terms;
- CCAM shall monitor the effectiveness of measures that have been implemented by its members;
- CCAM may invite other Government Agencies, officials or any persons to attend meetings or seminars of CCAM, as and when deemed appropriate or necessary by CCAM.

84. CCAM meets when required. It met four times in 2007 with one out of session update, and three times in 2008. The focus by CCAM since 2007 has been the Cook Islands Mutual Evaluation where

outstanding issues and progress on certain projects were discussed such as the drafting of new legislation and amendments to existing A

85. ML/CFT related legislation, a Law Enforcement Training Workshop, the National Money Laundering and Terrorism Financing Threat Assessment and other related issues.

#### Combined Law Agency Group (CLAG)

86. At the operational level, the Combined Law Agency Group (CLAG) can be instigated at any time by the Cook Islands Police for any multi-agency efforts required for any operational matters such as investigations, undercover, monitoring or surveillance. The CLAG is led by the Commissioner of Police and has representatives from Customs, Immigration and the CIFIU.

87. The CLAG used to meet once a month. After the construction of the new Police HQ in 2007, no meetings were held until recently. The CLAG met again on 29 January 2009 in preparation for the South Pacific Mini Games to be hosted by the Cook Islands in September 2009.

#### Cook Islands Financial Intelligence Network (CIFIN)

88. The Cook Islands Financial Intelligence Network (CIFIN) was established by the CIFIU in September 2006 following receipt by the CIFIU of a STR which required multi-agency cooperation for further investigation. CIFIN's aim is to facilitate, coordinate, manage and share intelligence reports considered relevant to the investigation of any serious offence, money laundering or terrorist financing.

89. The group is coordinated by the CIFIU, chaired by the Intelligence & IT Officer and initially included representatives from the Police, Customs, Immigration and the CIFIU. Members from outside of the CIFIU have to sign a Confidentiality Agreement with the CIFIU to ensure that information that they are privy to during the course of any discussions is kept confidential and used for the purposes of the investigation only. CIFIN is not restricted to the agencies listed above; membership is determined by the CIFIU according to the nature and circumstances of the matter under investigation.

90. The CIFIU can activate CIFIN for operational matters that may require law enforcement or private sector agencies for financial matters and investigations. CIFIN was established following receipt of an STR relating to a drug trafficking case and the representatives from Police, Customs, Immigration, Inland Revenue (Tax) and the CIFIU would meet on a monthly basis. However, when the current Police Commissioner took over his office in mid-2007, his priorities for the staff represented on CIFIN changed and CIFIN now operates on a needs basis.

#### Memoranda of Understanding

91. Memoranda of Understanding to formalize the sharing of information and intelligence have been signed between the CIFIU and the FSC, Police, Customs, and the Ministry of Justice.

## ***Roles and responsibilities of agencies involved in combating ML***

### Cook Islands Financial Intelligence Unit

92. The Financial Intelligence Unit of the Cook Islands (CIFIU) was established under section 20 of the *Financial Transactions Reporting Act 2003*, which was repealed in May 2004 and replaced by the *Financial Transactions Reporting Act 2004* (FTRA). The *Money Laundering Prevention Act 2000* that initially served informally to provide for the Cook Islands FIU was repealed upon the introduction of the FTRA 2003 on 3 June 2003.

93. The CIFIU is an administrative-type FIU and operates independently. It has five full-time staff. Effective from 27 June 2007, following an amendment to the FTRA, the Head of the CIFIU is appointed by the Attorney-General under section 21 of the FTRA and, under section 26 of the FTRA, is required to report to the Solicitor-General in the exercise of his functions and powers and 'on any matter relating to money laundering and financing of terrorism'. Previously the Head of the CIFIU was appointed by and reported to the Minister of Finance.

### Financial Supervisory Commission (FSC)

94. The FSC is a statutory body created under the *Financial Supervisory Commission Act 2003*. It has a five member board and the day-to-day administration is performed by the FSC Commissioner and has nine staff. The FSC operates with regulatory independence and is self-funded from fees received from registration of offshore entities. Any excess revenue is paid to the Crown Accounts. In 2007-08 \$325,000 was paid to the Crown. The FSC is accountable to the Minister for Finance in that each year it is required to provide an Annual Report and a Statement of Corporate Intent to the Minister and these documents then become publicly available.

95. The FSC is responsible for licensing financial sector entities such as banks (domestic and offshore) and offshore insurers and registration of trustee companies. From 1 January 2009, the FSC became responsible for licensing or otherwise authorizing all insurers, insurance intermediaries and insurance managers.

96. The FSC has a robust licensing regime for financial entities and strong emphasis is placed on corporate governance, especially the fit and proper test for all directors and managers, as well as on capital requirements. Trustee companies are expected to comply with the Offshore Banking Group of Supervisors' statement of Best Practice for Trust Companies and Service Providers.

97. As noted above, the FSC undertakes annual on-site inspections of all banks and trustee companies for compliance with Part 2 of the FTRA under delegated authority from the CIFIU. For banks, the FSC has issued a Prudential Statement under the Banking Act which sets out the requirements in respect of Customer Due Diligence (CDD). The on-site inspection methodology is based on an assessment against this Prudential Statement. Where suspicious transactions are discovered by the FSC which have not been reported by the financial institution, a formal report is made to the CIFIU. A similar regime is being put in place for insurers and will operate once the *Insurance Act 2008* comes into full operation.

98. The Cook Islands does not have any credit institutions other than banks. Nor does it have exchanges for securities, futures and other traded instruments. The Cook Islands does not have a Central

Bank or a formal Payments and Settlements System. Inter-bank settlements are carried out in one of two ways in a system devised by the banks. The branches of the Australian banks settle between one another through *nostro* accounts maintained in New Zealand. Settlements with the local bank are carried out through accounts that the banks maintain with each other. There is no regulatory intervention in the settlement system.

#### Law enforcement agencies

99. The principal operational law enforcement agency in the Cook Islands is the Cook Islands Police (CIP), with Customs, Immigration, and Inland Revenue having minor investigative roles and with prosecutions undertaken by the Solicitor-General's office and the Cook Islands Police. As noted above, the CIP also has a role in prosecuting matters in certain circumstances and has a broad prosecutorial discretion within its areas, however any serious cases are handled by the Crown Law Office. Crown Solicitors and police prosecutors meet weekly to discuss and assign cases for prosecution.

#### COOK ISLANDS POLICE

100. The CIP is responsible for maintaining law and order in the Cook Islands which includes the surveillance of the country's Exclusive Economic Zone and the management of the Cook Islands Meteorological Service. The current Commissioner of Police was employed on contract from New Zealand in June 2007. His contract is due to expire in June 2009.

101. The CIP has a total of 132 officers of whom 94 are sworn<sup>4</sup>, 35 non-sworn<sup>5</sup> and three are part-time school leavers. Sworn staff are assigned to five operational divisions which include General Policing and Traffic, Criminal Investigation Branch (CIB), Prosecution, Corporate and Maritime and the Meteorological Service. Furthermore, 21 sworn staff are stationed in the Outer Islands.

102. Fraud and financial crimes are mostly investigated by CIB detectives and in particular by fraud detectives, depending on the amount of money involved and complexity of offending. Where there is a substantial amount of money and complex offending involved, further support to the investigation team is provided from other Divisions and by external agencies such as the Audit Office, New Zealand Police and the New Zealand Serious Fraud Office. Recently, the Fraud Unit was upgraded with the recruitment of a former Detective Inspector from the New Zealand Police on a part time basis and consideration is being given to recruitment of a forensic accountant.

103. The CIP in partnership with the Australian Federal Police has in place a Computer Based Training Center which provides a total of 75 online courses including drug, vehicle, money laundering and other investigations. This Training Center is accessible "24/7" and staff are encouraged to undergo their training when they are available.

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<sup>4</sup> Sworn officers are those who have undergone and successfully completed police training and are sworn on oath as police officers.

<sup>5</sup> Non sworn staff are civilians employed to do non operational police work and this includes staff in the Meteorological Service.

104. The CIP has in place a robust computer network for file management, intelligence management and file preparation. This system ensures that investigations are properly recorded and managed. The CIP operates the 3I Crime Reduction Model<sup>6</sup>.

#### CUSTOMS AND IMMIGRATION

105. Customs is a department within the Revenue Management arm of the Ministry of Finance and Economic Management. Customs' primary focus is on border revenue collection of import levies and customs import VAT. Additional to this role is the control on movements of crafts, passengers and cargo. The Comptroller of Customs is also the Treasurer with responsibility for Customs and Inland Revenue functions.

106. Customs has a staff of 22, comprising six (excluding the controller) full-time officers in Rarotonga and one full time officer in Aitutaki. There are five permanent officers at the Rarotonga International Airport. These officers are supported by 12 part time staff both on Rarotonga and within the outer islands. . There are quite a number of import-related detections each year. Customs investigates discrepancies in declarations with respect to import duty mainly with a view to administrative recovery rather than prosecution. Customs staff participated in the AML/CFT and Proceeds of Crime Workshop held by the Pacific Anti-Money Laundering Program in August 2008 in the Cook Islands.

107. .Customs has recently undertaken a review of its organisation and a technical assistance programme has been implemented with the appointment of a New Zealand Customs Service Officer to the Cook Islands. The desired outcomes of this programme are to:

- review and develop Customs' operational policy and procedures documents;
- modernize existing customs legislation;
- improve capability and performance; and
- develop the service to international standards.

108. It is anticipated that this programme will take two years to fully implement.

109. Immigration is a Division within the Ministry of Foreign Affairs & Immigration and comprises six staff: the Director for Immigration, three Border Control Supervisors and two Client Services staff. All immigration queries at the border are taken up by the duty immigration supervisor or can also be referred to the Director.

110. Customs and Immigration do not believe they have a significant role with respect to ML matters. They both see investigations being the responsibility of the CIP. Their roles are limited to processing cross-border declarations if made. With respect to cross-border declarations, both incoming and outgoing passengers are required to declare on the arrival and departure cards if that person is carrying of more than NZ \$10,000 cash or Negotiable Bearer Instruments (NBI). . Work is presently underway to include precious metals and stones in the declaration and reporting regime at the borders of the Cook Islands.

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<sup>6</sup> The Cook Islands Crime Reduction Model has been adapted from the 3i model developed by Dr Jerry Ratcliffe, and first published in the Intelligence led Policing,(2003) Australian Institute of Criminology – trends & issues in crime and criminal justice, No.248.

Subsequently, training of Customs and Immigration staff will be provided with respect to processing persons making such declarations. Customs officers currently have no power to arrest any person apprehended having failed to make the requisite declaration, i.e. following some form of fortuitous discovery.

#### SOLICITOR-GENERAL'S OFFICE/CROWN LAW OFFICE

111. The principal function of the Crown Law Office (CLO) is to advise the Government of the Cook Islands on legal matters that may be referred to it by the Prime Minister, Cabinet, the Ombudsman, Ministers, departments and statutory bodies pursuant to the *Crown Law Office Act 1980*.

112. The Attorney-General is the Minister responsible for the CLO. All prosecutions are coordinated by the CLO under the direction of the Solicitor-General. The CLO represents the Government in litigation, developing legislation and prosecuting offences. As previously noted, offences of a more minor nature are routinely prosecuted by police prosecutors and CLO prosecutors meet with police on a weekly basis to determine responsibility for prosecutions.

113. The CLO has four professionally qualified legal staff and two support staff. Previously the CLO had a significant lack of resources and expertise in dealing either with complex financial crime or ML. However the CLO has recently employed a senior criminal prosecution lawyer from New Zealand. Nevertheless at this time, all revenue management investigations and prosecutions are now either undertaken by the Treasurer or briefed out to private sector legal counsel.

#### **c. Approach Concerning Risk**

114. To date, risk-based supervision has not been applied by the FSC or CIFIU. Part of the reason for this is historical, in that the Cook Islands was previously on the NCCT list, so in order to ensure the AML/CFT laws were being correctly implemented, all entities in the regulated financial sector were subject to the same degree of scrutiny for all customers. However, the accounts of some high risk customers are subject to more intense scrutiny.

115. The Cook Islands is in the process of drafting risk-based regulations that it intends to issue under the Financial Transactions Reporting Bill 2009 (a revised version of the FTRA 2004 currently being drafted). It is intended that this regulation will provide the legal framework for RIs in the Cook Islands to adopt or to implement a risk-based approach to combating money laundering and terrorism activities in the Cook Islands.

116. The request to move towards adopting a risk-based approach was initially received during discussions held with the Trustee Companies Association. The new regulation is being circulated for comments together with the amended FTR Bill and is scheduled to be presented to Parliament in early 2009.

117. The Evaluation Team has some concerns about the proposed introduction of a risk-based approach in the Cook Islands. Noting in particular the predominance of higher risk trust relationships within the financial sector, the Evaluation Team is not convinced that providing for reduced or simplified CDD would be appropriate for the majority of RIs currently doing business in the Cook Islands (see section 3.2 of this report for further discussion). Rather, the authorities might consider specific AML/CFT

guidance for certain types of reporting institutions to address business practices that are unique that require either simplified or enhanced customer due diligence.

**d. Progress since the Last Mutual Evaluation**

118. As noted previously, in February 2004, the IMF in collaboration with the APG conducted a detailed assessment of the AML/CFT regime of the Cook Islands. This assessment assessed compliance with the 1996 version of the FATF 40 Recommendations and the (then) Eight Special Recommendations using the 2002 Assessment Methodology. The Cook Islands was also previously assessed in October/November 2001 by an APG/OGBS evaluation team.

119. In summary, the IMF Assessment Team found that:

**“Overall, the current AML legal, institutional, and supervisory framework provides a sound basis for the prevention, detection, and prosecution of ML offenses, but implementation remains weak and FT is not addressed.** The Cook Islands authorities have devoted considerable effort to increase compliance with international AML/CFT standards, i.e., the FATF 40+8 Recommendations. The legal framework has substantially improved in 2003 with the passage of an AML suite of legislation, which included new acts on proceeds of crime (POCA), mutual legal assistance (MACMA), extradition (EA) and financial transactions reporting (FTRA). The CIG [Cook Islands Government] also reorganized the supervisory structure with the legislative establishment of the already operational FIU. While much of the necessary legal and institutional components for an effective AML/CFT regime are now in place, implementation in several areas, in particular regarding compliance supervision, remains weak and appears often to be driven by external pressure. Other significant shortcomings include the lack of criminalization of FT and the delay in the ratification of the relevant international treaties.”

120. The following table provides an update of the actions undertaken by the Cook Islands regarding the primary areas of concern raised in that IMF Assessment Report.

Reference FATF Recommendation	Recommended Action	Actions undertaken by the Cook Islands <sup>7</sup>
<b>40 Recommendations for AML (1996 version)</b>		
General framework of the Recommendations (FATF 1–3)	Ratify the Vienna Convention and ensure that domestic legislation is in place for its implementation	The Cook Islands acceded to Vienna Convention on 22 February 2005 and it entered into force on 23 May 2005.  ML is an offence under the <i>Crimes Amendment Act 2004</i> . Proceeds of crime can be confiscated under the <i>Proceeds of Crimes Act 2004</i> .

<sup>7</sup> Please note that the information contained this table has been prepared by the Cook islands and that the adequacy and effectiveness of some these actions is analysed in detail in relevant sections of this report.

Reference FATF Recommendation	Recommended Action	Actions undertaken by the Cook Islands <sup>7</sup>
		Police are currently undertaking a potential ML investigation.
Provisional measures and confiscation (FATF 7)	Make criminal forfeiture mandatory for any serious offense where proceeds are detected	Criminal forfeiture is mandatory for any serious offence, and Police are working on a current case. No action has been undertaken to date under the POCA.
Customer identification and record-keeping rules (FATF 10–13)	The conflict between the FTR Regs 2004 and the FTRA should be resolved as a matter of priority by eliminating any provision in the Regs that diminishes the scope of the identification requirements set forth by the FTRA	The FTR Regs 2004/07 on Procedures to identify and verify an applicant, and exemption provided to listed Offering Companies and the FTRR 2004/06 defining ‘Customer, information and verification’ were revoked.  Prudential Statement 08-2006 on CDD was issued to ensure that banks have in place customer ID policies.
Increased diligence of financial institutions (FATF 14–19)	The FSC should undertake an initial process to determine whether banks have adequate recordkeeping systems and procedures to provide assurance that compliance will be maintained.  The FIU and FSC should open up further dialog with financial institutions to determine the level of understanding of suspicious activity concepts to identify potential gaps or bottlenecks in the process. Initiatives toward this end should also focus on clarifying what constitutes the tipping off of a customer.	The FSC undertakes an FTRA review of every bank each year as part of its routine on-site inspection program. This includes an assessment of the state of the record keeping systems and a compliance check on previously non-complying files and a random sample of new customer files.  The FIU has conducted awareness training for financial institutions covering topics from understanding ML and FT, CDD, record keeping, reporting requirements including tipping off. The FIU also provides the UNODC computer based training on money laundering.
Measures to cope with countries with insufficient AML measures (FATF 20–21)	The FIU and/or the FSC should issue the draft guidance notes that address enhanced scrutiny for countries that do not have adequate AML/CFT regimes	The FIU has issued Guidelines in June 2008.  The FSC has issued a Prudential Statement on Customer Due Diligence.

Reference FATF Recommendation	Recommended Action	Actions undertaken by the Cook Islands <sup>7</sup>
<p>Implementation &amp; role of regulatory and other administrative authorities (FATF 26–29)</p>	<p>The government should introduce statutory fit-and proper tests for directors, managers, and significant shareholders at the time of licensing/change in ownership of all regulated financial institutions similar to those contained in the banking law. In addition, the fit-and-proper test should be made an ongoing requirement.</p> <p>As part of the FSC’s overall development, it would be helpful to set forth a strategic plan specifically addressing AML/CFT issues to be included among the other supervisory initiatives it must undertake. This would include performing a risk assessment of regulated institutions to aid in the allocation/prioritization of examination resources, as well as key steps needed to develop appropriate supervisory guidance and procedures. This exercise could be conducted in cooperation with the FIU to enable the sharing of information, techniques, and resources.</p> <p>The level of resources in the FSC’s Supervisory Division should be assessed once the rationalization of licensing has been completed to ensure it has adequate human and other resources to carry out its supervisory and compliance role.</p>	<p>Fit and proper tests have been introduced for directors, significant shareholders and management of banks (Prudential Statement 06-2006). In addition to examining the material required to be submitted by licensees or applicants for licences, the FSC performs independent checks, including verification of the authenticity of documents.</p> <p>Under the <i>Insurance Act 2008</i> applicants for licences are required as part of the licensing process to submit identical material that will be required under the proposed Prudential Statement 10-2008.</p> <p>A similar process is applied to directors and owners for applicants for trustee company registration and it is intended that a fit and proper test will be included in the Trustee Companies Act when it is revised.</p> <p>The FSC’s annual work plan sets an FTRA on-site inspection program for all banks and trustee companies. FSC staff have undergone the UNDOC Computer based AML training at the FIU. Overall the FSC is moving towards a risk based approach to supervision to allow more targeted on-site visits.</p> <p>The FSC currently has a Senior Supervisor and 4 supervisors which is considered adequate in light of the workload and capacity building constraints. There is a strong emphasis on capacity building and, while taking advantage of opportunities that are offered, the FSC is approaching this in a structured manner.</p>

<b>Reference FATF Recommendation</b>	<b>Recommended Action</b>	<b>Actions undertaken by the Cook Islands<sup>7</sup></b>
	The FIU's Compliance Officer Position should be filled to ensure that all areas of risk related to the operation of licensed institutions are adequately covered.	The Compliance Officer position is now filled and works jointly with the FSC Supervisors on FTRA Compliance Audits.
Administrative Cooperation—Exchange of general information (FATF 30–31)	The basis and extent of cooperation of the FSC with other domestic authorities should be expanded in the FSC Act.	The FSC and FIU have signed an MOU to allow for the sharing of information.
Administrative Cooperation—Exchange of information relating to suspicious transactions (FATF 32)		The FIU has signed MOUs to exchange information with the FSC, Police and Customs.
Other forms of cooperation—Basis and means of cooperation in confiscation, mutual assistance, and extradition (FATF 33–35)	Ratify the Vienna Convention and ensure that domestic legislation is in place for its implementation	Vienna Convention signed February 2005 and entered into force on 23 May 2005. The <i>Proceeds of Crimes Act 2003</i> , <i>Mutual Assistance in Criminal Matters Act 2004</i> and the <i>Extradition Act 2004</i> are in place and being administered by the Crown Law Office.
<b>Special recommendations on terrorist financing</b>	<b>Recommended Action</b>	
I. Ratification and implementation of UN Instruments	Ratify the ICSFT and ensure that domestic legislation is in place for its implementation. Implement the UN SCRs on FT.	The ICSFT was ratified on 4 March 2004. FT is an offence under the <i>Terrorism Suppression Act 2004</i> .
II. Criminalizing the financing of terrorism and associated money laundering	Criminalize FT as a matter of priority and include it among “serious offences” so that it is a predicate offences for ML.	FT falls within definition of “serious crimes” and is therefore a predicate offence for ML.
III. Freezing and confiscating terrorist assets	Adopt as matter of priority legislation that provides for the freezing of terrorist funds and enables the effective implementation of UN SCRs on FT.	<i>Terrorism Suppression Act 2004</i> provides for the freezing/confiscation of assets associated to any terrorist, terrorist group(s) or activities.
IV. Reporting suspicious transactions related to terrorism	Ensure, if necessary by issuing regulation, that the CIG regularly circulate UN and other terrorist watchlists to financial institutions and keeps them abreast of new	A copy of the UN “Watchlist” provided by the Ministry of Foreign Affairs to the FIU and FSC has been circulated to the FIs.

<b>Reference FATF Recommendation</b>	<b>Recommended Action</b>	<b>Actions undertaken by the Cook Islands<sup>7</sup></b>
	developments	FI are required under the FTRA to report STRs related to suspected terrorism activities.
V. International Cooperation	Ratify the ICSFT and ensure that domestic legislation is in place for its implementation.  Implement the UN SCRs on FT.	The ICSFT was ratified on 4 March 2004. The provisions of the Mutual Assistance in Criminal Matters Act covers any MLA requests related to FT. Pursuant to section 5 of the Terrorism Suppression Act, UNSC listed terrorist entities fall within the definition of “specified entities”.
VI. Alternative remittance	N/A	
VII. Wire transfers	N/A	
VIII. Non-profit organizations	N/A	

## 2. LEGAL SYSTEM AND RELATED INSTITUTIONAL MEASURES

### 2.1 Criminalization of Money Laundering (R.1 & 2)

#### 2.1.1. Description and Analysis<sup>8</sup>

##### *Legal framework*

121. The current ML offence is found at section 280A of the *Crimes Act 1969* as amended (the Crimes Act). Previous offence provisions created by the *Money Laundering Prevention Act 2000* and *Crimes Amendment Act 2003* were repealed by the *Proceeds of Crime Act 2003* and the *Crimes Amendment Act 2004* respectively. Certain ancillary liability is provided by the general terms of the *Crimes Act*.

122. Responsibility for the investigation of ML offences rests with the Cook Islands Police and the prosecution with either the Solicitor General or the police.

#### **Recommendation 1**

##### *Criminalisation of money laundering*

123. The Cook Islands acceded to the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention) on 22 February 2005 (entered into force on 23 May 2005) and the 2000 Convention against Transnational Organised Crime (the Palermo Convention) on 4 March 2004 (entered into force on 3 April 2004). The form of the current ML offence substantially follows the terminology and elements proposed by those conventions, but also extends the requisite mental element to conduct where the person “had reason to believe” or was “wilfully blind”.

124. Section 280A provides:

(2) A person commits the offence of money-laundering if the person –

- a. acquires, possesses or uses property, or engages in a transaction that involves property, knowing or having reason to believe that it is derived directly or indirectly from a serious offence;
- b. converts or transfers property with the aim of –
  - (i) concealing or disguising the illicit origin of that property; or
  - (ii) aiding any person involved in the commission of the offence, to evade the legal consequences thereof;knowing or having reason to believe that the property is derived directly or indirectly from a serious offence;
- c. conceals or disguises the true nature, origin, location, disposition, movement or ownership of the property knowing or having reason to believe that it is derived directly or indirectly from a serious offence;

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<sup>8</sup> For all recommendations, the description and analysis section should include the analysis of effectiveness, and should contain any relevant statistical data.

d. renders assistance to another person for any of the above.

125. “Serious offence” is defined in sub-section 280A(1) as:

- a. an act or omission that constitutes an offence against the law of the Cook Islands punishable by imprisonment for not less than 12 months or the imposition of a fine of more than \$5,000; or
- b. an act or omission that constitutes an offence against the law of another country that, had the act or omission occurred in the Cook Islands, it would have been punishable by imprisonment for not less than 12 months or the imposition of a fine of more than \$5,000.

126. Sub-section 280A(3) effectively reproduces the terms of sub-section 280A(2) but with an alternative mental element which requires proof that the person “was wilfully blind as to the fact that the property is derived directly or indirectly from a serious offence”.

127. As the various forms of accessorial liability would constitute serious offences in themselves, the requirement to criminalize the laundering of property derived from the ancillary conduct of “an act of participation” in the predicate offences is addressed. So too is the requirement to criminalize conduct designed to assist any person involved in the commission of the predicate offence to evade the legal consequences of his actions by virtue of sub-paragraph 280A(2)(b)(ii) and (3)(b)(ii), which makes it an offence to convert or transfer property with the aim of aiding any person involved in the commission of “the offence”.

### ***Property***

128. “Property” is broadly defined in section 2 of the *Crimes Act* as including real and personal property, and any estate or interest in any real or personal property, any debt, and any thing in action, and any other right or interest. There is no limitation on the value of the property the subject of the offence.

129. Sub-section 280A(5) of the *Crimes Act* specifically provides that persons may be convicted of the offence of ML “notwithstanding the absence of a conviction in respect of a crime which generated the proceeds alleged to have been laundered”. The term “proceeds” is however not used in the ML offences specified at sub-sections (2) and (3) of section 280A, nor defined in the *Crimes Act*.

### ***Scope of predicate offences***

130. The predicate offences for ML are not limited by offence type and extend, as a result of the definition of “serious offence” set out above, to all offences punishable by imprisonment of not less than 12 months or a fine of more than \$5,000. The relevant offences falling within the FATF designated categories of offences are set out in the table below:

**Table 3: Predicate offences for money laundering**

<b>FATF designated categories of offences</b>	<b>Relevant legislation</b>	<b>Penalty or range</b>
Participation in an organized criminal group and racketeering	S 109A <i>Crimes Act 1969</i>	5 years' imprisonment
Terrorism including terrorism financing	<i>Terrorism Suppression Act 2004</i> ; Terrorism Financing, s 11	14 years' imprisonment
Trafficking in human beings and migrant smuggling	Ss 109H & I <i>Crimes Act 1969</i>	30 years' imprisonment or \$800,000 fine or both
Sexual exploitation, including sexual exploitation of children	<i>Crimes Act 1969</i> ss109I, 109H with element of sexual exploitation as per s109K; 109C, 109D & 109N with sexual exploitation as per s109E	20 years' imprisonment or \$500,000 fine or both
Illicit trafficking in narcotic drugs and psychotropic substances	<i>Narcotics and Misuse of Drugs Act 2004</i>	Class A Drugs – 20 years' imprisonment. Class B Drugs – 15 years and 10 years for other cases.
Illicit arms trafficking	No relevant legislation	
Illicit trafficking in stolen and other Goods	<i>Crimes Act 1969</i> section 255	3 years' imprisonment
Corruption and bribery	<i>Crimes Act 1969</i> sections 110, 111, 112, 113, 114, 115, 116 and 117.	7 – 14 years' imprisonment
Fraud	<i>Crimes Act 1969</i> sections 268, 269, 270, 273, 274, 275, 276, 277, 278, 279 and 280 280A & B.	3 months – 10 years' imprisonment depending on the value and nature of the fraud
Counterfeiting currency	<i>Crimes Act 1969</i> section 306 – 315 (coins only), ss 287 – 294 (notes)	Coins: 1 year – 10 years' imprisonment Notes: 7 – 10 years imprisonment
Counterfeiting and piracy of products	No relevant legislation with sufficiently high penalties to qualify as predicate offence <sup>9</sup>	

<sup>9</sup> The Cook Islands authorities referred to offences in the Copyright and Patents Acts, however the relevant penalties do not render them predicate offences for ML.

<b>FATF designated categories of offences</b>	<b>Relevant legislation</b>	<b>Penalty or range</b>
Environmental crime	<i>Marine Resources Act 2005</i> – Illegal Fishing Section 19 (1) & (2)	Fine: min \$100,000, max \$1,000,000.
Murder, grievous bodily injury	<i>Crimes Act 1969</i> section 187 & 192, 191 & 197, 208, 209, 210, 211, 212 and 213.	3 years – life imprisonment
Kidnapping, illegal restraint and hostage taking	<i>Crimes Act 1969</i> section 231, 230 and 232	7 – 14 years’ imprisonment
Robbery or theft	<i>Crimes Act 1969</i> Section 256, 257 and 242 & 249	Theft: 3 months – 5 years imprisonment Robbery: 10 – 14 years imprisonment
Smuggling	<i>Crimes Act 1969</i> , ss 109C – 109E (People Smuggling) <sup>10</sup>	People smuggling: 14 years imprisonment or \$300,000 fine or both – 20 years or \$500,000 fine or both
Extortion	<i>Crimes Act 1969</i> section 260	7 – 14 years’ imprisonment
Forgery	<i>Crimes Act 1969</i> sections 286, 287, 288 and 289.	7 – 10 years’ imprisonment
Piracy	<i>Crimes Act 1969</i> sections 103, 104, 105, 106, 107 and 108.	7 years – life imprisonment
Insider trading and market manipulation	<i>Crimes Act 1969</i> , sections 336, 337, 338, 339, 340 and 341.	Person: 2 years imprisonment or \$50,000 fine or both Corporation: \$250,000 fine.

131. Although the designated categories of predicate offences have for the large part been addressed, there is presently no offence for illicit arms trafficking, for counterfeiting and piracy of products and for smuggling other than of people, and environmental crime does not extend beyond illegal fishing.

#### ***Threshold approach for predicate offences***

132. The Cook Islands has adopted a threshold approach for predicate offences by making all offences punishable by not less than 12 months’ imprisonment or a fine of more than \$5,000 “serious offences” for the purposes of the ML offence provisions.

<sup>10</sup> The Cook Islands authorities also referred to smuggling offences in the Customs Act and Crimes Act Part X, however the relevant penalties do not render them predicate offences for ML.

### *Extraterritorially committed predicate offences*

133. By virtue of sub-section 280A(1)(b) of the Crimes Act, the definition of “serious offence” extends to acts or omissions constituting an offence in another country, which, had they occurred in the Cook Islands would have constituted an offence punishable by the threshold of imprisonment of not less than 12 months or a fine of more than \$5,000.

### *Self laundering*

134. Persons who commit the predicate offence may also be punished in the Cook Islands for laundering property derived from that offence. Subsection 280A(8) expressly provides:

“For the avoidance of doubt, a person may be found guilty of an offence under subsections (2) or (3) even if the property involved in the offence is property that is derived directly or indirectly from a serious offence committed by that person”.

### *Ancillary offences*

135. Certain accessorial liability for ML offences is provided by subsections 280A(2)(d) and 280A(3)(e)<sup>11</sup> of the Crimes Act which make it a money laundering offence to “render assistance to another person” for any of the conduct specified in subsections 280A(2) or (3). The scope of an offence of “rendering assistance” to another engaged in an act constituting ML is uncertain, as it is understood the phrase has not been the subject of judicial consideration. It is envisaged that such an offence would extend to acts or omissions for the purpose of aiding the person to commit the offence.

136. General categories of accessorial liability are covered by subsection 68(1) of the Crimes Act which provides that in addition to the person who commits the offence, those who aid, abet, incite, counsel or procure another are regarded as parties to the offence and guilty of that offence. Subsections 74(1) and 333(1) of the Crimes Act deal with attempts to commit offences and conspiracy respectively.

### *Additional elements*

137. The current ML offences do not extend to conduct involving dealings with proceeds of crime derived overseas unless the foreign offence itself falls within the “serious offence” definition. This observation is however made subject to the comments made under the Recommendations and Comments section below regarding the required physical elements of the offence provisions. Whilst the current offences mirror the convention requirements, they do not expressly provide that it is necessary in respect of the offence specified at sub-section 280A(2)(a) for the Crown to prove that the property the subject of the dealing is derived from the commission of a serious offence. Similar considerations apply to the offence established by sub-paragraph 280A(2)(b)(ii).

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<sup>11</sup> It is noted that subparagraph 280A(3)(d) is absent

## **Recommendation 2**

### ***Liability of natural persons***

138. The ML offences specified in sub-section 280A(2) of the Crimes Act apply to natural persons who knowingly engage in money laundering activities. The penalty for natural persons under that subsection is a term of imprisonment of up to 5 years or a fine up to \$50,000 [s280A(6)].

### ***Mental element of ML offence***

139. Both conventions require that the requisite mental element of “knowledge, intent or purpose” be able to be inferred from objective factual circumstances. Sub-section 280A(4) of the Crimes Act makes express provision for this.

### ***Liability of legal persons***

140. Criminal liability for ML under section 280A of the Crimes Act extends to legal persons by virtue of the definition of “person” in the Crimes Act, s2(1). The punishment applicable to legal persons found guilty of the offences specified in subsections 280A(2) and 280A(3) is five times the fine applicable to natural persons – being up to \$50,000 or \$30,000 respectively. Legal persons are also subject, notwithstanding the provisions of any other Act, to suspension or cancellation of any licence held to carry out their business as determined by the Court in addition to the imposition of any fine.

### ***Parallel criminal, civil or administrative proceedings***

141. The Crimes Act provisions do not expressly preclude the possibility of parallel civil or administrative proceedings. Section 417 of the Crimes Act does provide that civil remedies for any act or omission shall not be suspended by reason that the act or omission amounts to an offence.

### ***Sanctions***

142. The maximum penalty for ML specified in subsection 280A(2) of the Crimes Act is a maximum of imprisonment of up to five years or a fine of \$50,000 in the case of a natural person and in the case of a legal person, a fine of up to five times the fine applicable to a natural person, together with suspension or cancellation of licence. The penalty in respect of natural persons compares with that of receiving stolen goods and conversion or attempted conversion of property, however is considered to be in the lower end of the range should the value of the property involved be substantial. As such it is regarded by the Evaluation Team as not adequately proportionate and dissuasive.

143. Relevant penalties for other offences involving dishonesty or corruption range between three and 10 years with the penalty for conspiracy to defeat justice at seven years’ imprisonment. Having regard to the range of offences and penalties available in the Crimes Act, it appeared that penalties had not been revised for some time and that comparison of the penalties for ML and other serious offences would not be useful.

144. The penalty for legal persons is regarded as proportionate and dissuasive. It should also be noted that the penalty for a corporation failing to report an STR under section 11(2) of the FTRA is a fine of \$100,000.

## *Statistics and effectiveness*

145. While there have only been limited opportunities to pursue possible ML offences (and/or proceeds of crime action), the Evaluation Team was made aware of several predicate crimes involving relatively substantial amounts of proceeds of crime. Cook Islands authorities appear to have missed several opportunities for pursuing ML offences, due in part to capacity issues in both the Cook Islands Police (in terms of investigative capacity) and the CLO (in terms of the provision of advice as to what additional investigations should be conducted and charges laid). As outlined in section 2.6 of this report, however, the CIP now considers that it has sufficient capacity to undertake future ML investigations.

### **2.1.2. Recommendations and Comments**

146. The current ML offence provisions follow closely the terminology employed in the Vienna and Palermo conventions. The legislation has sought to cover the various forms of required physical conduct and in respect of the mental element has provided for proof of knowledge along with “having reason to believe” and “wilful blindness”. The definition of property is broad and is not limited by any reference to value.

147. A threshold approach has been adopted under which all offences falling within the definition of “serious offence” are predicate offences for the offence of ML. Whilst the FATF designated categories of predicate offences have been well represented, competent authorities should ensure that each designated category is fully addressed, in particular that an offence of trafficking in firearms, counterfeiting and piracy of products and smuggling (other than of people) exist as serious offences, and to consider relevant forms of environmental crime beyond illegal fishing.

148. Competent authorities should also consider increasing the relevant penalty for ML for natural persons to ensure that it is proportional and dissuasive.

149. Sub-section 280A(5) of the Crimes Act uses the term “proceeds” in providing that it is not necessary for any person to have been convicted of the predicate offence to secure a conviction for ML. Whilst the meaning of the term may be implicit, competent authorities should consider defining the term for the purposes of the offence, noting however that the definition of “proceeds” in the *Proceeds of Crime Act 2003* is narrower than may have been intended and should not be adopted in its present form.

150. Whilst the terminology of the offence provisions closely follows the wording of the Vienna and Palermo conventions, that language creates some uncertainty in its practical application without further clarification. The offence created by subsection 280A(2)(a) of the Crimes Act does not expressly provide that it is necessary to prove that the property the subject of the offence must be derived (directly or indirectly) from a serious offence. The derivation of the property is a consideration only in respect of the mental element of the offence. Whilst it may be considered that such a requirement is implicitly required to prove that the person had knowledge of the derivation of the property, the same cannot be said of having only a belief of the origins of the property. The same issue arises in a consideration of subsection 280A(2)(b)(ii). It is recommended for the sake of clarity that the competent authorities consider precisely what is intended to be proven in terms of the actus reus of the offences before considering amending the offence provisions to ensure that all necessary elements are clear.

151. The Evaluation Team had some concerns about the efficacy of the more recently inserted mental element of “wilful blindness”. Although it is understood that this was a recommendation previously made to the Cook Islands, the Evaluation Team would suggest that the competent authorities consider the manner in which the concept would be applied and whether other alternative mental elements, such as “recklessness”, appear elsewhere in Cook Islands law.

152. Authorities may also wish to consider (for the sake of clarity), insertion in the Crimes Act of a definition for the word “illicit” which appears in subparagraph 280A(2)(b)(i) and insertion of the word “predicate” before the word “offence” in subparagraph 280A(2)(b)(ii).

153. The ML offence provisions have not been tested as no charges have been laid for the offence. The CIP indicated in the course of the onsite visit that whilst it may not previously have had capacity to conduct such an investigation, this was no longer the case. Competent authorities should consider devising a process to ensure that consideration is given to the appropriateness of pursuing an investigation for ML charges at the same time as the investigation for the predicate offence is conducted. As the CIP have a broad discretion in laying charges and conducting prosecutions of a less complex nature, the CIP and CLO should consider consultation at an early stage to ensure ML offences are given adequate consideration in appropriate cases, awareness is heightened and a consistent approach to charging and sentencing submissions is developed.

154. From a practical perspective, difficulties may be encountered in the prosecution of a complex financial case in the Cook Islands as the judiciary visit on circuit from New Zealand for periods currently fixed at two weeks. This is particularly so where a matter proceeds by jury trial. Competent authorities may wish to consider whether the judiciary may be available for longer periods when required.

### 2.1.3. Compliance with Recommendations 1 & 2

	Rating	Summary of factors underlying rating <sup>12</sup>
<b>R.1</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>• A threshold approach has been adopted which ensures that the offence extends to a very broad range of predicate offences, however, not all designated categories of offence are covered.</li> <li>• Whilst the opportunities to pursue the prosecution of money laundering may be limited, no charges have been laid and the offence provisions have not been tested.</li> </ul>
<b>R.2</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>• The penalty for natural persons is at the lower end of the range and not proportionate or dissuasive</li> </ul>

<sup>12</sup> These factors are only required to be set out when the rating is less than Compliant.

## **2.2. Criminalization of Terrorist Financing (SR.II)**

### **2.2.1. Description and Analysis**

#### *Legal framework*

155. The *Terrorism Suppression Act 2004* as amended by the *Terrorism Suppression Amendment Act 2007* provides for the criminalization of certain offences relating to terrorism including the financing of terrorism (FT), and for the forfeiture of terrorist property.

156. Responsibility for investigations under the Act rests with the Cook Islands Police (CIP) and for prosecution and taking action to freeze and forfeit terrorist property with the Solicitor General (SG) and Crown Law Office (CLO).

#### *Criminalization of terrorist financing*

157. The Cook Islands signed the International Convention for the Suppression of the Financing of Terrorism on 24 December 2001. It was ratified it on 4 March 2004 and entered it into force on 3 April 2004.

158. Terrorist financing was criminalised by section 11 of the *Terrorism Suppression Act 2004* (TSA). The offence provision was amended by the *Terrorism Suppression Amendment Act 2007* to expand the nature of conduct constituting the offence.

159. Section 11(1) of the TSA satisfies the convention requirement to criminalise both limbs of conduct where the person by any means, directly or indirectly, unlawfully and wilfully provides or collects funds with either the intention that they should be used in full or in part to carry out a terrorist act, or in the knowledge that the funds are to be used in full or in part to carry out a terrorist act.

160. “Terrorist act” is defined in the TSA as comprising any act or omission which constitutes an offence within the scope of a “counter terrorism convention” (being 13 conventions specified in the First Schedule to the TSA) and in addition, by sub-section 4(2) of the TSA, any act or omission which involves death or bodily injury to a person, *inter alia*, and which is intended or may reasonably be regarded as intended to either intimidate the public or section thereof, or to compel a government or an international organisation to do or refrain from doing any act. Sub-section 4(2) goes further to impose an additional requirement at sub-section 4(2)(c), that the conduct:

“must be made for the purpose of advancing a political, ideological or religious cause.”

161. The TSA applies a very broad definition to the use of the word “property” in its TF offence which in effect adopts the convention definition of “funds”. The property need not derive from any unlawful source.

162. It is not necessary in the proof of an offence contrary to sub-section 11(1) of the TSA for the prosecution to prove that the funds collected or provided were actually used in full or in part to carry out a terrorist act [ss11(3) TSA].

163. The TF offence in the TSA also extends to the provision or collection by any means, directly or indirectly, of any property, intending, knowing or having reasonable grounds to believe that the property will benefit an entity that the person knows is a specified entity (ss11(2) TSA). Specified entities include entities which may be listed from time to time by the Security Council of the United Nations as terrorist entities or any entities in respect of which the High Court of the Cook Islands may make a declaration that the entity is a “specified entity” following an application by the SG under s6 of the TSA (no such declarations have been made to date). As a result, the offence provision has the capacity to extend to a range of terrorist organisations or individual terrorists.

164. The offences which are capable of extending to terrorist organisations or entities set out in sub-section 11(2) depart from the requirement that the property be collected or provided with the intention or in the knowledge that the property *will be used* by the (terrorist organisation or terrorist). The sub-section instead requires that the property:

“*will benefit* an entity that the person knows is a specified entity”.

165. A further offence is created by sub-section 12(1) of the TSA which involves the provision of more general assistance or services for the benefit of a terrorist group. This offence could be utilised where the support is in the nature of a payment for rental of premises or cars on behalf of the group. “Terrorist group” is further defined to mean a “specified entity” or an entity that has as one of its activities or purposes committing, or facilitating the commission of, a terrorist act.

166. Articles 2(4) & 2(5) of the Terrorist Financing Convention require that offences also be committed where persons attempt to commit any of the relevant offences or participate as an accomplice, organize or direct others to commit or contribute to the commission of one or more offences by a group acting with common purpose.

167. The provisions of the *Crimes Act* as amended which apply to attempts to commit offences, (s74) or recognise parties to offences as those who commit the offence, aid, abet, incite counsel or procure other persons to commit the offence, (s68), and conspiracy, (s333) apply to the offences specified in the TSA. Those provisions, along with the recognition of the doctrine of common purpose, [s68(2)] apply to an “offence” which is defined in the *Crimes Act* as any act or omission for which anyone can be punished under that Act “or under any other enactment”.

#### ***Terrorist financing as predicate offence for money laundering***

168. The TF offences created by s11 of the TSA are punishable by imprisonment for a period of 14 years. As such, they fall within the definition of “serious offence” as defined in the *Crimes Act* as amended and are capable of constituting predicate offences for ML contrary to section 280A of the *Crimes Act*.

#### ***Jurisdiction for terrorist financing offence***

169. Section 41 of the TSA provides that proceedings for an offence against the Act may be brought where the act or omission is committed in the Cook Islands, on board a ship or plane registered in the Cook Islands or by a Cook Islander, or, inter alia, is committed against a Cook Islander or to compel the

Cook islands to do or abstain from doing an act. “Terrorist act” is also defined in the TSA to include an act or omission in or outside the Cook Islands.

170. The only category of conduct specified in the Convention but omitted from section 41 is where the conduct is directed towards a State or Government facility abroad, including diplomatic or consular premises of that State.

#### ***Mental element of the TF offence***

171. The TSA does not expressly provide that the intentional element of the offence of TF be inferred from objective factual circumstances, however the absence of such a provision would not necessarily prevent any such inference being drawn.

#### ***Liability of legal persons***

172. Section 43(1) of the TSA provides that legal liability for any of the offences set out in the Act apply to corporations. Sub-section (2) enables the conduct and state of mind of certain officers or employees of the corporation to be attributed to the corporation in determining criminal liability.

173. No specific monetary penalty is specified for a legal person convicted of offences under the TSA.

#### ***Possibility of parallel criminal, civil or administrative proceedings***

174. There is no provision in the TSA which would preclude parallel civil or administrative sanctions against corporations prosecuted for offences under the TSA. It is also noted that section 417 of the *Crimes Act* provides that no civil remedy for any act or omission shall be suspended by reason that such act or omission amounts to an offence (which would include an offence under the TSA). It is likely that any parallel civil or administrative sanctions (if those were available) would await the determination of any criminal proceedings.

#### ***Sanctions***

175. Criminal liability for TF is expressly extended to legal persons. The only penalty specified is imprisonment for a term up to 14 years. There is no monetary or alternate penalty specified in the case of a corporation. As there is no available mechanism to convert imprisonment to a fine or to calculate a fine for a corporation by reference to a specific formula, there appears to be no effective sanction for offences committed by corporations under this Act.

176. A term of imprisonment for TF of 14 years is regarded as at the lower end of the range for a maximum penalty.

#### ***Statistics and effectiveness***

177. The CLO is responsible for administering the TSA and is responsible for maintaining statistics on terrorism financing. As there have been no investigations or prosecutions in respect of terrorist offences in the Cook Islands, there are no relevant statistics and effectiveness cannot be assessed.

### 2.2.2. Recommendations and Comments

178. Section 11 of the TSA effectively addresses the convention requirements in the criminalization of TF. It is noted that the term “*will benefit*” [a specified entity] utilised in section 11(2) of the TSA represents a departure from the terminology used in the convention and in section 11(1) of the TSA, that the funds “*will be used*” to carry out the terrorist act. It is however considered that the term “will benefit” is broad enough to encapsulate the potential use of the funds, and as such should not limit the operation of the offence as it applies to terrorist organisations and individual terrorists who are caught as “specified entities” under the Act.

179. Sub-section 4(2)(c) of the TSA imposes a requirement in the definition of “terrorist act” which is not otherwise required by the convention, namely, that the act or omission “*must be made for the purpose of advancing a political, ideological or religious cause*”. As such, it affects proof of the TF offences which involve the collection or provision of property intending, knowing or having reasonable grounds to believe that the property will be used in full or in part to carry out a “terrorist act”, [section 11(1) TSA]. Other TSA offences which apply the term “terrorist act” are similarly affected. Competent authorities should consider whether this additional limb of the definition of “terrorist act” should be deleted.

180. The absence of any specific penalty for corporations and any ability to calculate or otherwise set a penalty may mean that a Court has no ability to impose a sanction on a corporation found guilty of a TSA offence or that there is doubt as to the scope of that penalty. Competent authorities should consider specifying a monetary penalty (together with the ability to cancel relevant licences) for corporations for offences under the TSA which are sufficiently high to be regarded as proportionate and dissuasive.

181. The Evaluation Team accepted that the risk of TF in the Cook Islands is low and that the absence of any investigations is not a relevant factor in determining effectiveness.

### 2.2.3. Compliance with Special Recommendation II

	Rating	Summary of factors underlying rating
SR.II	LC	<ul style="list-style-type: none"><li>• A penalty is required to be specified for corporations convicted of Terrorism financing and other TSA offences.</li><li>• The additional limb of the definition of “terrorist act” may limit the effectiveness of the offences generally.</li></ul>

## 2.3. Confiscation, freezing and seizing of proceeds of crime (R.3)

### 2.3.1. Description and Analysis

#### *Legal framework*

182. Confiscation in the Cook Islands is currently governed by the *Proceeds of Crime Act 2003* as amended by the *Proceeds of Crime Amendment Act 2004* (POCA). The POCA is a conviction-based regime which provides for the forfeiture of tainted property and assessment of pecuniary penalty orders, seizure and restraint of property and creates additional information gathering powers for investigators.

All actions are dependent upon the commission of a “serious offence” as defined by the POCA which is defined as offences punishable by imprisonment of more than 12 months or a fine in excess of \$5,000, both committed in the Cook Islands or which would have constituted such an offence had they been committed in the Cook Islands.

183. The Solicitor General, (SG), has responsibility for making applications for restraining orders and an Administrator (who may be the Solicitor-General or other person appointed by the Attorney-General) is obliged to manage seized and restrained property and to enforce forfeiture and pecuniary penalty orders. The Cook Islands Police (CIP) has responsibility for the conduct of investigations under the Act.

### ***Confiscation***

184. Property is liable to confiscation under the POCA where that property falls within the definition of “tainted property”, namely:

- (a) property that is used in, or in connection with, the commission of a serious offence whether situated in the Cook Islands or elsewhere; or
- (b) property that is intended to be used in, or in connection with the commission of a serious offence whether situated in the Cook Islands or elsewhere; or
- (c) proceeds of that offence.

185. As such, instruments actually used or intended to be used in the commission of a serious offence (which would include ML or TF having regard to the relevant penalty), may be subject to forfeiture, however, property which is native freehold land in the Cook Islands may not be made the subject of a forfeiture order (section 16, POCA).

186. The definition of “proceeds” is however narrower than might have been intended and does not extend to property derived directly or indirectly from a serious offence unless that property has been subject to some form of successful conversion, as set forth below:

“Proceeds” in relation to property, means property into which any property derived or realized directly from a serious offence was later successfully converted, transformed or intermingled, as well as income, capital or other economic gains derived or realized from such property at any time since the commission of the offence, whether the property is situated in the Cook Islands or elsewhere.”

187. Where a forfeiture order cannot be made against property for reasons which include that it cannot be found, that it is located outside the Cook Islands, has been transferred to a legitimate third party, has been intermingled with other property and cannot be divided without difficulty or is native freehold land or an occupation right, the court may order the payment to the Crown of an amount equivalent to the value of the property which would otherwise have been forfeited.

188. Alternatively, where a person has been convicted of a serious offence and the court is satisfied that that person has benefited from the offence, the court must make an order for the payment of a pecuniary penalty to the Crown.

189. Where, following an application made after conviction for a serious offence, a court is satisfied that property is “tainted property”, it is required to make a forfeiture order. Similarly, where a court is satisfied that a person has derived a benefit from the commission of a serious offence, the court must make a pecuniary penalty order. The making of orders of this nature was discretionary (provided the prerequisites were satisfied) until the enactment of the *Proceeds of Crime Amendment Act 2004*. A further amendment made by that Act also now imposes a mandatory requirement on the SG to apply for such orders when a person has been convicted of a serious offence.

190. The definition of “proceeds” in the POCA extends to property derived from property derived directly or indirectly from the commission of a serious offence and to income, capital or other economic gains derived therefrom, however it does not apply to property which itself is derived directly or indirectly from the commission of a serious offence. The definition requires some form of successful conversion of the property derived from the commission of the offence.

191. Property may be subject to a forfeiture order or be used to satisfy a pecuniary penalty order (in limited circumstances) regardless of whether the property is property of a third party. Certain protections are available to third parties, however the discretionary factors which the court was previously entitled to consider on a forfeiture application (which included rights or interests of third parties and hardship) can no longer have application as the court “shall” make the order if satisfied the property is “tainted property”. Third parties do however retain certain rights to exclude or have their interest repaid to them which are discussed below.

### ***Provisional measures***

192. The POCA makes provision for the seizure by warrant of “tainted property” and for the restraint of property. A Police Officer may obtain a warrant which authorises the seizure of tainted property, however he may not retain that property indefinitely. Obligations to return such seized property arise where an information has not been laid within 48 hours or within 14 days if a forfeiture order has not been made. The property may be retained where a restraining order is made before the obligation to return arises.

193. The SG may make application to a court for a restraining order in respect of “realisable property” of the defendant or “realisable property” specified in the application held by a person other than the defendant. “Realisable property” is defined as any property of the person convicted of or charged with a serious offence or property of a person to whom a person so convicted or charged has directly or indirectly made a gift caught by the POCA.

194. The application is required to be supported by an affidavit of the SG setting out his suspicions as to the commission of the offence and, if the property is property of a person other than the suspect, his suspicions that the property is proceeds of the offence or under the effective control of the suspect.

195. The court may make the restraining order if satisfied that the person has been convicted, has been charged or is to be charged within 48 hours with a serious offence and that either:

- i. where the property is property of the defendant – that it is tainted property or the defendant has derived a benefit from the commission of the offence; or

- ii. where the property is property of a person other than the defendant – that there are reasonable grounds for believing the property is tainted property or that the property is subject to the effective control of the defendant.

196. Limitations in respect of the restraining order provisions which potentially undermine their effectiveness arise as the definition of “realisable property” does not extend to property effectively controlled by the offender or to property of a person yet to be charged. Realisable property held by a person other than the defendant is limited to property gifted to the person by the defendant after the offence which may or not represent property received in connection with the offence. Whilst the Act provides that the actual restraining order may be made in respect of property subject to the effective control of the defendant or tainted property of third parties (broader than the operation of the gift provisions), the application for the order cannot.

197. The court may prohibit the defendant or any other person from disposing of or otherwise dealing with the property or an interest in it specified in the order and may direct the Administrator to take custody and assume management of the property. The order may also make provision for payment out of the restrained property of legal expenses, living expenses (including those of dependants) and of a specified debt incurred in good faith.

198. In addition to payment of expenses, various other ancillary orders may also be made including an order for the examination of a person on oath concerning the affairs of the owner of the restrained property or the defendant. It should be noted that the scope of any such orders would be similarly undermined by the definition of “realisable property” referred to above.

199. Applications for restraining orders may be made ex parte and the court is obliged to consider the application without requiring reasonable notice to be given to any person having an interest in the property the subject of the application if requested to do so by the SG. Where a restraining order is made in respect of an ex parte application, it ceases to have effect after 14 days unless extended by the Court after hearing an application on notice.

200. Applications for and execution of search warrants to seize tainted property are made without notice to any person.

### ***Powers to identify and trace property***

201. It is expected that investigators will be able to utilize traditional investigative tools such as search warrants as part of their criminal investigation of the predicate or ML offence which may lead to the identification of assets which may be subject to confiscation. It is also noted that information may be provided to the investigators by the CIFIU relevant to the commission of the serious offence. The POCA provides additional investigative tools which assist investigators/the SG in the conduct of investigations and proceedings under the Act.

202. Police officers may apply for search warrants to search for and seize tainted property (which includes an ancillary seizure power and an obligation to return as set out above.) Police officers may also apply to a Judge for the issue of a production order requiring the production to them of “property tracking documents”, defined as documents which are, inter alia, relevant to identifying locating or quantifying property of a person who committed a serious offence and to identifying locating or quantifying tainted

property or any document necessary for the transfer of such property. Such applications are made without notice. Search warrants for property tracking documents are also available on application by a police officer to a Judge where the court is satisfied it would not be appropriate to make a production order or the investigation would be seriously prejudiced without immediate access (without notice) to the documents sought.

203. The SG may make application to the Court for a monitoring order which would require a financial institution to report the details of transactions conducted in respect of an account of a person who has committed or is about to commit a serious offence or is otherwise involved in the commission of a serious offence or has or is to benefit from such offence. The details are required to be provided to an “enforcement agency” (a term not defined in the POCA) for a specified period.

204. Another important information gathering tool is the examination order which may be made as an ancillary order to a restraining order. Any person may be examined on oath regarding the affairs of the owner of the restrained property or the defendant.

205. The SG may also direct government departments to disclose information held by them to the SG or to an authorized officer if the SG is satisfied that the document or information held is relevant to establishing whether a serious offence has been or is being committed or the making or proposed or possible making of an order under Parts 2 or 3 of the POCA [s93(2)].

#### ***Protection of bona fide third parties***

206. Prior to the amendments made to the POCA by the *Proceeds of Crime Amendment Act 2004*, Judges hearing forfeiture applications were entitled to exercise their discretion having regard to various factors including any right or interest of a third party in the property, any hardship that might be caused to any person and the use ordinarily made of the property. Since the amendment and although not repealed, these discretionary factors may no longer be considered as the court “shall” make the order if satisfied that the property is “tainted property”.

207. Third parties who claim an interest in the subject property may in any event apply to the Court (before or after the forfeiture order is made) for a declaration as to the nature, extent and value of their interest in the property. They are obliged to satisfy the court that they were not involved in the commission of the serious offence or that they acquired their interest in the property in the same manner as a bona fide purchaser for value without notice. The court may order the Administrator to return the property or a part of it to the person or to pay an amount of money equal to the value of the person’s declared interest.

208. Third parties whose property is affected by a restraining order may also make application to the Court for an order excluding their interest from the restraining order. They are obliged to satisfy the court of any of the following:

- (a) the property is not tainted property or required to satisfy a pecuniary penalty order; or
- (b) the person was not in any way involved in the commission of the serious offence and if they acquired their interest at the time of or after the offence, that it was acquired for sufficient consideration and without knowing or in circumstances which did not arouse a reasonable suspicion that the property was tainted; or

- (c) it would otherwise be in the interests of justice to exclude the interest.

### ***Power to void actions***

209. A court considering a forfeiture application may also set aside any conveyance or transfer of property that occurred after the seizure or service of notice of application for forfeiture unless satisfied that the transaction was bona fide.

210. In addition, where a person deals with property in contravention of a restraining order, the SG may apply to the court to set aside the dealing. The Court may set aside the dealing if satisfied that it was not for sufficient consideration or not in favour of a person who acted in good faith.

### ***Additional elements***

211. The POCA was also amended by the *Proceeds of Crime Amendment Act 2004* to enable the SG to make an application for the forfeiture of property of an “organized criminal group”. This amendment coincided with the insertion into the *Crimes Act* by the *Crimes Amendment Act 2003* of a new offence of “Participating in organized criminal group” and the definition therein is picked up by the POCA.

212. Sub-section 109A(2) Crimes Act provides:

“For the purposes of this Act, a group is an organized group if it is a group of 3 or more people who have as their objective or one of their objectives:

- (a) obtaining material benefits from the commission of offences that are punishable for a term of 4 years or more;
- (b) obtaining material benefits from conduct outside the Cook Islands that, if it occurred in the Cook Islands, would constitute the commission of offences that are punishable by imprisonment for 4 years or more; or
- (c) the commission in the Cook Islands of offences that are punishable by imprisonment for 10 years or more; or
- (d) conduct outside the Cook Islands that, if it occurred in the Cook Islands, would constitute the commission of offences that are punishable by imprisonment for 10 years or more.”

213. Under the POCA, the Court may order forfeiture of the property if it is satisfied that the property is property of an organized criminal group. The Court may take into account in determining the application, evidence as to the possession of the property by the group at the time of commission of the “offence” (not defined).

214. The effectiveness of this provision is uncertain as no other corresponding amendments were made to the restraining order provisions of the Act and the nature of any trigger offence, if required, is unclear. It appears that forfeiture under this provision is not dependent upon any conviction of a person, however, in determining whether the property is property of an organized criminal group, the court is entitled to draw inferences from the possession and location of the property in connection with the commission of an offence – suggesting that evidence at least of the commission of the offence is required.

215. The Evaluation Team had the opportunity to review a draft of a Civil Forfeiture Bill which may be introduced during 2009. In general terms, this Bill would permit applications for forfeiture of property to be made upon a court being satisfied that the property is proceeds of unlawful activity.

216. The POCA does not contain any reverse onus provisions in respect of forfeiture, however the pecuniary penalty order assessment provisions have been amended by the 2004 Amendment to contain certain rebuttable presumptions in respect of the calculation of benefit derived from the commission of serious offences which the person is obliged to disprove.

217. The *Terrorism Suppression Act 2004* does make provision for the forfeiture of terrorist property as defined under that Act without any requirement for a conviction to have been obtained.

### *Statistics/effectiveness*

218. The Crown Law Office (CLO) is responsible for administering the POCA and for maintaining statistics on combating ML, TF and confiscation actions.

219. There have been no proceeds of crime investigations conducted in the Cook Islands, with the exception of certain assistance provided to a foreign country. No domestic proceedings have been conducted and as a result, no statistics have been compiled.

220. In the course of the on-site visit it became apparent that the relevant agencies did not have a well developed awareness of their functions under or operation of the POCA and that investigations of this nature had not been accorded much consideration, primarily as a result of other more pressing operational and developmental priorities.

### **2.3.2. Recommendations and Comments**

221. The POCA provides the framework for conviction-based confiscation, however, its effectiveness is limited by certain definitions and a lack of cohesion or consistency in the various provisions of the Act. In particular, property which may be the subject of an application for restraining order is limited to the definition of “realizable property”, a definition which does not include property of a third party subject to the effective control of the defendant or which is tainted property (unless that property falls within the gift provisions.) The application provisions do not match up with the affidavit requirements or the section which deals with the making of the restraining order. The inability to extend the restraining order to property subject to the effective control of the defendant (which can be lawfully acquired property) will also affect the ability to obtain effective control declarations and enforce pecuniary penalty orders. It should also be noted that time for making a conviction-based forfeiture order or pecuniary penalty order is six years from the date of conviction . This could lead to uncertainty for the parties and could invite delay and costly storage/management costs.

222. It is also noted that the application for restraining order is required to be supported by an affidavit setting out the suspicions of the SG, rather than an investigator. In addition, whilst the affidavit is required to set out suspicions, the order is made on the basis of the existence of “reasonable grounds to believe”.

223. It is recommended that competent authorities:

- Should consider reviewing the restraining order and any related provisions to ensure that the property which may be subject to restraint extends to property of the defendant, property of third parties subject to the effective control of the defendant, tainted property and property gifted by the defendant.
- In addition, should ensure that the terminology and operation of the restraining order and related provisions are consistent.
- May also wish to consider replacing the requirement that the application be supported by an affidavit of the SG deposing to his suspicions with a requirement that the affidavit be made by a police officer or an “authorized officer”.
- Regardless of whether a test of suspicion or belief is adopted, there should be consistency in the provisions governing the application and restraining order.
- Should also consider revising the definition of “proceeds” to ensure that it applies to property derived, directly or indirectly from the commission of a serious offence. This definition is also applied in the *Mutual Assistance in Criminal Matters Act 2003* and accordingly affects the operation of that Act.
- May also wish to consider extending the monitoring order provisions to enable such an order to be made in respect of accounts of persons other than the suspect. Under the present provision, an order could not be obtained in circumstances where a corporate account or account of other third party was used. In addition, the Act requires the application to be made by the SG.
- May wish to consider enabling the application to be made on behalf of the investigating police as it is purely an investigative tool. It is also noted that the SG has power to compel disclosure of information from government departments which might be relevant to establishing whether an offence has been committed or to a POCA application or order. As a consequence, the SG is placed in a position of having an active role in a criminal investigation which he might later be required to prosecute.
- May wish to consider whether such a power might be more appropriately exercised by police at a very senior level (although it is noted that CIP do have a broad prosecution function also).
- May also wish to consider whether this provision was intended to expressly override taxation secrecy provisions as such information is of invaluable assistance in the conduct of proceeds of crime proceedings where reverse onus provisions apply or where the examination power is actively used.

224. The on-site visit indicated a lack of awareness amongst agencies with responsibilities under the POCA. Whilst it is accepted that the POCA would have limited application in the Cook Islands, considering the relatively low levels of criminal activity, the Evaluation Team considers that all relevant agencies need to take steps to ensure that any cases involving proceeds of crime are identified and appropriate action taken. As many matters are prosecuted by the CIP, coordination with the CLO is required. It is recommended that the CIP and CLO develop a strategy to ensure that appropriate matters are identified and investigated and action taken in a consistent manner.

225. In addition, the POCA provides that the Administrator under the Act is the SG or a person appointed under the Act by the Attorney-General. There was a general understanding that the Cook Islands Investment Corporation (CIIC) would be best placed to undertake the role, however this agency had not been formally appointed by the AG and had not considered the scope of the prospective role. It is recommended that in conjunction with CLO and CIP, a protocol be developed to ensure as above that action be considered and taken in appropriate cases and that the role of the CIIC be considered. Competent authorities may also wish to consider whether CIP should be obliged to consider whether POCA action (or a ML investigation) arises when assessing cases.

226. It is noted that mandatory forfeiture and assessment of pecuniary penalty orders are now available in respect of offences which may involve only a fine in excess of \$5,000 arising out of the definition of “serious offence”. Competent authorities may wish to consider the appropriateness of that outcome and whether it might ultimately affect the manner in which a Court interpreted its remaining discretion. Whilst mandatory forfeiture in the case of serious offences is an important consideration, competent authorities may wish to consider whether it should apply to the definition of “serious offence” adopted in the POCA.

227. It is understood that the Cook Islands is considering adopting a civil forfeiture model. Competent authorities may wish to consider identifying the precise shortcomings in the current regime and their application to potential cases in the Cook Islands before finally determining the nature of the model which would best suit the Cook Islands. It is difficult to evaluate the effectiveness of the conviction-based model when it is untested or to fully assess the commitment required of a civil model.

### 2.3.3. Compliance with Recommendation 3

	Rating	Summary of factors underlying rating
R.3	PC	<ul style="list-style-type: none"> <li>• The effectiveness of the POCA is limited by the definitions of “proceeds” and “realizable property” and inconsistencies in the provisions.</li> <li>• Agencies do not have a well developed awareness of the POCA.</li> <li>• Some clarification of functions is required.</li> <li>• There has been no practical application of the POCA in domestic matters.</li> </ul>

## 2.4. Freezing of funds used for terrorist financing (SR.III)

### 2.4.1. Description and Analysis

#### *Legal framework*

228. The *Terrorism Suppression Act 2004* (TSA) creates a mechanism for the designation of terrorist entities by Court order and for the making of orders for the control and forfeiture of what is defined below as “terrorist property” in the absence of any criminal proceedings. Responsibility for taking action under the TSA rests with the Solicitor General (SG) and also the Administrator, who may be directed to take control of and manage certain controlled property. “Administrator” has the same meaning as in the *Proceeds of Crime Act 2003* (POCA), namely the SG or a person appointed by the Attorney General.

229. The regime created by the TSA operates in addition to the manner in which the POCA may be applied in respect of terrorism offences, particularly TF.

### ***UNSCR 1267***

230. Section 17 of the TSA enables the SG to apply to the High Court for a control order in respect of property in the Cook Islands if the SG has reasonable grounds to believe that the property is “terrorist property”, which is defined in the TSA as:

- “(a) property that has been, is being, or is likely to be used to commit a terrorist act; or
- (b) property that has been, is being, or is likely to be used by a terrorist group; or
- (c) property owned or controlled, or derived or generated from property owned or controlled, by or on behalf of a “specified entity”.

231. The definition of “specified entity” comprises those persons or entities listed from time to time by the Security Council of the United Nations as terrorist entities or entities in respect of whom the SG has obtained a declaration from the High Court pursuant to section 6 of the TSA.

232. The SG may make an application for a declaration under section 6 where the SG has reasonable grounds to believe that –

- (a) an entity has knowingly committed, attempted to commit, participated in committing, or facilitated the commission of a terrorist act; or
- (b) an entity is knowingly acting on behalf of, at the direction of, or in association with an entity mentioned in paragraph (a); or
- (c) an entity, other than an individual, is wholly owned or effectively controlled directly or indirectly by an entity mentioned in paragraph (a) or (b).

233. A “terrorist act” is defined in section 4 of the TSA as an act or omission in or outside the Cook Islands constituting an offence within the scope of a counter terrorism convention (currently 13 conventions listed in Schedule I to the Act), or an act or omission involving death or serious bodily injury to a person, (inter alia) which must be intended or by its nature and context, reasonably be regarded as being intended to intimidate the public or section thereof or to compel a government or international organization to do or refrain from doing an act and which must be made for the purpose of advancing a political ideological or religious cause.

234. “Terrorist group” is defined as a specified entity or an entity that has as one of its activities or purposes committing, or facilitating the commission of a terrorist act.

235. The Court may deal with the application for a control order ex parte and may order the Administrator to take custody and control of the property if satisfied that there is evidence to support the application.

236. Notice of the control order must be given as soon as practicable to the person who owns or controls the property and to any other persons the SG considers may have an interest in the property. Applications may be made to vary or revoke the orders by persons affected and third parties are entitled to seek relief.

237. As the High Court Judges are visiting from New Zealand and may not be present in the Cook Islands at the time of any such urgent application, the application would be required to be made by telephone.

### ***UNSCR 1373***

238. Section 6 of the TSA creates the mechanism whereby the SG may make application to the High Court for an order that an entity is a “specified entity” for the purposes of the Act. The court may deal with the application ex parte and may hear any evidence or information presented by the SG and receive information which would not otherwise be admissible as evidence, including information from the government or institution or agency of a foreign country or international organization regarded by the court as reliable and relevant.

239. The SG is entitled to make application for a control order in respect of the property of an entity declared to be a “specified entity” by the High Court and also in respect of any other terrorist property, being property that has been, is or is likely to be used to commit a terrorist act or by a terrorist group.

240. It is envisaged that the application would be heard by the High Court (wherever the court might be convened) in the same manner as it would hear any urgent application for injunctive relief.

241. The SG may also apply for forfeiture of the terrorist property. Where a court is satisfied on the balance of probabilities that the property is “terrorist property”, the court must order that the property be forfeited to the Crown. Persons with an interest in the property are entitled to appear and adduce evidence on the hearing of the application. Certain protections are extended to third parties.

### ***Freezing actions taken by other jurisdictions***

242. There is no specific provision in the TSA for recognizing freezing action taken by other countries in respect of their obligations under the UNSC resolutions, other than for the court to be permitted to rely on information received from another jurisdiction in considering an application for a control order and for the SG to make the application himself in respect of “terrorist property” in the Cook Islands.

### ***Extension to funds or assets controlled by designated persons***

243. The ability to take freezing action under the TSA extends to property which is:

- (a) property owned or controlled, by or on behalf of a “specified entity” (which may include persons and organizations designated by the UN or declared by the High Court under s6 TSA);
- (b) property derived or generated from property specified in para (a) above;

244. The TSA does not specify that property of a designated person may be subject to a control order where the property is jointly owned with a third party, however, the interest in the property of the designated person may be subject to a control order along with any property subject to the control of the person.

245. Property of those who finance terrorism and terrorist groups may also be caught by the other categories of “terrorist property” which extends to property that has been, is being, or is likely to be used

to commit a terrorist act or be used by a terrorist group (if those terrorists or persons do not otherwise fall within the definition of “specified entity”).

246. Property of those who finance terrorism or other persons intending to commit or engaging in the commission of terrorist acts may also be caught by the provisions of the POCA where persons are charged or are to be charged with relevant offences, however such action cannot always be taken in a timely fashion given the requirement for a charge to be laid or pending.

#### ***Communication with and guidance to the financial sector***

247. No specific procedures for notifying the financial sector of freezing action have been devised, however, as the action constitutes a court order, notice of the making of the order would be required to be given to any person having an interest in the property as soon as possible.

248. Reporting institutions (RIs, as defined under the *Financial Transaction Reporting Act 2004* [FTRA]) are obliged to immediately inform the SG about the existence of any property in its possession or control that may be or be suspected to be property owned or controlled by a terrorist group or derived or generated therefrom.

249. RIs are also obliged under the TSA (in addition to their obligations under the FTRA) to report to the CIFIU about every dealing that occurs in the course of their activities which is reasonably suspected of being related to the commission of a terrorist act.

250. Where a control order made under section 17 of the TSA is served upon a financial institution, it may also include a direction that the Administrator take custody and control of the property and the financial institution would be obliged to act in accordance with the terms of the order.

251. The TSA does not contain any requirement for the circulation of the UN Security Council consolidated list (of terrorist entities) to reporting entities although it does provide for certification of entities by the Secretary of Foreign Affairs. It is understood that no relevant regulations under the *United Nations (Security Council Resolution) Act 2003* which might have been issued to effect circulation or to otherwise give effect to UNSC resolutions have been issued. The UN list is currently directed to the CIFIU by the Minister for Foreign Affairs which in turn is circulated to RIs but is considering electronic delivery as they Evaluation Team and the Cook Islands acknowledge that the current process is ad hoc and cumbersome.

#### ***De-listing, unfreezing, access to frozen funds and challenges to freezing orders***

252. The TSA has mechanisms for the notification of the making of declarations as to specified entities and the revocation of such declarations. Where a court makes an order that an entity is to be a specified entity under sub-section 6(3) of the TSA, the order must be published in a newspaper published and circulating in the Cook Islands. Similarly, where there is a revocation of that order, notice of the revocation must also be published.

253. Where a control order made under section 17(3) of the TSA is revoked, notice of that revocation must be published in any newspaper published and circulating in the Cook Islands.

254. Sub-section 19(5) of the TSA specifically provides for the expiry of an order made under section 17 (if not earlier revoked) in circumstances where the specified entity ceases to be a specified entity. There is no corresponding requirement to publish the expiry of an order on this basis.

255. The revocation of control orders and publication provisions would apply equally to the situation where property of a person was inadvertently affected under the TSA regime. Third parties may also seek relief from a control order (set out below).

256. In addition, the SG is obliged to engage in an ongoing review of all orders made pursuant to sub-section 6(3) of the TSA to determine whether it is appropriate for such orders to remain in force, and if not, to seek revocation of the order.

257. There is no specific provision to permit access to property which is subject to a control order made under the TSA for the purpose of payment of basic expenses other than the power of the court to make the order subject to conditions (s17(4)(b)) and to vary those conditions under sub-section 19(1)(a) of the TSA.

258. Where a court has made an order pursuant to section 6(3) of the TSA that an entity is a specified entity, the entity may apply to the court for revocation of the order.

259. Where a court has made a control order pursuant to section 17(3), a person is entitled to seek variation or revocation of that order. In addition, a right of appeal exists to the Court of Appeal against either a decision to make a control order or a refusal to grant a revocation of that order.

#### ***Freezing, seizing and confiscation in other circumstances***

260. The POCA makes provision for the seizure and forfeiture of tainted property, defined in that Act to extend to instruments used or intended to be used in the commission of a “serious offence” as defined and to “proceeds” of such serious offence (although the definition of “proceeds” is limited).

261. Each of the offences created by the TSA being punishable by 14 years’ imprisonment are serious offences for the purposes of the POCA and as such, property falling within the definition of tainted property can be forfeited where a person is convicted of a serious offence.

262. The POCA was amended by the *Proceeds of Crime Amendment Act 2004* to enable police officers to obtain search warrants and to seize and retain “terrorist property” in the same manner as they would any “tainted property” under that Act. If this power was exercised and no other charge based action was available under the POCA, the SG would be obliged to seek a control order under the TSA within 48 hours as no other consequential amendments justifying retention or restraint have been made to the POCA.

#### ***Protection of third parties***

263. The rights of third parties are protected at various stages of the control and forfeiture proceedings. Where a control order is made under the TSA, a person who owns or controls the property may apply to the court for a revocation of the order. The Court may revoke the order if satisfied there are reasonable grounds for so doing.

264. Third parties may also apply for relief from the control order under section 22 of the TSA. The court must, if satisfied that the person's interest is valid, make an order declaring the nature, extent and value of the person's interest in the property and that the property is no longer affected by the control order. Where the interest is held by the Administrator, the court may direct the Administrator to transfer the interest to the person or to pay an amount equal to the value of the interest to the person. The court may refuse to make the order if it is satisfied that the person was in any way involved in the carrying out of the terrorist acts that are the basis of the designation of the entity as a specified entity, or, inter alia, the person did not acquire their interest in the manner of a bona fide purchaser for value without notice. Relief under section 22 of the TSA is not available to a third party who owns the subject property.

265. Where an application for a forfeiture order is made under the TSA, any person claiming an interest in the property is entitled to appear and adduce evidence at the hearing of the application. The Court must, if satisfied that persons having an interest in the property have exercised all reasonable care to ensure that the property is not terrorist property and the person is not a member of a terrorist group, order that the interest is not affected by the forfeiture. Third parties not given notice of the forfeiture application are also entitled to make application for a declaration in respect of their interest in the same manner. Persons affected by the decision of the court may also appeal against the decision to the Court of Appeal.

### ***Monitoring compliance***

266. RIs who fail to comply with their obligations under section 30(1) of the TSA to disclose information to the SG regarding owned, controlled or suspected terrorist property, or who fail to report to the CIFIU any dealing reasonably suspected of being related to the commission of a terrorist act under section 30(4) of the TSA commit an offence punishable by imprisonment of up to seven years. No monetary penalty for corporate defendants is specified.

### ***Additional elements***

267. The TSA implements some but not all aspects of the Best Practices Paper. Court ordered freezing mechanisms are available, the de-listing process is made public and RIs making disclosures as required under the TSA and acting in good faith are protected against civil suits. The TSA enables a Court to admit as evidence information received from a reliable foreign source and also authorizes the SG to share information relating to terrorist groups or acts with authorities of foreign countries.

268. There is no specific provision to permit access to property subject to a control order made under the TSA other than the power of the court to make the order subject to conditions, (s17(4)(b) and to vary those conditions under sub-section 19(1)(a) of the TSA.

269. Where property has been restrained under the POCA in respect of a financing of terrorism offence (or other terrorism offence), the restraining order can make provision for the payment of the person's reasonable living expenses and those of their dependants, reasonable expenses of defending a criminal charge or a specified debt incurred in good faith.

### *Statistics/effectiveness*

270. The CLO administers the TSA and is responsible for maintaining statistics on TF in the Cook Islands. As noted above, the Cook Islands also recently commissioned a study (The ML Risk Analysis Report 2008) to identify various risks including TF. The study concluded that there was no evidence of such activity in the Cook Islands. The low level of TF risk has been taken into account in this analysis and in the rating process.

271. No relevant actions have been taken under the TSA or POCA to date and no investigations undertaken. As a result there are no available statistics.

#### **2.4.2. Recommendations and Comments**

272. The TSA permits the SG to obtain declarations that entities are “specified entities” and to obtain control and forfeiture orders in respect of “terrorist property” (which includes property of entities listed by the UN as terrorist entities and other declared “specified entities”). The definition of “terrorist property”, whilst broad, does not extend to all assets, whether wholly or jointly owned by a specified entity. Competent authorities should ensure that the definition extends to jointly owned property and to property which is “directly or indirectly” controlled.

273. As the ability to obtain a control order in respect of the property of certain entities may be wholly dependent upon first obtaining a declaration that the entity is a specified entity under section 6 of the TSA, competent authorities may wish to ensure that notice of the declaration be able to be delayed until after the control order is also obtained (although this would appear to be within the court’s discretion at present).

274. There is currently no mechanism to ensure the prompt circulation of the UNSC consolidated list of terrorist entities to RIs. Competent authorities should consider enacting regulations to the UNSCR Act for this purpose. The Evaluation Team accepts that the list is in practice currently being circulated however the process did not appear to have been formalized. The TSA does however require the publication in a Cook Islands newspaper of any declaration made under section 6(3) TSA that an entity is a specified entity under the Act.

275. Competent authorities should consider making provision for appropriate procedures for authorizing access (for basic requirements) to funds or other assets frozen as a result of UNSCR 1267/1999.

276. Competent authorities may also wish to consider whether applications under sections 6 and 17 of the TSA should be reliant upon the beliefs held by the SG rather than an investigator.

#### **2.4.3. Compliance with Special Recommendation III**

	<b>Rating</b>	<b>Summary of factors underlying rating</b>
<b>SR.III</b>	<b>LC</b>	<ul style="list-style-type: none"><li>The TSA regime enables the freezing and confiscation of “terrorist property” but does not extend to property jointly owned controlled (directly or indirectly) by relevant entities nor for access to frozen property for basic</li></ul>

		<p>expenses in accordance with UNSCR1452.</p> <ul style="list-style-type: none"> <li>• Clearer, more formal processes are required to ensure information (including the consolidated list of terrorist entities) is communicated to reporting institutions.</li> </ul>
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## 2.5. The Financial Intelligence Unit and its Functions (R.26)

### 2.5.1. Description and Analysis

277. As noted in section 1 of this report, under the FTRA the Cooks Islands Financial Intelligence Unit (CIFIU) performs both a compliance/regulatory role and a more traditional FIU role. This section of the report examines the CIFIU's functions as an FIU. Analysis of the CIFIU's other functions is contained in sections 3 and 4 of this report.

#### *Legal framework*

278. The CIFIU was originally established in 2001 under the *Money Laundering Prevention Act 2000*. It currently undertakes its function pursuant to Part 4 of the *Financial Transaction Act 2004* (FTRA). Pursuant to the FTRA, the CIFIU is an administrative FIU in that it has no formal investigative function with respect to ML/FT or the predicate offending.

#### *Establishment of FIU as national centre for receiving, analysing and disseminating STRs*

279. The CIFIU serves as the national centre for the receipt analysis and dissemination of STRs to other competent authorities. The legislated duties of the CIFIU include to:

- Receive STRs from RIs submitted in accordance with the FTRA; from the Cook Island Customs Service (CICS) (with respect to the cross border currency reporting requirements); the Financial Services Commission (FSC) (with respect to activity it identifies through its supervisory function); and information provided from foreign jurisdictions or law enforcement, and any other information voluntarily provided to the FIU.
- Analyse, assess and disseminate information to the CIP for investigation upon suspicion of criminal activity.
- Request information from law enforcement agencies and any regulatory authority for the purpose of undertaking its functions in accordance with the FTRA.
- To issue guidelines, training and feedback to financial institutions and other reporting entities in relation to customer identification, record keeping, reporting obligations, identification of suspicious transactions, ML and TF typologies. Further it may educate the public and create awareness of matters relating to ML/TF.
- Undertake of research into trends and developments in the area of AML/CFT including improved ways of detecting, preventing and deterring ML and TF.
- Provide instruction to any institution upon receipt of any information to enforce compliance of the FTRA.

- Compile statistics and records related to ML/TF, and destroy suspicious transaction reports upon an expiry of six years from the date of the last activity relating to the person or the report.

280. The CIFIU is an autonomous, stand-alone agency with an independent budget. Its reporting line to government is through the SG. In practice, this reporting takes place informally by telephone, email or in meetings.

281. Upon receipt of STRs, cash transaction reports (CTRs), electronic fund transfer reports (EFTRs) and border currency reports (BCRs) from reporting entities, they are manually entered into the CIFIU's database which was provided by AUSTRAC (the Australian FIU). STRs are submitted manually by RIs in a prescribed form. Because the jurisdiction is small, the process of manual submission of reports to the CIFIU is both timely and efficient.

282. The STRs are then analyzed and referred to the CIP for investigation if required. Since the CIFIU commenced receiving STRs in 2001, 142 STRs have been received of which only one has been disseminated to the CIP for investigation.

283. The analytical function of the CIFIU is constrained by the inability of the database to perform some essential functions in analyzing reports. For example, there is currently no ability to search the database by an individual's name to establish the number of CTRs, EFTRs and BCRs that may be linked to that individual, or to conduct a search using a bank account number. The database is currently awaiting repair to resolve these issues.

284. Analysis (outside of the database) is undertaken through review of public database records, law enforcement information, further information obtained from RIs and from information received through foreign requests. Reports are then reviewed for consideration for dissemination.

285. Tax-related information is not available to the CIFIU to assist in the analysis of reports for dissemination.

### ***Guidance to reporting entities***

286. In June 2008, the CIFIU issued six guidelines under the FTRA to RIs. All financial institutions met during the on-site confirmed receipt of the guidelines.

287. The guidelines are comprehensive and, inter alia, describe reporting requirements, reporting forms and the prescribed manner of reporting. Also described is guidance on attempted transactions, tipping off and numerous examples of ML methodologies. RIs are generally submitting reports in accordance with the guidelines.

288. The CIFIU encourages reporting entities to undertake the computer-based training that has been developed by UNODC. This computerised training is undertaken by inviting reporting entity staff to the CIFIU office. Training is undertaken in a separate room within the office so as to maintain the confidentiality of the CIFIU's functions and information. The following table reflects that this training facility is being utilised.

**Table 4: UNODC Training: number of persons trained**

<b>Reporting Institutions</b>	
Completed General AML Training	19
Compliance & Reporting:	3
General, Compliance & Reporting:	14
General, Compliance & Reporting, Specialist:	10
<b>Law Enforcement</b>	
General, Advanced & Specialist	1
<b>Regulator</b>	
General, Advanced	2
General, Advance & Specialist	
<b>Anti- Money Laundering</b>	
General, Advance	1
<b>Financial</b>	
Investigation, Reports	1
<b>General Awareness</b>	
Level 1	13
Level1,2,3	1

289. Between 2006 and 2008, the CIFIU has undertaken training sessions for many reporting entities, which has included outreach training to reporting entities and stakeholders in seven of the outlying islands.

#### ***Access to information***

290. Under sub-sections 27(b) and 27 (d) of the FTRA, the CIFIU has relevant powers to request or obtain access to information concerning STRs from the banks (including both offshore and domestic banks), other reporting entities and from law enforcement and supervisory authorities. The CIFIU can also access information that is publicly available, including commercially available databases, or information that is collected or maintained by the Government, with the exception of information held by taxation authorities.

291. A number of both formal and informal relationships exist with other FIUs which enable the efficient and effective exchange of information when required.

### ***Obtaining information from reporting entities***

292. The CIFIU is empowered under sub-section 27(h) of the FTRA to request additional information relating to an STR from reporting entities. As an example, the CIFIU has exercised these powers, having requested further information from the FSC (which must report STRs under section 12 of the FTRA) concerning STRs filed with the CIFIU. While detailed statistics are not kept concerning the exercise of section 27 (h), there have also been a number of examples where further information has been sought from other reporting institutions under subsection 27(h) for additional information to enable the CIFIU to determine the appropriateness of dissemination of an STR. All STRs classified as medium or high priority by the CIFIU involve a request for additional information from the financial institution.

293. It should also be noted that section 30 of the *Terrorism Suppression Act 2004* No.10 obligates RIs to advise the SG about the existence of any property that is in the RI's possession or control that is owned or controlled by a terrorist group. RIs must further report to the CIFIU any activity that they undertake for any person or entity where the RI has reasonable grounds to suspect that such activity may relate to the commission of a terrorism related activity.

### ***Dissemination***

294. The CIFIU is authorised by section 27(f) of the FTRA to send any report or any information derived from reports including STRs to the appropriate law enforcement authorities. As noted above, to date only one STR has been disseminated to the CIP for investigation. This intelligence identified the remittance of funds from the Cook Islands to New Zealand. Additional information sought pursuant to section 27(h) identified that this activity had been occurring over an extended period and approximately \$300,000 NZD had been remitted to New Zealand. This intelligence assisted the CIP investigation into the predicate drug dealing activities of the subject of the report and ultimately formed the foundation for a successful prosecution. .

295. Section 29 of the FTRA permits the dissemination of information to a foreign state or foreign FIU. The CIFIU can place terms and conditions and any restrictions that may be appropriate to the information when disseminating such information. The CIFIU has made four disseminations into matters relating to an offshore bank; this matter is currently the subject of an FSC initiated application and is currently awaiting resolution before the courts. Other disseminated reports have been sent to Cook Islands Customs and foreign counterparts in New Zealand, Brazil, Uruguay and the United Kingdom.

296. Upon receipt of an STR the CIFIU reviews and prioritizes the report. The reports are classified as high, medium or low priority subject to content. This prioritization is determined against the quality of the information and data associated with the report and a review of the 'grounds' for the report in the context of any further information available to the CIFIU. Reports that contain poor information are immediately returned to the RI seeking additional information before the prioritization process occurs. If a report is of low priority no action is taken until further information is available, high priority reports result in full analysis and the generation of an intelligence report if appropriate. CIFIU informed the Evaluation Team that its analysis of the remaining STRs indicated that there was no need for dissemination. With regard to

CTRs and EFTRs the issue with the database as previously referred prohibits effective analysis other than statistical capture such as value currency etc.

297. It should be noted that a relatively large number of reports which have been received by the CIFIU (and treated as STRs for statistical purposes) relate to the offshore trust sector. Section 5 of the FTRA requires a financial institution, inter alia, to report to the CIFIU where it cannot obtain sufficient evidence as to the identity of the customer (as set out under section 4 of the FTRA). These reports in large part relate to failure to produce CDD documents to the trustee (often as the trustee attempts to back-capture CDD information relating to trusts established prior to the passage of the FTRA in 2004) and have been reported exclusively by one financial institution. Such reports do not technically fall within the requirements of section 11 of the FTRA 2004, in that they do not relate to any specific transaction or attempted transaction. These reports are not being submitted in an STR format but are being provided to the CIFIU in 'free' form. A policy decision was however made by the CIFIU to treat such reports as STRs for the purpose of statistical capture. Subsequent to the on-site visit, 33 of these reports relating to failure to produce CDD documents to the trustee have been disseminated to FINCEN in the United States. .

### ***Independence and autonomy***

298. The CIFIU has sufficient independence and autonomy as provided for by section 26 of the FTRA. The CIFIU Head reports to the SG on the exercise of the Head's powers and performance of functions pursuant to the FTRA. There is an obligation to advise the Solicitor General on any matter relating to ML/TF, however operationally the CIFIU maintains its independence. Having its own budget and operational independence, the CIFIU operates without political interference.

299. It is also important to note that an amendment was made in 2007 to the FTRA which requires the Head of CIFIU to report to the Solicitor General, rather than the Minister of Finance. This new reporting line realigns the CIFIU within the relevant government authority. In practice, reporting takes place on an informal basis, normally orally.

### ***Protection of information***

300. The Head and staff of the CIFIU may not disclose any information, except in accordance with the FTRA, that would directly or indirectly identify an individual who has provided information to the CIFIU, or a person or entity about whom a report or information was provided under the FTRA.

301. Information held by the CIFIU is maintained in a stand-alone, secure database, and hard copies of reports are kept in secure storage. An electronic copy of the database is maintained offsite in secure fire proof environment. Information is only disseminated according to conditions under the FTRA or as contained in an MOU.

### ***Public reports***

302. The CIFIU is not required under the FTRA to publish a periodic or annual report as to its activities including statistics, typologies and trends. However, information on its activities is published in limited form on its website ([www.cifu.gov.ck](http://www.cifu.gov.ck)), which links to APG, FATF and UNODC websites for typologies on ML/TF. Legislation is pending which will require the CIFIU to produce annual reports.

### ***Membership of Egmont Group of FIUs and exchange of information***

303. The CIFIU has been a member of the Egmont Group of FIUs since 2004. The Head of CIFIU has attended the Egmont Group Plenary and has co-sponsored Niue, together with the New Zealand FIU, to become an Egmont member. The CIFIU has also offered to co-sponsor the Solomon Islands Financial Intelligence Unit for Egmont membership.

304. The CIFIU has signed its Egmont Group Commitment letter to the FIU Charter and it does exchange financial intelligence or information with relevant national authorities through the Egmont Secure network. The CIFIU uses and has received requests for information via Egmont. In total 71 files, relating to 39 incoming and 32 outgoing requests, have been created for information requests via the Egmont Secure Network. Any subsequent requests related to any of those files are not recorded, nor is the fact that a single request had been sent to more than one jurisdiction, so the 71 figure somewhat understates the total flow of information via this channel.

### ***Resources (FIU)***

305. The CIFIU is adequately funded by the Government of the Cook Islands through its annual budget process. It has adequate resources to fully and effectively perform its functions. The CIFIU has operated with surplus budgets for the past three consecutive years.

306. The CIFIU is staffed by five people: the Head of FIU, two Compliance Officers, one Intelligence Officer & IT and an Admin and Data Entry Officer.

307. The Intelligence Officer receives, evaluates, analyses and disseminates reports via the CIFIU Head. An additional responsibility is that of conducting local inquiries in response to requests from overseas agencies and organisations. Together with the Intelligence Officer, the Compliance Officers assist with training and increasing the awareness of RIs with regards to reporting procedures and ML typologies and trends. The Compliance Officers also undertake the supervisory function outlined in Part 3 of the FTRA (eg on-site examinations of RIs).

308. Current employees of the CIFIU have backgrounds in finance, banking and policing. Senior employees also have qualifications at both graduate and post-graduate level.

309. The CIFIU is well resourced with sufficient IT equipment and support. There is however the outstanding issue relating to the analysis function in the database as previously referred which is frustrating for staff and limits the effectiveness and efficiency of the analysis function.

310. The CIFIU occupies a secure and suitable office site with sufficient space to conduct training for external agencies. This office site is separate from the Crown Law Office and the Head of FIU makes the final decisions about its operations and the dissemination of reports to the relevant authorities.

### ***Integrity and professional standards (FIU)***

311. Staff recruited by the CIFIU go through a transparent and stringent selection process to identify persons that meet the academic, professional and personal qualities required for the role.

312. Criminal background checks are undertaken through the CIP for staff recruited by the CIFIU.

313. Section 33 of the FTRA requires that every employee of the CIFIU must keep confidential any information or matter that has been obtained by the employee through the performance of the employee's duties. The exceptions to this provision relate to when a communication must take place to effectively carry out the functions of the CIFIU and when a disclosure is required to enforce the *Proceeds of Crime Act 2003*.

314. When commencing employment with the CIFIU, every person employed must sign a "Terms of Employment" contract which contains a confidentiality clause relating to all information that the employee will be privy to during and after the course of their employment. The terms of employment contract was sighted by the Evaluation Team and it is clear what the confidentiality expectations are. All staff employed with the CIFIU have signed a terms of conditions contract.

### ***Training***

315. CIFIU staff have attended several international AML/CFT workshops and conferences over the past two years. There are plans to explore further training opportunities for members of the CIFIU. In August 2008, an ML/TF/POC course was facilitated by the Pacific Anti-Money Laundering Program (PALP) in the Cook Islands which was attended by CIFIU staff.

316. It was not apparent during the on-site that there was any significant training deficiency with the intelligence component of the CIFIU.

### ***Statistics***

317. The CIFIU, as required under section 27 (j) of the FTRA, maintains statistics on CTRs, EFTRs, STRs and Border Cash Reports (BCRs) in the CIFIU database. These statistics record the number of STRs received by the CIFIU from RIs and the number of STRs disseminated for investigation or for further action.

318. As of October 2008, the total number of reports were:

- CTRs – 6,609 since 2001
- EFTRs – 18,321 since 2001
- BCRs – 34 since 2004
- STRs – 142 since 2001

### ***Additional elements***

319. The CIFIU keeps records and statistics of STRs disseminated for investigation. Police also keep records of STRs referred to them for investigation and prosecution. As noted previously, only one STR has been disseminated to the Police for investigation. The STR ultimately contributed to a successful conviction in relation to the drug dealing matter; a ML prosecution is yet to be initiated.

320. The Crown Law Office and the MOJ keep records of ML, TF and predicate offence prosecutions. No ML or TF prosecutions have been initiated.

## *Effectiveness*

321. Overall the CIFIU is undertaking its functions described in the FTRA well. Given the size of the Cook Islands and its financial sector, the CIFIU is well resourced.

322. The CIFIU undertakes a robust review of all reports submitted to substantiate the grounds for suspicion. A number of STRs when reviewed identified that the grounds for the suspicion were simply insufficient to advance or justify any further action.

323. STRs that have a genuine foundation for the suspicion are the subject of more in-depth analysis which subject to the outcome are disseminated as required.

324. Of the 142 STRs received since 2001, 38 have been disseminated, one to the CIP, four to the FSC and 33 in relation to international trusts which were disseminated to FINCEN.

325. Of the 88 STRs submitted between the 2006 and 2008, 44 came from the TCSPs, 16 from domestic banks, eight from international banks and seven from ARS providers. The domestic banks and the ARS providers accounted for 23 STRs for the years 2006 -2008. It was one of these STRs that was referred to the CIP. In the view of the Evaluation Team, the low level of dissemination to the CIP is more reflective of the low general level of domestic crime (and the nature of some of the STRs received) rather than the effectiveness of the CIFIU.

326. Additional 'information reports' are disseminated to international counterparts in relation to other STRs and information of a more general nature received by the CIFIU. The dissemination of such information reports reflects the effective use of the information exchange mechanisms available to the CIFIU and the proactive approach taken with regard to financial intelligence.

327. The inability to maximise the use of the CIFIU database because of technical issues prevents complete analysis to occur in relation to some reports and this is prohibiting the effective use of this tool. To overcome this problem, the CIFIU is reliant upon the review of records retained by RIs to identify and isolate related reports to complete the analysis function. This is inefficient. However, the Evaluation Team was persuaded that although there exists technical issues with the CIFIU database which undermine efficiency, the overall effectiveness of the CIFIU in its analysis of STRs and other reports is adequate.

328. During the on-site visit, a number of the reporting entities spoke favorably of their relationship with the CIFIU. Other reporting entities felt that the CIFIU profile could be enhanced given the resources available to the CIFIU. It was also suggested that further training and outreach by CIFIU staff would assist others' understanding of some of the services and processes undertaken by RIs.

329. The inability to maximise the use of the CIFIU database because of technical issues prevents complete analysis to occur and is prohibiting the effective use of this e tool.

330. Notwithstanding the existence of various co-ordination mechanisms, the day to day quality of key working relationships with law enforcement and other government agencies, in particular the CIP, needs to be further developed to enhance engagement and to ensure clear understanding of function and the importance of an effective AML regime in the jurisdiction, and the role of the CIFIU in that system. While the informal reporting line to the SG seems to be working effectively in practice, some thought could be given to establishing, in addition, a more formal, regular reporting mechanism.

### 2.5.2. Recommendations and Comments

331. Continued outreach is required to all reporting sectors to ensure that the CIFIU maintains a high profile and RIs understand and comply with their responsibilities under the FTRA.

332. As a matter of priority, support should be given to resolve the current issues with the CIFIU database. As an interim measure, the CIFIU should consider whether to record basic data such as name and bank account details in a simple format (such as Excel or Access) to allow some search capacity (it may even be beneficial to back capture data) until such time as the database issues can be resolved.

333. Consideration should be given to formalising a process for the exchange of information between the CIFIU and the taxation authority pursuant to the mechanism provided for in section 96 of the POCA. This would require an application process via the Solicitor General; a process should be implemented to enable effective use of this provision. Such information may assist with the detection of predicate and tax crimes by the CIFIU.

334. Given the number of STRs that have been generated from the offshore trust sector (albeit they largely relate to CDD deficiencies), the CIFIU should consider outreach to authorities in the settlor's country of origin to build a constructive relationship and reconsider the need for dissemination of relevant information to these authorities.

335. Engagement from all partner agencies, in particular the CIP and the Audit Office, is critical and needs to be maintained. A jurisdiction the size of the Cook Islands needs to share all available resources, expertise and abilities so that all agencies, including the CIFIU, can effectively undertake their respective legislative functions. Enhancing relationships may be achievable through secondments between agencies to share skill and resources. Close collaboration will not only be efficient but also more effective. Consideration should also be given to establishing a more formal, regular reporting mechanism to the SG to ensure that the requirements of section 26 of the FTRA are met.

336. In relation to the publishing of annual reports, pending legislation will require the CIFIU to publish annual reports. These reports will to include statistics, typologies and trends. This is supported.

### 2.5.3. Compliance with Recommendation 26

	Rating	Summary of factors relevant to s.2.5 underlying overall rating
R.26	LC	<ul style="list-style-type: none"><li>• Limitations in the ability to undertake in depth analysis as a result of issues with the database.</li><li>• No annual reports circulated.</li></ul>

## **2.6. Law enforcement, prosecution and other competent authorities—the framework for the investigation and prosecution of offences, and for confiscation and freezing (R.27, & 28)**

### **2.6.1. Description and Analysis**

#### *Legal framework*

337. Three agencies within the jurisdiction enforce the legal framework for the detection and prosecution of ML, TF and the recovery or confiscation of criminal proceeds, namely:

- the Cook Islands Police (CIP) – the principal investigating agency;
- Crown Law Office (CLO) – the prosecuting agency; and
- the Cook Islands FIU (CIFIU) – supporting the CIP in its investigative role.

338. As noted in section 1.6 of this report, the Cook Islands Customs Service (CICS) does not have a significant investigative role with respect to ML. Its role is limited to processing cross-border declarations and any investigative matters are referred directly by the CICS to the CIP. The role of the CICS is therefore discussed in section 2.7 of this report.

339. As is discussed in more detail in section 6.1 of this report, the CIP, CIFIU and CICS all participate in the Combined Law Enforcement Agency Group (CLAG). The objective of this group is to share information to enhance delivery of law enforcement through a multi-agency approach. The CIP, CIFIU and CICS are also all members of the Cook Islands Financial Intelligence Network (CIFIN) which has a more focussed mandate to address specific operational objectives.

#### *Designation of authorities for ML/FT investigations*

##### Cook Island Police (CIP)

340. The CIP is responsible for maintaining law and order in the Cook Islands which includes the surveillance of the country's Exclusive Economic Zone. The CIP comprises 132 staff (94 sworn officers, 35 non-sworn staff, including 23 Meteorological Service staff, and three temporary/part-time staff).

341. The Criminal Investigation Branch (CIB) of the CIP is the specialised group that has responsibility for the investigation of all serious offences, drugs and financial crimes that would include ML/FT and proceeds of crime investigations.

342. The CIB has a total of 14 staff: Detective Inspector (1); Detective Senior Sergeant (1); Detective Sergeants (2); and Constables (9). The Detective Inspector has a tertiary qualification; and a number of staff have attended overseas training courses. Most staff have experience with the investigation of serious crimes and a few are experienced in investigating serious financial crimes. The Commissioner believes that there is now a skill foundation and systems in place that give the CIB sufficient capability to handle complex financial investigations with the assistance of the fraud consultant (the ex-NZ Detective Inspector referred to above) and other agencies such as Crown Law Office, CIFIU and others.

343. As a result of an external review of the CIP structure and service delivery<sup>13</sup>, a rebuilding process to enhance capacity and capability has now been ongoing for 18 months. This process has involved the appointment of a senior police officer from New Zealand as the Commissioner of the CIP for a two year term commencing in June 2007.

344. Since his appointment, the Commissioner and the senior management team have implemented a wide range of reforms to enhance the organisation and improve the delivery of a police service. The priorities have been to implement policy, systems and structures to improve the performance of the organisation across all areas of policing. This has included the implementation of a case management system and the delivery of training directed at the enhancement and development of policing skills at all levels. The benefits of these reforms are now becoming apparent in a range of areas and favourable comment about the improvement of general police performance was received from various sectors and agencies during the on-site visit.

345. These reforms have been implemented against a background where fraud and financial investigations were recognised as a challenge for the CIP. Prior to mid-2007 there was a number of stagnant fraud related files some of which had been held by Police and not resolved for up to 10 years. Factors contributing to this problem included inadequate file management systems and skill deficiencies with investigative staff.

346. A training programme for investigators has been developed and implemented to enhance investigative skills within CIP. This training programme includes modules on, for example: planning and managing investigations, legal processes, and requirements around the exercise of search powers, all of which have a wide application to police work. Included as part of these training modules is a specific training module in respect of money laundering. A further training programme is soon to be rolled out to all staff targeting skill development around interviewing.

347. In respect of financial investigations and fraud, a former New Zealand Police Detective Inspector has been contracted to the CIP Fraud Unit to facilitate training and build investigative capacity and capability in the fraud and financial crime investigative area.

348. The CIP Commissioner believes that as a result of the reforms, policing skills in all areas have and will continue to improve. This was reiterated by CLO prosecutors and the CIP is now better positioned to develop the skills and investigative ability to address ML and associated offending in the future.

349. The New Zealand Serious Fraud Office (SFO) has been engaged on occasion to assist with the investigation of fraud matters in support of the CIP. This is a resource that the CIP confidently believes it can call upon in future to assist with the resolution of more complex matters if required.

350. The CIP cooperates with foreign investigative agencies and has recently assisted with evidence gathering resulting from a mutual assistance request from Australia and the United States. The CIP is currently awaiting information sought pursuant to a mutual assistance request with Fiji. The CIFIU has

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<sup>13</sup> The review of the Cook Islands Police conducted in 2006 by C&M Associates Limited, Wellington, New Zealand, led by the former Commissioner of the New Zealand Police, Mr Rob Robinson.

also requested the assistance of the CIP with regard to foreign requests received from counterpart FIUs in foreign jurisdictions.

351. As an active participant in the Pacific Islands Chiefs of Police Secretariat, and having the ability to call upon the Pacific Islands Forum Secretariat and the Pacific Trans National Crime Co-ordination Centre, the CIP has established relationships and participates to assist with policing responses. These forums provide an opportunity for those involved in regional policing to review policing methods and techniques and share ideas.

352. The CIP has not initiated any investigation in pursuit of proceeds of crime. Understanding and knowledge of the provisions of the *Proceeds of Crime Act 2003* is very limited and the CIP concedes that this lack of understanding has undoubtedly led to missed opportunities to recover the proceeds of crime. During the course of the on-site visit, the Evaluation Team learned of investigations of predicate offences that could have been pursued to investigate and recover proceeds of crime. The CIP believes that as a result of the recent reform process it is now in a position to pursue proceeds of crime opportunities should they occur in the future.

353. The Maritime Division of the CIP has a responsibility for the maintenance of a credible maritime surveillance capability to monitor marine resources in the Exclusive Economic Zone. It has been identified that there is a lack of clarity around the legislative basis for the enforcement of customs and immigration requirements should such activities be required. This may be resolved in the intended review of the *Customs Act 1913* which is in need of urgent modernisation.

#### Crown Law Office (CLO)

354. The CLO is responsible for prosecution in the name of the Solicitor General (SG). In addition, the SG has the responsibility for taking actions pursuant to the POCA.

355. The CLO comprises the Solicitor General, Senior Crown Counsel (2) and Crown Counsel (1). This office has a well established and effective relationship with New Zealand that provides advice and assistance when required.

356. Weekly meetings between CLO and the CIP have recently been initiated which have resulted in greater co-ordination between these two agencies. The CLO also confirmed that the quality of files being received from the CIP has improved and this reflects the improvements that have been achieved by the reforms being undertaken by the Police Commissioner and his management team.

#### Cook Islands Financial Intelligence Unit (CIFIU)

357. As previously outlined in part 2.5 of this report, the CIFIU is an administrative/intelligence FIU. During the course of a recent investigation, however, police assistance was required by the CIFIU which, due to a lack of available resources in the CIP, resulted in the CIFIU Head (an ex member of Police) being provided temporarily with the full complement of police powers. This was primarily to allow for the application and execution of search warrants in respect of a CIFIU-initiated investigation.

358. Although a temporary measure, provision of investigative powers to the CIFIU and the resulting overlap of functions between the CIP and the CIFIU is an area that requires careful consideration and clarity. There is of course a strong synergy in the function performed by the FIU and the police, but the

role of the Head of CIFIU with respect to the CIFIU's supervisory function is not compatible with the responsibility of the position as a member of CIP. These two roles need independence as there could be a potential conflict of interest in the exercise of these respective powers; such a conflict needs to be avoided. The appointment of the Head of CIFIU may also contravene section 24 of the FTRA, which states that the 'Head must not without approval of the Minister hold any office or other occupation'. The Evaluation Team understands that this appointment was made without Ministerial approval. The Evaluation Team was advised that this authority is to be revoked however in future such a practice needs careful consideration to avoid conflict of interest.

#### ***Ability to postpone/waive arrests and seizure of money***

359. As a matter of procedural practice the CIP, during the course of any investigation, can suspend or waive the arrest of a suspected person or the seizure of the money for the purpose of identifying persons involved in such criminal activities or for evidence gathering.

360. A specific provision is contained in section 31 of the *Terrorism Suppression Act 2004 (TSA)* to allow the controlled delivery of any property to identify persons or gather evidence against an offence contained in the TSA. There is no other specific authority to permit the CIP to undertake controlled deliver of narcotics or dishonestly obtained property.

#### ***Additional elements***

361. The CIP has the ability to undertake static surveillance (and has done so in respective of predicate offending) but does not have the capability to undertake mobile surveillance. There is nothing in law that prohibits such activities, though there are issues of resources and limitations associated with the practicalities (such as undercover operations) of undertaking such techniques in such a small jurisdiction. Legislation to authorise the interception of private communications has existed since 2003 however these powers have not been exercised. The CIP is unsure of what technical requirements would be needed to facilitate the exercise of these investigative powers and would be reliant on New Zealand to assist if such an investigative approach was required.

362. Section 31 of the *Terrorism Suppression Act 2004, No.12 (TSA)* permits any constable, customs official or immigration official who has reasonable grounds to believe that a person has committed or is about to commit an offence against the TSA to undertake a controlled delivery of property. Section 31 (2) of the TSA allows property believed to have been used or is being or may be used to commit an offence under the TSA to enter, leave or move through the Cook Islands for the purpose of gathering evidence to identify a person or to facilitate a prosecution for the offence. There has been no need to utilise these provisions to date.

363. Investigations have been undertaken in collaboration with overseas law enforcement agencies and reflect the ability to undertake investigations of a serious, multi-national nature.

364. The CIP has dedicated staff assigned to the Rarotonga International Airport. This function assists in providing security for the airport together with Customs, Immigration and the Airport Authority. An additional resource at the airport are two narcotic dogs which have been fully operational at the airport for the last six months.

365. The CIFIU has undertaken a study on ML/TF threats and trends as they apply to the Cook Islands. This report is yet to be finalised, but upon completion will be distributed as appropriate.

## **Recommendation 28**

### ***Powers to obtain records***

366. The primary information gathering tool for the CIP is the search warrant provisions pursuant to section 79 of the *Criminal Procedures Act 1980-81* to conduct searches of places (including financial institutions) and seize any relevant records as they relate to any criminal matter including ML/TF investigations or prosecutions. There are certain other provisions which provide specific search powers in relation to searching persons such as those contained in the *Narcotics and Misuse of Drugs Act 2004*.

367. The CIP also has authority to apply to the Court for a production order to seize and obtain records as they relate to property tracking documents pursuant to section 79 of the POCA. If it would not be appropriate to issue a production order, a police officer can apply for a search warrant pursuant to section 85 of the POCA to enter premises to recover any property tracking documents. In issuing a search warrant to recover property tracking documents, a Judge must be satisfied that the investigation in relation to which the search warrant is being sought might seriously be prejudiced if the police officer does not gain immediate access to the document without warning any person.

368. Additional powers relating to the monitoring of accounts (Monitoring Orders) and the search and seizure of “tainted property” (used to commit a serious offence or the proceeds of a serious offence) are also contained within the POCA. .

369. Under part 5 of POCA, the Solicitor General may direct the disclosure of any information held by any government department (despite any other law) if that information has relevance to the establishing whether an offence has been or is being committed or for the making or proposed or possible making of forfeiture or pecuniary penalty orders. Such a provision permits the use of taxation information in proceeds of crime matters.

### ***Witness statements***

370. The CIP is entitled to conduct investigations and take statements from witnesses and suspects for use in criminal proceedings regarding ML, predicate and TF offences. Any person can be summoned to appear in any criminal proceeding other than the wife of an accused who, although competent, cannot be compelled to give evidence against that accused.

371. There are no express provisions which prohibit Customs Officers from taking witness statements in relation to ML/TF activities to detect border currency movements. Express authority to question persons is provided in limited form pursuant to Section 172 of the *Customs Act 1913* however this relates to dutiable, restricted, uncustomed or forfeited goods. The Currency Declaration Bill 2009 is intended to provide specific powers to Customs Officers which will include the authorisation to question travelers.

***Resources (Law Enforcement and Prosecution Authorities Only)<sup>14</sup>***

372. As previously noted, the CIP has recently been subject to various reforms. Currently the CIP is well managed and operating well within the limitations of resource constraints. New Zealand Police Officers have been contracted through an Aid Funded Mentoring Programme to provide advice, mentoring and coaching to CIP officers.

373. The resources of the CIP are however limited and with a wide range of policing functions to perform, there is the inherent difficulty that a large investigation can consume a large proportion of investigative capacity.

374. The CIP has pursued the appointment of a Forensic Accountant however funding issues have placed restrictions around this appointment. Other avenues are still being explored to build this function into investigative resources.

375. A concern for the wider financial sector is the sustainability of the reforms that have been implemented. Discussion during the on-site visit indicated that there is a perception that there is limited depth in the CIP in respect to financial investigative ability and that current output is largely dependent on a few individuals. The reforms that have been undertaken within the CIP have been positive but the challenge remains for the Cook Islands to continue to build depth and a sustainable capacity.

376. While the resources of the CIP are limited, the CIP Commissioner is of the belief that there is now sufficient capacity within the police to address most financial crimes. It is also noted that there are additional resources in the form of the CIFIU and the Audit Office, both of which have staff who could provide technical support to the CIP if required, for example in intelligence and financial analysis.

377. The CLO is inadequately staffed at present and has recently recruited a Senior Prosecutor from the New Zealand Crown Law Office. The CLO is otherwise adequately resourced and funded by the Government of the Cook Islands and has sufficient operational independence and autonomy to ensure freedom from undue influence or interference.

***Professional standards, ethical and professional requirements***

378. All employees of the CIP are required to maintain a high standard of professionalism and integrity according to the requirements of the *Police Act 1980-81*, *Police Regulations 1983* and Police General Instructions. The Police General Instructions provide explicit guidance in respect of confidentiality of police related information and appropriate use of the CIP computer database. The CIP has also newly implemented a robust recruiting process to ensure that potential police officers are thoroughly vetted so that only those applicants with high standards of integrity are employed.

379. The CICS has in place a transparent and stringent selection process when recruiting staff members. Every officer is required to be professional in providing service to the community and there is clear understanding of the confidentiality requirements of staff. Personnel employed by the CICS are provided with a copy of the Ministry of Finance and Economic Management Personnel Policy. This

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<sup>14</sup> As related to R.30; see s.7.1 for the compliance rating for this Recommendation.

policy details performance expectations, in respect of confidentiality, conflicts of interests and standards of conduct. CICS believe their recruitment process has sufficient safeguards to ensure the maintenance of high standards of behavior by its employees.

380. CLO legal staff are required to be registered to practice under the *Law Practitioners Act 1993-94* and hold the appropriate knowledge, skills and abilities to perform their duties to the highest standard.

### ***Training of staff***

381. A training programme designed to “upskill” CIP staff has been initiated as part of the current reforms. Structured training has been developed to enhance skills in general policing as well as advanced investigator training for criminal investigators. Furthermore, the on-line computer studies programme provided by the Australian Federal Police, which includes ML and drug trafficking modules, is available to all members of the CIP in Rarotonga. Data provided in respect of the number of students who have undertaken this training reflects that staff need to be encouraged to complete these modules.

382. Members of the CIP attended the ML and Proceeds of Crime training workshop coordinated by the CIFIU in collaboration with the Pacific Anti-Money Laundering Program in August 2008. Consideration from within the CIP to further enhance capacity in POC investigation techniques and methods may be beneficial.

383. CICS staff indicated they are provided with insufficient training and there remain important training deficiencies however there is confidence that these deficiencies will be addressed as a result of the current reforms. Some Customs Officers were provided training on ML and proceeds of crime together with other law enforcement officers by the Pacific Anti-Money Laundering Program in August 2008.

384. Training for CICS staff can be requested through the Oceania Customs Organisation (OCO). The OCO Secretariat looks for sponsors to accommodate training requests, such as the World Customs Organisation, New Zealand or Australia. CICS should be encouraged to attempt to capitalise on these opportunities.

385. CLO legal staff attended the Proceeds of Crime, Money Laundering & Terrorist Financing Training Workshop in Auckland in June 2008 administered by the Pacific Anti-Money Laundering Program, and there is further intention to participate in further training in Australia later in 2009.

### ***Additional element***

386. All Cook Island Judges are appointed under the Cook Island Constitution and come from New Zealand and no special training is provided in respect of ML/TF offending.

### ***Statistics/effectiveness***

387. Given the relatively low levels of crime in the Cook Islands, opportunities for ML investigations have been limited however there have been several opportunities that were not pursued. The absence of ML investigations and prosecutions reflects the fact that, in recent years at least, the implementation of a broader reform process has been the priority for the CIP. It has also been conceded that proceeds of crime

recovery is an area that has not been pursued, which reflects a lack of understanding of how to apply this legislation.

388. This lack of understanding extends from the CIP to the CLO. Despite there being only limited opportunities, the failure to consider the application of the ML offence and the POCA provisions reflects an overall lack of engagement in these areas.

389. The CIP reforms have been comprehensive and have focused at general policing issues. This approach is important and understandable against a background of the apparent shortcomings in respect of management and service delivery in the recent history of the CIP. The reform process should however provide a stable foundation for the future application of the ML offence and the POCA legislation, and investigation of serious crime generally.

390. CICS has identified training and resource issues within the service that have limited its effectiveness. A comprehensive review is being implemented to address the identified issues.

#### **2.6.2. Recommendations and Comments**

391. The CIP should continue to improve capacity and capability with regards to specialist investigative skill development. In particular, the ongoing professional development of financial investigators should be maintained. Proceeds of crime investigations involve unique income determination investigation techniques that have not been developed in the CIP, and can augment the investigation of many predicate offences.

392. Consideration should be given to the identification of an appropriate investigation, then seeking further specialist assistance from an appropriate jurisdiction to mentor the investigation to provide exposure of these specialist investigative methodologies. This will increase depth and experience and ensure that the CIP can do its part to meet the international AML/CFT obligations imposed by the FATF requirements.

393. The CIP believes it now has the capacity to undertake ML investigations however the Evaluation Team was made aware of an historic ML allegation that had not been adequately investigated due to combination of priorities, resource availability and a skill deficiency that existed at that time. This matter can and should be reviewed and if appropriate an ML prosecution initiated.

394. The CIP indicated a willingness to employ a forensic accountant. If funding constraints continue to prevent the obtaining of forensic accountancy capability, consideration should be given to formalising a protocol whereby such services can be obtained from the Audit Office on a case by case basis.

395. CIFIU functions are clearly outlined in the FTRA and do not include the investigation of ML offences. The situation where CIFIU personnel are given police powers to undertake such investigations may cause an overlap with the role of the CIP which clouds responsibility for ML investigations. For example, domestic ML offending is intrinsically linked with the predicate offending and separation of investigative functions between two agencies may be ineffective. In addition, the compliance role of the CIFIU may conflict with any investigative role. Ideally there should be clear separation to ensure transparency and integrity of the CIFIU.

396. To overcome the need to delegate the CIFIU with police powers it is critical that the CIP and the CIFIU work closely and support of each other's function. It is recommended that further development of this relationship is required to ensure a more cohesive and effective response to suspicious financial activities occurs.

397. The CIP and the CICS (and Immigration) work closely together. Pending legislation (Currency Declaration Bill 2009), together with current CICS reforms, will enhance cohesion. The continuing development of this relationship and the sharing of resources are to be encouraged. The sharing of resources such as the UNODC computer based training programme, which contains a number of highly relevant modules related to the CICS function at the airport, is an example of how a collaborative approach could enhance effectiveness.

398. It is accepted that there has only been limited opportunity to apply the POCA, however the CIP and CLO need to be vigilant to opportunities to apply this law. Qualifying income generating crimes such as drug dealing and the misappropriation of government funds need to be considered during the investigation and prosecution process. It is recommended that a POCA training awareness programme be implemented for both the CIP and CLO to address the current lack of awareness of the POCA.

### 2.6.3. Compliance with Recommendations 27 & 28

	Rating	Summary of factors relevant to s.2.6 underlying overall rating
<b>R.27</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• There have been no prosecutions for ML despite there being some opportunities to investigate such activities.</li> <li>• Notwithstanding the lack of opportunity, there is a lack of knowledge and understanding of the application of the POCA 2003 by both the CIP and CLO and as a result no actions have been identified and pursued.</li> <li>• The CIP needs to further develop skills in the area of financial investigation and to build a sustainable long term capability in this area.</li> <li>• A closer relationship between the CIP and the CIFIU needs to be developed so a more timely and effective response to reported suspicious financial activity occurs.</li> </ul>
<b>R.28</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>• A number of relevant powers are available in various laws including the POCA but the effectiveness of the powers has not been tested.</li> </ul>

## 2.7. Cross Border Declaration or Disclosure (SR.IX)

### 2.7.1. Description and Analysis

#### *Legal framework*

399. When entering or exiting the Cook Islands persons are provided with arrival or departure documents that require passengers to complete a truthful declaration as to the carriage of NZD \$10,000 or more, or the equivalent in foreign currency, across the border.

400. The requirement to make a declaration to the CICS arises under the *Entry Residence and Departure Act 1971-72*. It is mandatory to complete this declaration when crossing the border.

401. The departure declaration form details the cash reporting obligations pursuant to the “Financial Transaction Reporting Act 2000”. However there is no such legislation, nor does such an obligation exist in the FTRA 2004. This issue has been raised with the jurisdiction and will be rectified with the next batch of printing of this document.

402. The *Proceeds of Crime Act 2003*, No.12 (POCA) provides the legislative framework for the enforcement of the declaration system and relevant provisions which allow for the detection of undeclared cross border movements of funds. The *Proceeds of Crime Amendment Act 2003*, No.19 (POCA 2003 No 19) provides a prescribed Border Currency Declaration Report (BCR). This document must be completed if a person intends to take into or out of the Cook Islands NZD\$10,000 or more or the equivalent in foreign currency.

403. The BCR defines cash currency and Negotiable Bearer Instruments (NBI). “Negotiable Bearer Instrument” means “a document representing ownership of debts or obligations, including bills of exchange, promissory notes, or certificates of deposit, whether made payable to the bearer or not”.

404. A completed BCR form seeks full passenger's details, identification documents, details of the owner of the funds if they are being carried by the passenger on behalf of another, along with related travel information and the amount of cash or NBI carried.

405. A further amendment contained within the POCA 2003 No 19 was the inclusion of a requirement that the CICS forward any BCR to the CIFIU as soon as practical after the document has been completed by the traveler. In practice, BCRs are generally received by the CIFIU within 24 hours.

406. The *Terrorism Suppression Act 2004* No.10, section 32, obligates the operator of any craft arriving or departing the Cook Islands or if registered in the Cook Islands, departing from any place outside of the Cook Islands, to provide to the relevant border authority any information related to any person or goods on board, or expected to board the craft. Such information obtained can only be used or disclosed for the purpose of protecting border security, national security or public safety. Additional provisions exist which would enable such information to be shared with competent foreign jurisdictions.

#### ***Disclosure/declaration system***

407. In circumstances where a border crossing has occurred and a passenger has failed to declare the carriage of funds on a BCR report, section 96(1) of the POCA provides for a sanction. Failing to declare that a person who leaves or arrives in the Cook Islands with more than \$10,000 in cash or negotiable bearer instruments on his or her person or in his or her luggage commits an offence punishable by:

- a. in the case of an individual, to a fine of up to \$20,000 or a term of imprisonment not exceeding 2 years; or both;
- b. in the case of a body corporate, to a fine of up to \$50,000.

408. Section 96(3) of the POCA permits a Customs Officer to examine the luggage or any article carried by any passenger entering or leaving the Cook Islands. If the Officer has reasonable grounds to

suspect that the passenger is in possession of an undeclared amount exceeding \$10,000, they may physically search the passenger.

409. Section 96(5) of the POCA authorises any Customs Officer to stop, board and search any ship aircraft of conveyance for the purpose of exercising the power conferred by section 96(3).

410. Customs officers and any authorised officer can effectively respond to intelligence and can inspect persons or property that accompanies that person to detect and prevent undisclosed cross border movements of funds. However, there has to date been no appointment of authorised officers under the POCA.

411. The search provisions under section 96 of the POCA relate to persons and accompanying luggage; they do not relate to cash that may be moved across the border unaccompanied such as via post or cargo. There is no express provision to search cargo or postal items for the express purpose of interdiction of cash or NBI.

#### ***False declarations/disclosures***

412. On the prescribed BCR form, a Customs or an Authorised Officer is required to ask or obtain from the carrier details of the country of origin of the currency or NBI and the intended use of the currency/NBI. There is however no explicit legal authority to request such information. However there is no authority that expressly inhibits Customs Officers or Police Officers from seeking such information from passengers and take statements as required.

413. To rectify this deficiency, Clause 3 of the draft Currency Declaration Bill 2009 will provide authority for a designated 'Authorised Officer' (which includes Customs and Police Officers) to question any person arriving or departing from the Cook Islands with respect currency in that person's possession or custody. Failure or refusal to answer questions in respect of the source of currency will result in an as yet to be determined monetary sanction

#### ***Restraint of currency***

414. In the case of a false declaration or the discovery of a non-declared movement of currency or NBI, section 97(1) of the POCA authorises the detention of the currency or NBI for up to 48 hours. This detention requires there to be reasonable grounds to believe that the funds are derived from a serious offence or there are reasonable grounds to believe that the funds are intended to be used in the commission of a serious offence. The court may grant continued detention if satisfied that there are reasonable grounds for suspicion as to the grounds outlined in section 97 of the POCA and that continued detention is justified while:

- (i) its origin or derivation is further investigated; or
- (ii) consideration is given to the institutions (in the Cook islands or elsewhere) of criminal proceeding against a person for an offence with which the currency or NBI is connected.

415. The Court can grant an order for no more than three months, however the order can be renewed as long as the total period of detention does not exceed two years from the date of the first order made.

416. There is no express provision to seize undeclared currency or NBI in the absence of a belief that the funds are derived from a serious offence or there are reasonable grounds to believe that the funds are intended to be used in the commission of a serious offence. Clarity in statute to permit immediate seizure whilst an investigation into a breach of section 96(1) of the POCA is undertaken or whilst a prosecution is pending would be advisable.

#### ***Retention of and access to information***

417. The CICS retains copies of all BCRs and forwards the original documents to the CIFIU. There have been no false declarations reported by CICS but had such incidents occurred, CICS is required to submit details of them to the CIFIU. There is no express provision which obligates border authorities to submit a report to the CIFIU where they suspect a ML/TF border movement of cash for an amount of less than \$10,000, however it was identified during the on-site visit that such BCRs were being submitted to the CIFIU.

418. Copies of BCRs are retained by CICS for an unspecified period of time. The CIFIU retains BCRs in both hard copy and electronic form within the CIFIU database. BCRs are available for further investigation and are able to be accessed by competent authorities for AML/CFT purpose.

#### ***Domestic cooperation***

419. The CICS, Immigration and CIP are members of the Cook Islands Financial Intelligence Network (CIFIN) and the Combined Law Agency Group (CLAG). Both these groups facilitate the sharing of operational knowledge and intelligence to enhance the effectiveness of multi-agency operations or investigations. The CICS is also a member of the Coordinating Committee on Combating Money Laundering and Terrorist Financing (CCAM). The CCAM meets to review current measures and discuss operational issues that can improve compliance with the international standards. There are formal agreements between CICS, CIP, Immigration, and the Ministry of Agriculture.

420. The CICS and the CIFIU share information and co-operate on matters of shared concern. In the operational arena, the CICS, CIP, Immigration and the Airport Authority work as a co-ordinated unit when processing passengers at the International Airport.

#### ***International cooperation***

421. The Cook Islands is not a member of the World Customs Organisation, but is a member of the Oceania Customs Organisation (OCO). OCO has a secretariat based in Suva, Fiji, and has 25 members. Through this mechanism there is a two-way flow of information between the OCO and member countries.

422. There is a close working relationship between New Zealand Customs and the Cook Islands as most international flights to and from the Cook Islands are routed through New Zealand. Examples were cited where this co-operation has extended to the sharing of intelligence and subsequently initiated responses by both the jurisdiction and their counterparts in New Zealand.

423. The Cook Islands has a number of other mechanisms to co-operate with other Pacific island countries which are utilised in a range of law enforcement functions, including border activities.

424. With regard the exchange of information relating to terrorist groups and terrorist acts, the Solicitor General may share with any appropriate authority in a foreign county any information that relates to travel movements, the use of travel documents, and information relating to the use of any communication technology used by any terrorist group or any person suspected of involvement with any terrorist act.

### ***Sanctions***

425. When a person falsely reports or fails to report a movement of funds into or out of the jurisdiction of an amount greater than prescribed, section 96 of the POCA outlines sanctions of a fine of up to \$20,000 or a term of imprisonment not exceeding two years or both in the case of an individual; or, in the case of a body corporate, a fine of up to \$50,000.

### ***Seizing, freezing and confiscation of assets of designated entities***

426. There are provisions in the POCA to seek restraint and confiscation of currency if it relates to a ML or qualifying serious offence. The financing of terrorism as described in the *Terrorism Suppression Act 2004* is a serious offence. There are in addition specific provisions pursuant to sections 24 and 25 of the Terrorism Suppression Act which provide the mechanism for forfeiture of terrorist related property.

### ***Precious metals and stones***

427. If, during the course of routine customs inspections, a discovery of an unusual cross border movement of gold, precious metals or stones were made, there is no legislative obligation to notify the appropriate Customs Service of the country from which the items had originated or to which they were destined. However should such a discovery be made, the Team was informed that it is most likely that in practice this information would be passed on as appropriate.

428. Within the Currency Declaration Bill 2009, the definition of “currency” will be expanded to include jewellery, natural pearls, cultivated pearls, precious metals and precious stones to capture the cross border movement of such items.

### ***Information protection***

429. BCR data or information is held in the CIFIU’s secure database and is used or disseminated if necessary in accordance with the FTRA. Copies retained by the CICS are forwarded to the Department of Statistics for statistical capture.

### ***Additional elements***

430. The FATF’s Best Practices Paper on Detecting and Preventing the Cross Border Transportation of Cash by Terrorists and other Criminals has not been implemented however it is likely that the relevant procedures will be incorporated into the training regime to be implemented as part of the reform process recently initiated by CICS.

431. As noted above, BCRs are sent to the CIFIU and maintained in the CIFIU database. Despite the issues with the analysis and statistical functions of the CIFIU database referred to in section 2.5 of this

report, the relatively small number of BCRs means that these records can be manually retrieved and data provided to competent authorities as required.

**Statistics (Customs)**

432. For the period 1 January 2006 - 1 October 2008, the International Airport received 1,890 international flights. For the year 2008, 17,056 persons arrived via 19 cruise ships and in addition 223 fishing vessels and 169 yachts were also processed by the CICS.

433. The CIFIU maintains statistics on BCRs, as shown in the following table:

**Table 5: Border Cash Reports.**

	2004	2005	2006	2007	2008
International Airport Rarotonga: inbound	12	3	12	5	2
Value (NZ\$)	\$275,023	\$67,419	\$448,888	\$80,426	\$58,935
International Airport Rarotonga: outbound	0	0	0	0	0
Detections of unreported or falsely reported declarations	0	0	0	0	0

434. The statistics reflect that there have been no out bound declarations. All the BCRs received relate to cash and there have been no BCRs relating to NBIs. No detections have been made of false or failed declaration between 2004 and 2008. During this time approximately 350,000 persons have entered the border. There have been no sanctions imposed for false or failed declarations.

435. The CICS also reports that it undertakes targeted searches of passengers and luggage entering or exiting the border. During these searches CICS routinely discover undeclared goods such as alcohol and tobacco that exceed the duty free provisions.

**Resources and effectiveness**

436. The CICS is a department within the Ministry of Finance & Economic Management and is funded through the normal government budgetary process. Excluding the Controller on Rarotonga, it has six full-time staff members and 12 part-time staff, two of whom are based in the Outer Islands of Penrhyn and Pukapuka and undertake other public service duties for the Island administration. In addition, there are five airport staff who are present for all 15 flights each week and six part-time staff who also work full-time for Revenue Management.

437. CICS has recently undertaken a review of its organisation and as a result a technical assistance programme has recently been implemented. A newly appointed New Zealand Customs Officer will work with CICS staff to formalise practices and policies with the CICS. The aim is to develop the service to international standards. This will involve the development of high level documents such as a strategic plan and reviewing CICS operational policy, procedures and legislation. There is a strong desire to build

capacity across the CICS and to implement an information technology system. At the time of the on-site visit, this reform was in its infancy and it was anticipated the process would take two years to fully implement.

438. As part of the review, the roles of staff will be better defined and coordinated to improve efficiencies. Establishment of a modern IT platform to capture information concerning passenger movements and intelligence is an objective of the reform process, an ambition which is supported by the Evaluation Team. Preliminary discussions with the CIP have occurred that may enable the development of an integrated computer system to enable both CICS and Immigration to share and develop CIP IT resources.

439. There is limited equipment available at the Rarotonga International Airport to assist in the detection of illegal activities. CICS is reliant on utilising a baggage x-ray machine that is owned by the Airport Authority. The effectiveness of this is constrained in that CICS officers have not received any specific training on the interpretation of the images that this machine produces. CICS indicated that it wishes to obtain equipment of this nature for itself and that further resources are required at the Airport to enable CICS to perform more effectively.

440. CICS identified that there were training deficiencies related to border activities and in other areas and there is a desire to implement various training opportunities as part of the reform process. For example, a key responsibility at the border is the detection of bearer negotiable instruments, however there was some uncertainty with CICS officers as to what sorts of financial instruments fell within this definition.

441. There are thus a number of constraints in the form of resources and training which are limiting the effectiveness of the CICS at the border. However the resolve shown by CICS to thoroughly review its performance and implement a range of measures to increase effectiveness as part of the current reform process is applauded. The reforms are important and much needed to develop and augment the effectiveness of the CICS.

### **2.7.2. Recommendations and Comments**

442. The CICS recognises the need to further develop policy and procedures and to acquire specialist equipment to enhance the delivery of service. There is a strong desire to improve the effectiveness of the CICS and to build capability and capacity across a broad range of delivery areas. Such proactive development is supported and encouraged by the Evaluation Team. The full implementation of this program will enhance compliance against the international standards. The Quarantine section of the Ministry of Agriculture is in the process of purchasing an X-Ray machine which could also be used by Customs to check for currency.

443. CICS staff identified that training deficiencies existed and a training needs assessment has been undertaken to identify and focus on key training needs to enhance the effectiveness of CICS functions. A further priority (which is recognized by the authorities) is the development of an IT platform to enhance efficiencies and provide the ability to monitor and analyze border activity. Implementing training identified as a result of the training needs assessment and developing an IT platform at the border are both supported by the Evaluation Team.

444. It is recommended that equipment be obtained to assist with the inspection of luggage and cargo at the Rarotonga International Airport, in particular an x-ray machine and training to enhance the ability to detect cross border movements of currency and NBIs.

445. It is recommended that the border declaration documents be amended to accurately reflect the authorities under which the declarations are sought.

446. At the time of the on-site visit, some Customs staff were unclear as to what an NBI was and also sought training to enhance the ability to detect the movement of currency was required. It is recommended that as part of the capacity building programme this training deficiency be given priority.

447. Section 97 *Proceeds of Crime Act 2003* should be amended (or a provision should be introduced as part of the Currency Declaration Bill (2009)) to include an authority for immediate seizure of undeclared currency or NBI if a prosecution is to be initiated.

448. The Currency Declaration Bill (2009) will include a requirement to declare precious metals and stones and will provide a legal authority for customs staff to question and enquire into the source and destination of currency as it crosses the border. This legislation will further improve the framework of the jurisdiction and is supported by the Evaluation Team.

449. The introduction of specific search powers is required to allow the search of cargo and mail for the purpose of interdiction of cash or NBI. The Currency Declaration Bill (2009) has a broad search power but, for the purpose of clarity, it is recommended that such provisions include the ability to search any 'receptacle' crossing the border which would clarify the search authority in respect of unaccompanied cargo or mail.

450. Immediately after the on-site the CIFIU commenced an analysis of border movements and CTRs. This analysis identified that cash was moving through the airport undetected and then being deposited into domestic bank accounts, generating CTRs. Four such instances have resulted in the CIFIU forwarding reports to the CICS suggesting follow-up in relation to the failure to declare these cash movements across the border. This simply reinforces the deficiencies and non-compliance identified at the border.

### 2.7.3. Compliance with Special Recommendation IX

	Rating	Summary of factors relevant to s.2.7 underlying overall rating
SR.IX	PC	<ul style="list-style-type: none"> <li>• There is an absence of current policy for the implementation of cross border reporting legislation</li> <li>• Cross border reporting only relates to carriage by an individual and needs to be extended to include all forms of physical cross border movement of currency and bearer negotiable instruments. BCRs although electronically stored are not able to be effectively analysed within the database.</li> <li>• Lack of effective implementation – negligible level of reporting. No detection of false/failed declarations, no sanctions imposed</li> <li>• Precious metals and stones not captured in the reporting requirements.</li> </ul>

### **3. PREVENTIVE MEASURES —FINANCIAL INSTITUTIONS**

#### **Scope issues**

451. The Cook Islands considers the following entities to be part of the financial sector for the purposes of AML/CFT preventive measures: banks (domestic and offshore), offshore insurers and trustee companies. Trustee companies are primarily dealt with in section 4 of this report.

452. From 1 January 2009, with the commencement of the *Insurance Act 2008*, all insurers became part of the regulated financial sector. In addition, money changers and outwards remittance businesses will be treated as licensed financial institutions once the Money Changers and Remittance Businesses Bill has been enacted.

453. The Financial Supervisory Commission (FSC) is the sole prudential regulator of the financial sector. Under delegation from the CIFIU, the FSC carries out annual inspections on all banks and trustee companies for compliance with Part 2 of the FTRA. Part 3 inspections remain the responsibility of the CIFIU.

454. There are currently three offshore insurers in the Cook Islands who were until 1 January 2009 licensed under the *Offshore Insurance Act 1981*. Under the new *Insurance Act 2008*, offshore insurers will be required to have an insurance manager in the Cook Islands, which will be a trustee company. The annual inspections of trustee companies will extend to any insurance companies that are the responsibility of the trustee.

455. There is only one money changing and remittance operator in the Cook Islands, which is Western Union. While Western Union is not regulated and supervised by the FSC for prudential purposes (pending enactment of the *Money Changing and Remittance Businesses Bill 2008*), for AML/CFT purposes it falls within the definition of "reporting institution" (RI) in section 2 of the FTRA. Section 2(d) specifies that "reporting institution" means any person or entity who conducts as a business "providing transfer of money value, including:

- (i) collecting, holding, exchanging or remitting funds or the value of money, or otherwise negotiating transfers of funds or the value of money, on behalf of other persons;
- (ii) delivering funds; or
- (iii) issuing, selling or redeeming travelers' cheques, money orders or similar instruments.

456. Therefore, Western Union is a RI under the FTRA and compliance oversight of it is undertaken by the CIFIU. The same standard of AML/CFT compliance required of banks under the FTRA applies to Western Union.

#### **3.1. Risk of money laundering or terrorist financing**

457. To date, risk-based supervision has not been applied by the FSC or CIFIU. Part of the reason for this is historical, in that the Cook Islands was previously on the FATF's NCCT list, so in order to ensure the AML/CFT laws were being correctly implemented, all entities in the regulated financial sector were subject to the same degree of scrutiny for all customers. However, the accounts of some high risk customers are subject to more intense scrutiny.

458. In addition, the financial sector in the Cook Island is quite small, so it is relatively easy for the FSC to schedule an annual on-site inspection of every institution.

### **3.2. Customer due diligence, including enhanced or reduced measures (R.5 to 8)**

#### **3.2.1 Description and Analysis**

##### *Legal framework*

459. The overarching AML/CFT pieces of legislation laying down the framework under which financial institutions operate are:

- i. the *Financial Supervisory Commission Act 2003* (FSC Act) which establishes the Financial Supervisory Commission and sets out its functions and powers;
- ii. the *Financial Transaction Reporting Act 2004* (FTRA). This Act applies to all RIs as defined in section 2 of the Act and encompasses 26 activities of a financial nature;
- iii. the *Crimes Amendment Act 2004*, which covers the prevention and suppression of ML; and
- iv. the *Terrorism Suppression Act 2004*, which covers the prevention and suppression of the crime of terrorism.

460. The Financial Supervisory Commission (Qualifications of Compliance Officers) Regulations, 2004 which are made pursuant to the FTRA, set out the qualifications for compliance officers. Under the FSC Act every licensed institution is required to have a compliance officer.

461. Under section 27(k) of the FTRA, the CIFIU has issued six sets of Guidelines which provide background information and assistance to RIs so as to aid them in meeting their obligations under the FTRA. These Guidelines cover:

1. Background information
2. Suspicion Transaction Reporting
3. Cash Transaction Reporting
4. Electronic Funds Reporting
5. Record Keeping and Customer Identification
6. Implementing a Compliance Regime

##### **Banks**

462. The FSC has the duty under the FSC Act to regulate and supervise all licensed financial institutions in the Cook Islands. The Cook Islands has seven banks that are licensed by the FSC to operate as banks and which are captured as RIs under the FTRA. The seven banks consist of three domestic banks and four international banks, with one of the domestic banks also having an international license. Two of the domestic banks are branches of Australian banks, and the third is a government-owned bank.

463. As noted in section 1 of this report, on 11 February 2009 the Cook Islands introduced the Banking Amendment Bill 2009 to amend the *Banking Act 2003* by abolishing offshore banks in the Cook

Islands. Once the amendments come into effect, only a bank licensed as a domestic bank will be permitted to carry out offshore banking activities. Existing offshore banks will be given nine months from the date the amendments come into effect to obtain a domestic licence, wind up their operations or move to another jurisdiction. One of the existing offshore banks has had its licence revoked by the FSC and is required to cease business in the Cook Islands by 31 December 2009. The reasons for this action are currently subject to a secrecy order of the High Court of the Cook Islands.

464. In addition to adhering to the FTRA, banks are also expected to comply with the requirements of the *Banking Act 2003* and Prudential Statements which are issued by the FSC in accordance with the provision in section 14(3) of the *Banking Act 2003*. In particular, Prudential Statement No. 08-2006 outlines the principles and recommendations which the FSC requires all domestic and international banks to incorporate into their risk management policies with the objective of ensuring that banks have in place know your customer (KYC) policies and procedures.

### **Insurance**

465. The Cook Islands has one domestic general insurance company and three offshore insurers, one of which provides only general insurance, a visiting insurance broker acting for a reputable global company places large risks with insurers in markets outside the Cook Islands. One of these companies has only issued two policies, one annuity and one compensation scheme for a medical practice. The other company offers variable life insurance policies and deferred variable annuities. Both of these products are essentially investment portfolios wrapped inside a life insurance policy or annuity contract.

466. Additionally, two agents representing three New Zealand life insurance companies visit the Cook Islands on a quarterly basis. These agents have been visiting the Islands for 30 years but have never been subject to any form of prudential supervision or AML/CFT regulation. The agents are currently operating under transitional provisions contained in the Insurance Act 2008. Going forward, it is the intention of the FSC that fit and proper assessments be made of these two agents in order to satisfy the requirements of the *Insurance Act 2008* and in addition they will be required to meet the provisions of the FTRA.

467. The *Offshore Insurance Act 1981* as amended 1987 has been repealed by the coming into force on 1 January 2009 of the *Insurance Act 2008*. Up until 1 January 2009, persons carrying on or transacting any offshore insurance business in or from the Cook Islands were required to be licensed and those underwriting or placing life insurance and other investment related insurance, including insurance intermediation were by definition subject to the FTRA (section 2(m)).

468. While the FTRA applies to trustee companies, the FSC does not have the power under the *Trustee Companies Act 1981-82* to issue a Prudential Statement as it has for banks. However, relying on the provisions of the FTRA, the FSC applies the principles that are contained in the Prudential Statement to trustee companies and expects them to meet the same standard as banks. It is expected that this deficiency in powers will be overcome when the Trustee Companies Act is next updated.

469. Trustee companies are RIs under paragraph (q) of the definition in s.2 of the FTRA. Section 36 of the FTRA also provides that the FTRA is to prevail if there is a conflict with the *Trustee Companies Act 1981-82*. The FSC applies the same overall regulatory regime to the trustee companies in respect of governance, customer due diligence and KYC as it does to banks, although the arrangements for customers are more complex.

470. In 2008 the Government established an Offshore Industry Committee to advance the offshore industry and a consultant has been hired to provide a strategy for taking this forward. One of his recommendations in his initial report was that the Trustee Companies Act needs revision. The consultant will be visiting the Cook Islands in February 2009 and it is intended to have discussions with him about a suitable person to undertake this drafting work. The Crown Law Office does not have resources experienced in drafting corporate law and it is likely that an approach will be made to NZAID to fund the project. Previous attempts to obtain funding from other donors have been unsuccessful.

### **Law, regulation and “other enforceable means”**

471. The FATF standards require that the basic obligations under Recommendation 5, 10 and 13 should be set out in law or regulation. A number of criteria in the FATF Assessment Methodology are marked with an asterisk, which means that they include minimal obligations that should be set out in a law or regulation. In this context, “law or regulation” refers to primary and secondary legislation, such as laws, decrees, implementing regulations or other similar requirements, issued or authorised by a legislative body, and which impose mandatory requirements with sanctions for non-compliance. A separate concept referred to in the Methodology is that of “other enforceable means” such as guidelines, instructions or other documents or mechanisms that set out enforceable requirements with sanctions for non-compliance, and which are issued by a competent authority (e.g. a financial supervisory authority) or a self regulatory organisation (SRO). According to the Methodology, obligations set out in law or regulation as well as in other enforceable means have to be enforceable.

472. Bearing in mind the above, the Evaluation Team has concluded that the Guidelines issued by the CIFIU and the Prudential Statements issued by the FSC cannot be considered as either law or regulation or as “other enforceable means”. Law or regulation refers to primary or secondary legislation issued or authorised by a legislative body whilst “other enforceable means” refers to guidelines and instructions that are enforceable with sanctions for non-compliance and which are issued by competent authorities. Although the Guidelines and the Prudential Statements are issued by competent authorities, and they have indirectly led to enforcement action being taken, they are not directly enforceable as there are no sanctions which can be applied should RIs not meet the provisions of the Guidelines or the Prudential Statements.

## **Recommendations 5**

### ***Anonymous accounts***

473. Under section 37 of the FTRA, RIs are prohibited from maintaining an anonymous account or an account in a fictitious or false name. The FTRA requires all RIs to perform the required CDD measures for the opening and maintenance of all types of accounts. Section 37 of the FTRA fully covers the FATF Recommendations in this area and sets out legally enforceable requirements with criminal sanctions for non-compliance.

474. Additionally if a person is commonly known by two or more different names, the person must not use one of those names in opening an account with a RI unless the person has previously disclosed the other name or names to the RI.

475. If a person using a particular name in his or her dealings with a RI discloses to it a different name or names by which he or she is commonly known, the RI must make a record of the disclosure and must, at the request of the CIFIU, give the CIFIU a copy of that record.

476. Section 37(6) of the FTRA states that the provisions apply to accounts opened before the commencement of the Act.

***When is CDD required?***

477. Business relationships - RIs are required under section 4(1) of the FTRA to identify and verify customers when entering into a continuing business relationship. “Business relationship” is defined as meaning a continuing relationship between two or more parties at least one of whom is a RI acting in the course of that RI’s business in providing services to that other party.

478. Transactions - the identification and verification requirements of the FTRA also apply when a RI, in the absence of an established relationship, conducts any transaction. “Transaction” is defined as including, but not limited to – any deposit withdrawal, exchange, or transfer of funds, the use of a safety deposit box or any other form of safe deposit, any payment made in satisfaction, in whole or in part, of any contractual or other legal obligation and any other transactions that may be prescribed.

479. Wire transfers - RIs are required to identify and verify customers when carrying out an electronic funds transfer and other forms of funds transfers (section 4(1)(b) of the FTRA);

480. Suspicion of ML or TF – RIs are required to identify and verify customers when there is suspicion of a ML or TF offence (section 4(1)(c) of the FTRA);

481. Doubts about CDD - RIs are required to identify and verify customers when there are doubts about the veracity or accuracy of the customer identification information previously obtained (section 4(1)(d) of the FTRA).

482. In respect of banks, the general identification requirements are also set out in paragraphs 14 – 18 of Prudential Statement 08-2006. Prudential Statements for banks are issued under section 14 of the Banking Act and banks are required to comply with them as part of the general compliance provisions under the Act. Compliance is expected to be ongoing. It is assessed in annual on-site examinations but other matters may be taken into account at any time. In addition to the general identification requirements provided in the Prudential Statement, specific requirements are also provided for certain types of customers at paragraphs 20-25; for example, personal customers, corporate and other business customers, corporate vehicles and trustee, nominee and fiduciary accounts.

483. Additionally, the CIFIU has issued FTRA Guideline No 5 on Record Keeping and Customer Identification.

484. However, as noted in section 3.2.1 of this report, the Prudential Statements and FTRA Guidelines are not subject to sanctions for non-compliance and therefore cannot be considered as law, regulation or other enforceable means.

### ***Identification and verification***

485. Section 4(2)(a) of the FTRA requires that for natural persons, a RI must adequately identify and verify his/her identity. Sections 4(2)(b) and (c) of the FTRA require that if the customer is a legal entity or an association, a RI must adequately identify and verify its legal existence and structure, including obtaining information relating to the entity's name. Additionally section 4(2)(d) of the FTRA requires that if the customer is a trust, a RI must adequately obtain information relating to the trust's name, the nature of the trust and its beneficiaries and each settlor and trustee.

486. For banks, Prudential Statement 08-2006, at paragraph 20, requires banks to obtain for personal customers the customer's name, permanent residential address, date and place of birth, nature of employer or type of business engaged in, specimen signature, copies of utility bills and source of funds that will be deposited into the account. The only difficulty in the Cook Islands for domestic banks is that there are no street addresses. Residents generally only have their village as their address.

### ***Identification of legal persons or other arrangements***

487. Section 4(2)(b) of the FTRA requires that if the customer is a legal entity a RI must verify that any person purporting to act on behalf of the entity is authorized to do so and identify those persons. It also requires that if the customer is a legal entity, a RI must adequately identify and verify its legal existence and structure, including obtaining information relating to: the entity's name, legal form registration number and registered address; its principal owners and beneficiaries, and its directors and control structure and provisions regulating the power to bind the entity.

488. Section 4(2)(c) of the FTRA requires that if the customer is an association, a RI must adequately identify and verify its legal existence and structure, including obtaining information relating to the association's name, legal form, registration number and registered address, the principal members of the association, and provisions regulating the power to bind the association, and to verify that any person purporting to act on behalf of the association is authorized to do so and identify those persons.

489. Section 4(2)(d) of the FTRA requires that if the customer is a trust, a RI must adequately obtain information relating to the trust's name and registered office or address for service, the nature of the trust and its beneficiaries, and the name, address, occupation, national identity card or passport or other applicable official identifying document of each settlor and trustee.

490. When banks deal with legal persons, Prudential Statement 08-2006 requires that they obtain evidence of their legal status, such as an incorporation document, partnership agreement, association documents or a business licence.

491. Where banks deal with corporate vehicles such as international companies, they are advised to be vigilant in preventing such entities being used as a means of opening anonymous accounts. Prudential Statement 08-2006 requires the bank to understand the structure of the company, determine the source of funds and identify the beneficial owners and those who have control over the funds.

492. Where trust, nominee or fiduciary accounts are being opened, banks are required to establish whether the customer is taking the name of another customer, acting as a 'front' or acting on behalf of another person. If this is so, Prudential Statement 08-2006, at paragraph 23, requires that satisfactory

evidence is obtained of the identity of any intermediaries, and of the persons on whose behalf they are acting, as well as details of the nature of the trust or other arrangements in place. Specifically, where there is a trust, the bank is required to obtain information about the trustees, settlors/grantors and beneficiaries.

493. However, as noted in section 3.2.1 of this report, the Prudential Statements do not amount to law, regulation or other enforceable means.

### ***Identification of beneficial owners***

494. There is no requirement in the FTRA for RIs to identify and verify the identity of beneficial owners.

495. Prudential Statement 08-2006 sets out the principles and recommendations that the FSC requires all domestic and international banks to incorporate into their risk management policies. The objective of the Statement is to ensure that banks have in place CDD policies and for the purposes of the Statement a customer includes:

- The person or entity that maintains an account with the bank or those on whose behalf an account is maintained (i.e. beneficial owners);
- The beneficiaries of transactions conducted by professional intermediaries; and
- Any person or entity connected with a financial transaction who can pose a significant reputational or other risk to the bank.

496. Where a person conducts a transaction, other than a one-off transaction, through a RI and the RI has reasonable grounds to believe that the person is undertaking the transaction on behalf of any other person or persons, then, section 4(5) of the FTRA requires that in addition to complying with sub-sections (1) and (2), the RI must verify the identity of the other person or persons for whom, or for whose ultimate benefit, the transaction is being conducted.

497. Prudential Statement 08-2006 sets out obligations which require banks in this regard to identify the beneficial owners of accounts.

498. Section 4 of the FTRA requires RIs to obtain information on the principal owners and beneficiaries of a legal entity. Section 4 also provides that where the customer is a trust a RI is required to obtain information relating to the nature of the trust and its beneficiaries and obtain official identifying documents in respect of each settlor and trustee. There is no requirement in the FTRA for RIs to identify and verify the identity of beneficiaries or to determine who are the natural persons that ultimately own or control the customer when the customer is a legal person or legal arrangement. The FTRA does not provide definitions of “principal owners” or “beneficiaries” but the *Banking Act 2003* and the *Insurance Act 2008* both contain definitions of significant owners. This effectively means any person who holds 10 percent or more of the voting stock, a person who is entitled to receive 10 percent or more of the dividends or who is entitled to share 10 percent or more of the surplus assets of the company. For trustee companies the term is not defined; however, in the registration process for trustee companies, the FSC obtains detailed information about the owners and directors and applies the same ‘fit and proper’ test as is applied for banks and insurers. In trust law, a beneficiary is one of the essential elements of a trust and the common law definition is adopted.

499. Paragraph 23 of Prudential Statement 08-2006 refers specifically to trusts and sets out obligations which require banks when identifying a trust to include, the trustees, settlers/grantors and beneficiaries.

500. Paragraph 25 of Prudential Statement 08-2006 advises banks to exercise care in initiating business transactions with companies that have nominee shareholders or shares in bearer form. Banks are required to obtain satisfactory evidence of the identity of beneficial owners of all companies that have these structures, with extra care being exercised where there are bearer shares.

501. As noted above, the Prudential Statements do not amount to law, regulation or other enforceable means, although the FSC is able to take the requirements of the Prudential Statements into account when assessing the conduct of the institution and failure to comply with their requirements can lead to enforcement action.

502. In practical terms, the banking for all trustee companies in the Cook Islands is carried out by one bank, so the FSC has some ability to assess whether the bank has processes in place to meet these requirements.

#### ***Purpose and nature of business relationship***

503. Section 4(4)(a) of the FTRA requires a RI to obtain information on the purpose of a transaction but there is no explicit requirement for RIs to obtain information on the purpose and intended nature of the business relationship.

504. Banks are required by section 14 of Prudential Statement 08-2006 to obtain all information necessary to establish to their full satisfaction the identity of each new customer and the purpose and intended nature of the business relationship. Although, the Prudential Statements do not have sanctions for non-compliance, in practice it did appear to the Evaluation Team that the internal policies and procedures of the banking sector did require this information to be obtained.

505. Offshore banks are particularly exposed in this regard and the FSC exercises greater vigilance when carrying out on-site inspections of them. Where the FSC has concerns that the information provided may not be correct, independent checks are made of information. Where a bank has customers in jurisdictions that have lesser standards for AML, the FSC always takes particular note of the customer's transactions during the inspection

#### ***Ongoing due diligence***

506. RIs are required under section 4(4)(b) of the FTRA to conduct ongoing due diligence on business relationships.

507. Additionally, RIs are required under section 4(4)(c) of the FTRA to conduct ongoing scrutiny of any transaction undertaken through the course of the business relationship with a customer to ensure that the transaction being conducted is consistent with the RIs knowledge of the customer, the customers business and risk profile, including where necessary, the source of funds.

508. Paragraphs 38 and 39 of Prudential Statement 08-2006 provide comprehensive guidance in respect of the requirements for ongoing monitoring which banks should undertake and highlight the requirement for intensified monitoring for higher risk accounts.

509. The FTRA does not specifically require RIs to ensure that documents, data or information collected under the CDD process is kept up-to-date and relevant by undertaking reviews of existing records, particularly for higher risk categories of customers or business relationships. However, paragraph 10 of Prudential Statement No. 08-2006 requires banks to undertake regular reviews of existing records to ensure that records remain up-to-date and relevant. Paragraph 10 also suggests that an appropriate time to do so is when a transaction of significances takes place, when customer documentation standards change substantially or when there is a material change in the way that the account is operated or if a bank becomes aware that at any time it lacks sufficient information about an existing customer.

510. Additionally, when carrying out on-site FTRA inspections, the FSC always checks a sample of old files to ensure that the CDD information is up-to-date. Where it is not, discussions are held with the Compliance Officer to set out a plan for obtaining up-to-date information. The FSC draws a distinction between old files where transactions have occurred since 2004 and those that are essentially 'dormant'.

### ***Enhanced due diligence***

511. The FTRA does not set out requirements in respect of the provision for RIs to perform enhanced due diligence for higher risk categories of customer, business relationship or transaction.

512. Section 4 of Prudential Statement 08-2006 highlights the need for banks to formulate a customer acceptance policy and a tiered customer identification programme involving more extensive due diligence for higher risk accounts. This is particularly important in the Cook Islands due to the presence of offshore banking.

513. Specific guidance is provided in paragraphs 35-37 of Prudential Statement 08-2006 in order to address the issue of non face-to-face banking and the requirements that are imposed upon banks. These requirements are monitored by way of on-site FTRA inspections of banks by the FSC. RIs are expected to apply higher standards of risk management to non-face-to-face customers, including closer scrutiny of documents and seeking verification of the source of funds for the initial deposit. The bank is also expected to make independent contact with the customer.

514. Whilst, as identified previously, the Prudential Statements are not considered to be law, regulation or other enforceable means, banks do have procedures in place which require special attention to be given and for enhanced due diligence to be carried out where the account has been assessed as being higher risk of where the relationship is being established on a non-face-to-face basis.

515. The issue of trustee, nominee and fiduciary accounts, that can be used to circumvent customer identification, is also addressed at paragraph 23 of the Prudential Statement. Convolved business arrangements that involve a number of offshore jurisdictions are those to which the FSC gives close scrutiny.

### ***Simplified/reduced CDD***

516. The CDD measures identified in the FTRA apply equally to all business relationships and one-off transactions carried out by a RI and there is no provision within the FTRA for simplified or reduced CDD measures to be applied.

517. The FSC and the CIFIU have agreed specific exceptions within the CDD procedures in respect of customers living in the outer islands where photographic identification is limited. A process has been agreed with RIs on how to get identification documents for those customers.

518. Additionally, since street addresses do not exist in the Cook Islands, considerations are given to obtain village addresses. This does not in practice create any problems in a small country where almost everyone knows each other.

### ***Timing of verification***

519. Section 4(1) of the FTRA provides that the RI must identify the customer when the RI enters into a continuing business relationship; in the absence of such relationship, conducts any transaction, carrying out electronic funds transfers, there is suspicion of a money laundering offence or a financing of terrorism offence or when the RI has doubts about the veracity or accuracy of the customer identification information.

520. Additionally, section 5 of the FTRA provides for the necessity of identification to conduct business and provides that where satisfactory evidence of identity is not obtained by a RI then it must not proceed any further with the opening of the account or transactions, as the case may be.

521. Paragraph 10 of Prudential Statement 08-2006 refers to the fact that ‘the customer identification process applies naturally at the outset of the relationship’. This has been interpreted by the FSC to mean that the CDD is to be completed before a customer is accepted and is enforced accordingly

522. Whilst, as identified previously, the Prudential Statements are not considered to be law, regulation or other enforceable means, banks do have procedures in place which require CDD to be completed prior to any transaction being undertaken and the FSC has been able to take action when adequate processes have either not been put in place or have not been followed..

523. Section 4 of the FTRA requires RIs to identify and verify the identity of the customer when it enters into a continuing business relationship and section 5 of the FTRA provides that a RI must not proceed with the opening of the account or transaction, as the case may be, if satisfactory evidence of the identity is not obtained.

### ***Failure to complete CDD***

524. Section 5 of the FTRA provides that if satisfactory evidence of the identity is not produced to, or obtained by a RI, the RI must not proceed any further with the business relationship, the opening of the account or transactions, as the case may be and report to the CIFIU.

525. The FTRA does not contain any provisions in relation to the undertaking of a programme to ensure that for all relationships established prior to the coming into force of the FTRA RIs have collected the required CDD information. However, section 10 of Prudential Statement 08-2006 requires that banks undertake regular reviews of existing records to ensure that records remain up-to-date and relevant.

526. The FSC has agreed a process with RIs which requires that retrospective CDD is carried out whenever there is a transaction or where a further account is established. This process has the effect of concentrating the efforts of the RIs on active accounts at this time. Where there is a transaction and the

customer refuses to cooperate by providing the required information, the bank is to advise the customer that it will close the account.

527. Section 7(2) of the FTRA expressly forbids a RI from opening, operating or maintaining an anonymous account. Section 7(1) requires a RI to maintain any accounts in the true name of the account holder and RIs must not operate or maintain any account which the RI ought reasonably to have known is in a fictitious or false name.

### **Recommendation 6**

528. The FTRA specifically addresses the matter of Politically Exposed Persons (PEPs) and the treatment to be accorded them. For banks, the issue is additionally addressed at paragraphs 32 – 34 of Prudential Statement 08-2006.

529. Section 4(2)(e) of the FTRA provides for the specific requirements which RIs are required to undertake with regard to identifying and verifying PEPs. A definition of a PEP is provided for in the definition section of the FTRA. RIs are required to have appropriate risk management systems in order to determine whether the customer is a PEP. The definition of customer provided in the FTRA is sufficiently wide as to cover all parties to a relationship.

530. Under section 4(2)(e)(iii) of the FTRA, RIs are required to obtain the approval of senior management before establishing a business relationship with the customer. For banks this is reiterated in paragraph 34 of Prudential Statement 08-2006.

531. There is no requirement in the FTRA for RIs to obtain senior management approval where a customer has been accepted and the customer or beneficial owner is subsequently found to be, or subsequently becomes a PEP.

532. Additional information on who would be regarded as a PEP, the risks of PEP relationships and the requirement for banks to gather sufficient information and to check publicly available information, in order to establish whether or not the customer is a PEP, is provided in Prudential Statement 08-2006. Additionally, the Prudential Statement requires banks to investigate the source of funds before accepting a PEP and requires a decision to be taken at senior management level as to whether to open an account for a PEP.

533. RIs, under section 4(2)(e)(iv) of the FTRA, are required to take reasonable measures to establish the source of wealth and source of funds of a PEP customer.

534. RIs, under section 4(2)(e)(v) of the FTRA, are required to conduct regular and ongoing enhanced monitoring of the business relationship with a PEP customer.

### ***Additional elements***

535. The requirements of R.6 do not currently extend to domestic PEPs. It is however intended that when the FTRA is amended in 2009, the definition of PEPs will be amended to include domestic PEPs.

536. The United Nations Convention against Corruption has not been signed, ratified, or fully implemented.

## **Recommendation 7**

537. The issue of cross-border correspondent banking relationships is dealt with in section 4(6) of the FTRA which provides for the RI to obtain certain information and undertake specific procedures.

538. In addition to the normal CDD measures identified in the FTRA, section 4(6) requires RIs to gather sufficient information about the nature of the business of the person and to determine from publicly available information the reputation of the person and the quality of supervision to which the person is subject to.

539. There is no requirement in the FTRA for RIs to determine whether the correspondent bank has been subject to a money laundering or terrorist financing investigation or regulatory action.

540. Sub-section 4(6)(a)(iv) of the FTRA requires RIs to assess the respondent institution's AML/CFT controls but it does not require RIs to ascertain that the AML/CFT controls are adequate and effective.

541. Sub-section 4(6)(a)(v) of the FTRA requires RIs to obtain authority from senior management before establishing a new correspondent relationship.

542. Sub-section 4(6)(a)(vi) of the FTRA requires RIs to document the responsibilities of the RI and the person.

543. Section 4(6)(b) of the FTRA requires that where the business relationship is a payable-through account, a RI must ensure that the person with whom it has established the relationship has verified the identity of and performed ongoing due diligence on that person's customers that have direct access to accounts of the RI and is able to provide the relevant customer identification data upon request to the RI.

## **Recommendation 8**

544. The FTRA does not specifically address the matter of changes in technology and how measures are to be taken to prevent their use in ML. Neither does the FTRA provide for the specific risks associated with non-face to face business relationships or transactions.

545. Prudential Statement 08-2006 provides significant information on the issue of non-face to face customers. Although this cannot be considered as "other enforceable means", the regulated sector does in fact take notice of the requirements of the Statement and recognizes the importance of addressing the issue of non-face to face relationships which is an issue of particular interest for offshore banks.

546. Electronic banking is not well developed in the Cook Islands for domestic purposes, at this stage.

### ***Misuse of new technology for ML/TF***

547. The FTRA requires RIs to put in place policies and procedures to undertake CDD on customers in order to recognize, manage and mitigate the potential risk of the institution being used as a vehicle to conduct ML or TF. The FTRA does not include any provisions which require RIs to actively undertake measures which would prevent the misuse of technological developments for ML or TF. However, paragraph 36 of Prudential Statement No. 08-2006 provides guidance on the risk of undertaking business using electronic banking via the Internet or similar technology. The Statement advises that the FSC

expects banks to proactively assess various risks posed by emerging technologies and design customer identification procedures with due regard to such risks.

***Procedures re risks associated with non-face to face business relationships/transactions***

548. The FTRA does not provide for RIs to have policies and procedures in place to address any specific risks associated with non-face to face business relationships and transactions.

549. The FTRA does not provide for specific and adequate CDD measures to be undertaken to mitigate the higher risk associated with relationships and transactions which are undertaken on a non-face to face basis.

550. Section 4 of the FTRA sets out the obligations on RIs to identify and verify customers. The CDD requirements of the FTRA apply to all customers and relationships regardless of whether or not relationships are established or transactions undertaken on a non-face to face basis.

551. Additionally, paragraphs 35-38 of Prudential Statement 08-2006 provide information on what constitutes non-face to face business and identifies that RIs should apply equally effective CDD but that there must also be specific and adequate measures to mitigate the higher risk. The statement also provides examples of measures to mitigate the risks which include:

- Certification of documents presented;
- Requisition of additional documents to complement those which are required of face-to-face customers;
- Independent contact with the customer by the bank;
- Third party introduction, by an introducer subject to criteria established under the Prudential Statement, or
- Seeking verification of the source of funds for the initial deposit, including sighting documentary evidence confirming the source of the funds.

***Effectiveness of CDD measures***

552. The adoption of the FTRA has provided the Cook Islands with an Act which provides not only for comprehensive CDD obligations which apply to equally to all RIs but it also provides for the reporting obligations and for the establishment of the CIFIU.

553. The financial sector of the Cook Islands is limited to the banking and insurance sectors both of which are subject to the provisions of the FTRA.

554. The FSC has under the provisions of the *Banking Act 2003* issued Prudential Statements. Statement No. 08-2006 contains customer due diligence information and provides comprehensive information on when CDD should be carried out, what information should be obtained and contains guidance on how the requirements differ depending on the type of customer e.g. corporate and other business customers, trust, nominee and fiduciary accounts, introduced business and client accounts opened by professional intermediaries.

555. Although the Prudential Statements and the FTRA guidelines are not “enforceable” under the FATF definition, the banking sector is aware of the information provided in the documents and their

compliance culture is such that they include the requirements of the Prudential Statements and the guidelines in their policies and procedures as if they were mandatory requirements.

556. The Evaluation Team received copies of the procedure manuals from the domestic banks. These manuals were comprehensive, well thought out and assisted staff to meet the requirements of the AML/CFT legislative framework in place in the Cook Islands.

557. As discussed further in section 3.10 of this report, due to the size of the financial sector, the FSC and the CIFIU are able to undertake on-site examinations of each of the RIs on an annual basis, including a strong focus on RIs' levels of compliance with their CDD obligations. The FSC undertakes examinations of the institutions' compliance with Part 2 of the FTRA, which includes CDD requirements – this process takes between 3 and 5 working days. The CIFIU reviews compliance of Part 3 of the FTRA – this process takes between 1-2 working days.

558. Information provided to the Evaluation Team indicates that the domestic banks appear to receive reasonable results in their on-site examinations, with recommendations being mainly limited to improvement of their systems particularly with regard to reviewing the identification documents held in respect of customers taken on prior to the coming into force of the FTRA in 2004. Any breaches or shortcomings previously identified in exit letters had been rectified and note taken of any recommendations made by either the CIFIU or the FSC.

559. The on-site examinations of several of the international banks do not produce the same level of comfort. The FSC had particular concerns over the effectiveness of the policies and procedures in place in the area of CDD and obtaining information on the source of funds. Additionally, translated versions of foreign documents had not always been obtained which made checking of the CDD information held difficult. The products and services offered by the international banking sector provide the opportunity of setting up large, complicated structures which due to their complexity offer a high risk for misuse by money launderers. It was noted by the Evaluation Team that one of the international banks was advertising itself on the internet as being situated in the Cook Islands where the legislation takes a low risk approach to banking and additionally, where that same legislation also enforces strict client confidentiality. While these claims appear to be overstated, and the FSC pays particular attention to the customer accounts of offshore banks as well as the policies and processes adopted by the banks, this attitude is of concern to the Evaluation Team.

560. The offshore life insurance sector has not been subjected to any on-site examinations and has not been provided with any training or guidance as to its obligations under the FTRA.

### **3.2.2. Recommendations and comments**

561. The FTRA should require RIs to verify the identity of persons acting on behalf of a customer that is a legal person or legal arrangement.

562. The FSC and the CIFIU should consider the complexity of the products and services offered by international banks and how such products can provide an opportunity for ML and TF. The on-site examinations by both teams should reflect these opportunities and more focus should be placed on identifying the high risk areas of this sector. (It should be noted that similar observations are made in section 4 of this report in relation to the TCSP sector).

563. While it is noted that the Banking Act and the Insurance Act contain definitions of ‘significant owners’ which are used by the FSC in relation to approvals of principal owners and the ‘fit and proper’ test, there is no definition of “principal owners” or “beneficiaries” for the purposes of the FTRA. The FTRA should be amended to provide a definition of principal owners and beneficiaries for the purposes of CDD requirements and should explicitly require RIs to identify and verify principal owners and beneficiaries

564. The FTRA should explicitly require RIs to make a determination as to whether the customer is acting on behalf of another person.

565. Although section 4(2)(b) of the FTRA requires that if the customer is a legal entity RIs must obtain information on the control structure, there is no explicit requirement for RIs to determine who are the natural persons that ultimately own or control the customer.

566. The FSC and the CIFIU must bring the offshore life insurance companies and the visiting agents swiftly into the AML/CFT framework in order to reduce the risk in this area. Transitional provisions are still operating to preserve the position of companies and intermediaries operating in the Cook Islands prior to 1 January 2009. The *Insurance Act 2008* came into force on 1 January 2009 and provides for the FSC to undertake fit and proper checks of the relevant persons. These checks should be completed swiftly, on-site visits to the life insurance companies should be undertaken as soon as possible and training and specific guidance to the insurance industry should also be provided.

567. The FTRA should require RIs to obtain information on the purpose and intended nature of the business relationship rather than relying on the requirements of Prudential Statement 08-2006 which are not enforceable.

568. The FTRA should require RIs to ensure that documents, data or information collected under the CDD process is kept up-to-date and relevant by undertaking reviews of existing records, particularly for higher risk categories of customers or business relationships. This issue is dealt with in Prudential Statement 08-2006 but the requirements need to be incorporated into the FTRA.

569. The FTRA should explicitly require RIs to perform enhanced due diligence for higher risk categories of customer, business relationship or transaction. Examples of higher risk categories may include non-resident customers, private banking, legal persons or arrangements such as trusts, companies that have nominee shareholders or shares in bearer form and complex structures for high net worth customers. Although these risks are recognized by the authorities in the Cook Islands as being particularly important due to the presence of offshore banking, they are currently only dealt with in the Prudential Statement and not in the Act.

570. Additionally, the FTRA should provide for the types of enhanced due diligence which RIs should undertake rather than relying on the guidance provided in Prudential Statement 08-2006.

571. The Evaluation Team understands that currently the Cook Islands AML/CFT regulatory regime does not adopt a risk-based approach, but introduction of a risk-based approach is being contemplated and draft regulations are under preparation. The Evaluation Team considers that it may be prudent for the proposed adoption of a risk-based approach to be delayed until such time as all the RIs have been brought effectively into the current framework and when the supervisory authorities are confident that they fully

understand the business of all RIs and the products which they provide. Due to the predominance of trust relationships within the financial sector, the Evaluation Team is not convinced that providing for reduced or simplified CDD to be undertaken would be appropriate for most of the RIs currently participating in business in the Cook Islands.

572. Whilst it is implied in section 5 of the FTRA that verification of identity should be completed before a business relationship is established, consideration should be given to setting out explicit requirements as to when and in what circumstances (if any) RIs can delay the completion of the verification process.

573. The FTRA does not provide for the CDD requirements of relationships established prior to the FTRA coming into force in 2004. However, the Evaluation Team noted that the RIs were very aware of the necessity to ensure that verification of identity had been undertaken for all relationships. The institutions had procedures in place which required CDD to be reviewed and updated when a new account was opened or a transaction was requested. Consideration should be given to instigating a procedure to ensure that the process of review continues until the identity of all customers of active accounts has been verified appropriately.

574. With regard to criterion 6.2.1 of the Methodology, the FTRA should be amended to require RIs to obtain senior management approval where a customer has been accepted and the customer or beneficial owner is subsequently found to be, or subsequently becomes a PEP.

575. Section 4(6) of the FTRA should be amended to require RIs, when they are gathering information on correspondent banking relationships, to ascertain whether the bank has been subject to a ML or TF investigation or regulatory action.

576. In order to comply with FATF Recommendation 8, the FTRA should be amended to require RIs to take measures to prevent the misuse of technological developments in ML or TF schemes. However, the Evaluation Team took into consideration in the rating the fact that the systems in place within the banking sector are primarily manual systems - the provision of electronic services, for example internet banking, would not prove to be cost effective in the Cook Islands at this time.

577. Additionally, the FTRA should be amended to require RIs to have policies and procedures in place which address the specific risks associated with non-face to face business relationships or transactions. The issue of non-face to face business is identified in Prudential Statement No. 08-2006 but this needs to be incorporated into the FTRA. However, the guidance provided in the Statement together with the attitude taken by the RIs has been taken into account in the rating of Recommendation 8.

### 3.2.3. Compliance with Recommendations 5 to 8

	Rating	Summary of factors underlying rating
R.5	PC	<ul style="list-style-type: none"> <li>• No requirement to verify the identity of persons acting on behalf of a customer that is a legal person or legal arrangement.</li> <li>• No requirement to identify and verify principal owners and beneficiaries</li> <li>• No definition of principal owners and beneficiaries in FTRA.</li> <li>• No explicit requirement for a RI to make a determination as to whether a</li> </ul>

		<p>customer is acting on behalf of another person.</p> <ul style="list-style-type: none"> <li>• No explicit requirement for a RI to determine who are the natural persons that ultimately own or control the customer when it is a legal person or legal arrangement.</li> <li>• No requirement to obtain information on the purpose and intended nature of the relationship.</li> <li>• No legal requirement for data, documents or information collected under the CDD process to be reviewed.</li> <li>• No legal requirement for enhanced CDD to be undertaken for higher risk customers, business relationship or transactions.</li> <li>• No legal requirement for reporting institutions to undertake a review of existing customers to ensure that the CDD requirements of the FTRA are met.</li> </ul>
<b>R.6</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>• No requirement for senior management approval to be obtained where a customer has been accepted and the customer or beneficial owner is subsequently found to be, or subsequently becomes a PEP.</li> </ul>
<b>R.7</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• No requirement for RIs to determine whether the correspondent bank has been subject to a money laundering or terrorist financing investigation or regulatory action.</li> <li>• No requirement for reporting institutions to ascertain that the AML/CFT controls of the respondent institution are adequate and effective.</li> </ul>
<b>R.8</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• Although guidance is provided in Prudential Statement No. 08-2006 there is no legal requirement for reporting institutions to take measures to prevent the misuse of technological developments in money laundering or terrorist financing schemes.</li> <li>• Although comprehensive guidance is provided in Prudential Statement No. 08-2006 there is no legal requirement for reporting institutions to have policies and procedures in place which address the specific risks associated with non-face to face business relationships or transactions.</li> </ul>

### **3.3. Third Parties and Introduced Business (R.9)**

#### **3.3.1. Description and Analysis**

##### *Legal framework*

578. Section 4(7) of the FTRA provides for the procedures to be undertaken by a RI when reliance is being placed on an intermediary or a third party who is introducing business to the RI, to have undertaken CDD.

### ***Requirement to obtain CDD elements from third parties***

579. Under sections 4(7)(a) & (b) of the FTRA, RIs which are placing reliance on an intermediary or a third party to undertake its obligations with regard to the CDD procedures must immediately obtain the necessary information required by section 4 of the FTRA .

580. In the Cook Islands, by definition, intermediaries will always be offshore. It has been made clear by the FSC, that RIs wishing to use intermediaries are to apply the laws regarding CDD as if they were in the Cook Islands, otherwise a situation of regulatory arbitrage would emerge.

### ***Availability of identification data from third parties***

581. Section 4(7)(b) of the FTRA requires RIs to take adequate steps to satisfy themselves that copies of identification data and other relevant documentation relating to CDD requirements will be made available from the third party upon request without delay.

### ***Regulation and supervision of third party***

582. Section 4(7)(c ) of the FTRA requires RIs to satisfy themselves that the intermediary or third party is regulated and supervised for and has measures in place to comply with the requirements set out in sections 4,5 and 6 – identification and verification, not entering into a relationship or undertaking a transaction where satisfactory evidence of identity has not been obtained and the maintenance of records.

### ***Adequacy of application of FATF Recommendations***

583. The FTRA does not provide for a competent authority to determine which countries are regulated and supervised (in accordance with Recommendations 23, 24 and 29), and has measures in place to comply with the CDD requirements set out in R.5 and R.10.

584. RIs do not appear to have any appetite for placing reliance on anyone else to have undertaken the CDD procedures. Each institution undertakes its own identification and verification and retains such documents.

585. In July 2008 a letter was issued by the CIFIU to all RIs advising them that the Financial Action Task Force (FATF) had issued a statement regarding jurisdictions which required special attention. RIs are required under section 8(1)(b) of the FTRA to pay special attention to business relationships and transactions with persons in jurisdictions that do not have adequate systems in place to prevent or deter ML and TF.

### ***Ultimate Responsibility for CDD***

586. The FTRA does not recognize that where a RI is placing reliance on a third party to have undertaken customer identification and verification, the ultimate responsibility is retained by the RI.

587. Paragraph 26 of Prudential Statement 08-2006 makes it clear to banks that relying on due diligence undertaken by an introducer does not remove the ultimate responsibility of the bank to know its customers and their business.

588. As identified earlier Prudential Statements cannot be considered as other enforceable means. However, in practice banks do not place reliance on third parties, and CDD is undertaken and retained by the RI.

***Effectiveness***

589. Although the FTRA allows RIs to place reliance on an intermediary or third party to undertake CDD, RIs do not in practice take advantage of this provision. The RIs which met the Evaluation Team took the issue of placing reliance on a third party seriously and, as a result of the risks, their procedures were such that the RIs had adopted policies of undertaking the CDD procedures themselves, even when the business had been obtained through an intermediary or third party. The attitude and consistent practice of the RIs, and the positive impact that it has in terms of effectiveness, is reflected in the rating given below. Otherwise, on purely technical grounds, a lower rating would have been appropriate.

**3.3.2. Recommendations and Comments**

590. Consideration should be given to the provision of a list of countries or territories which the FSC and CIFIU consider adequately meet the FATF Recommendations.

591. Section 7 of the FTRA should be amended to make it clear to RIs that the ultimate responsibility for customer identification and verification will remain, as always, with the RIs relying on the intermediary or third party.

**3.3.3. Compliance with Recommendation 9**

	<b>Rating</b>	<b>Summary of factors underlying rating</b>
<b>R.9</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>• The FTRA does not provide a list of countries or territories which the FSC consider adequately meet the FATF Recommendations.</li> <li>• The FTRA does not place ultimate responsibility for customer identification and verification with the reporting institution.</li> </ul>

**3.4. Financial Institution Secrecy or Confidentiality (R.4)**

**3.4.1. Description and Analysis**

***Legal framework***

592. The Cook Islands has taken steps in recent years to ensure that excessive secrecy provisions cannot impede the performance of the functions of competent authorities in combating money laundering or terrorism financing. Amendments have been made to a number of Acts to ensure that investigative assistance and supervisory functions are not limited by secrecy provisions.

***Access to and sharing of information***

593. The FSC is required to undertake the prudential supervision of banking business of licensees under the *Banking Act 2003* (as amended) and is entitled to inspect premises and assets and to examine

and take copies of records and compel the further production of records or information for that purpose. The FSC may also, subject to certain safeguards as to secrecy and dissemination of information, permit a foreign supervisory authority to take part in a compliance inspection.

594. The FSC must not disclose information obtained (relating to a “protected person” being a licensee, depositor or other customer of a licensee or applicant for licence) unless the disclosure is, inter alia:

- required or authorized by the (High) Court;
- made for the purpose of discharging any duty, performing any function or exercising any power under this or any other Act;
- made as required by or under a warrant;
- otherwise required or authorized by or under any law; or
- made to a foreign law enforcement authority or foreign supervisory authority provided the FSC is satisfied that the foreign authority is subject to adequate legal restrictions on further disclosure and the information is reasonably required for the purpose of its regulatory or law enforcement functions.

595. Where information is disclosed on any of these bases, s46(4) of the *Banking Act 2003* provides that the recipient may further disclose the information (subject to any applicable restrictions on further disclosure contained in any law) for the purpose of discharging any duty, performing any function or exercising any power under that or any other Act.

596. Section 47 of the *Banking Act 2003* establishes similar exceptions to the prohibition on disclosure of information relating to the banking business of a licensee or of a depositor or other customer of the licensee which are applicable to persons other than the FSC. Again, information may be disclosed where required or authorized under law, by the Court or under warrant. Information may also be disclosed as part of a suspicious transaction report under the FTRA 2003 (note that the reference is to 2003 unless amended).

597. Information may also be disclosed under subsection 47(2)(b) of the *Banking Act 2003* if the disclosure is made for the purpose of discharging any duty, performing any function or exercising any power under that or any Act. This provision could be relied upon by licensees when they are obliged to exchange information to fulfil their obligations under FTRA

598. Information disclosed under section 47 of the *Banking Act 2003* may be further disclosed by the recipient (subject to any applicable restrictions on further disclosure contained in any law) for the purpose of discharging any duty, performing any function or exercising any power under that or any other Act.

599. The FTRA provides that RIs are obliged to make various reports to the CIFIU which is also authorized under s30 of the FTRA to examine the records and inquire into the business and affairs of any RI for the purpose of ensuring compliance with Parts 2 & 3 of the FTRA.

600. Section 35 of the FTRA expressly provides that RIs must comply with the requirements of that Act despite any obligation as to secrecy or other restriction on the disclosure of information imposed by

any written law or otherwise. Section 36 FTRA goes on to provide that in the event of any conflict with other specified Acts, the FTRA prevails over the terms of:

- (a) *International Companies Act 1980-82*;
- (b) *International Partnership Act 1984*;
- (c) *International Trusts Act 1984*;
- (d) *Banking Act 2003*;
- (e) *Off-Shore Insurance Act 1981-82*;
- (f) *Trustee Companies Act 1981-82*;

601. In terms of the offshore sector, amendments were made in 2004 to the secrecy provisions of the *International Companies Act 1980-81* and *International Trusts Act 1984* by similarly worded amending Acts. These amendments provide that it is not an offence to disclose information about the company or trust provided:

- (a) the disclosure is required or authorised by the Court; or
- (b) the disclosure is made for the purpose of discharging any duty, performing any function or exercising any power under any Act; or
- (c) the disclosure is made as required by or under a search warrant.

602. In addition, a further amendment was made, in the case of the *International Companies Act*, to section 249 to acknowledge that such a company would be subject to the obligations imposed or operation of those Acts directed at prosecution, investigation reporting and supervision under the AML regime, namely, the *Crimes Act 1969*, the *Criminal Procedure Act 1980-81*, the POCA, the FSC Act, the *Banking Act 2003*, the MACMA, the *Extradition Act 2003*, the FTRA and the TSA. An amendment was also made to the *International Trusts Act* in a slightly different, perhaps less effective manner.

603. The CIFIU is expressly authorized under various provisions of the FTRA to share information with domestic law enforcement agencies and in some instances a supervisory authority (supervisory bodies are entitled to obtain and receive information and to share that information in the performance of their duties), and to disclose its information to institutions or agencies of a foreign state or of an international organization established by the government of a foreign state.

604. The investigative tools available to investigators for domestic investigations found in the *Criminal Procedure Act* and POCA enable information to be obtained under compulsion from financial institutions (either by search warrant, production order or monitoring order).

605. Where the investigation (criminal or proceeds of crime) is conducted at the request of a foreign country, the MACMA expressly provides that secrecy provisions of RIs are overridden by the requirements of that Act. Section 60A(1), inserted by a 2004 amending Act, provides:

“For the avoidance of doubt, a RI must comply with the requirements of this Act despite any obligation as to secrecy or other restriction on the disclosure of information imposed by any written law or otherwise.”

(“Reporting institution” has the same meaning as in the FTRA which has a very broad application.)

606. Subsection 45(2) of the TSA also provides that despite anything in the MACMA, no request for mutual assistance in respect of a TSA offence may be declined solely on the basis of bank secrecy, (it is unclear however which particular provision of the MACMA is sought to be overridden by this subsection).

607. The *Financial Supervisory Commission Act 2003* permits disclosure where the disclosure is, inter alia:

- lawfully required or permitted by Cook Islands law;
- for the purpose of assisting the FSC in the exercise of any of the functions conferred on it by that Act or by any other enactment;
- with a view to the commencement of criminal proceedings, disciplinary proceedings relating to certain professionals, public officials or employees of the FSC; and
- for the purposes of any legal proceedings in connection with the winding-up or dissolution of a licensed financial institution.

608. Subject to certain restrictions, section 23 also permits disclosure to an overseas regulatory authority of information including the conduct of civil or administrative proceedings and proceedings to enforce laws, regulations and rules administered by that authority.

#### **3.4.2. Recommendations and Comments**

609. Secrecy provisions do not currently operate to prevent competent authorities accessing and sharing information, conducting criminal or proceeds of crime investigations or providing mutual assistance in respect of ML or TF offences.

#### **3.4.3. Compliance with Recommendation 4**

	<b>Rating</b>	<b>Summary of factors underlying rating</b>
<b>R.4</b>	<b>C</b>	<ul style="list-style-type: none"> <li>• This recommendation is fully observed.</li> </ul>

### **3.5. Record keeping and wire transfer rules (R.10 & SR.VII)**

#### **3.5.1. Description and Analysis**

##### *Legal framework*

610. Section 6 of the FTRA provides for the RI to maintain records in respect of transactions, correspondence relating to the transactions, records of identification and verification, reports made to the CIFIU and records of all enquiries made by the RI or to the RI by the CIFIU and other law enforcement agencies.

### ***Maintaining necessary records for at least five years***

611. Section 6(1) of the FTRA requires RIs to maintain records of all transactions carried out by it and correspondence relating to the transactions for a minimum period of six years from the date the account is closed or the business relationship ceases, whichever is the later.

612. Section 6(2) of the FTRA requires that the records to be retained under sub-section 1 are those records that are reasonably necessary to enable the transaction to be readily reconstructed at any time by the CIFIU or by a law enforcement agency.

613. In addition to the requirements of the FTRA, there is a general provision at section 55 of the Banking Act that requires a bank licensee to retain any cheque, bank draft bill of exchange or promissory note received by the bank for six years.

614. Section 6 of the FTRA requires that records in respect of correspondence related to transactions must be retained by RIs for a minimum period of six years from the date of the correspondence and that all other records must be retained for a minimum period of six years from the date the account is closed or the business relationship ceases, whichever is the latter.

### ***Availability of records and information to authorities***

615. Section 6(7) of the FTRA requires that where any record is required to be kept under the FTRA, it must be maintained in a manner and form that will enable the RI to comply immediately with requests for information from the CIFIU or a law enforcement agency.

### ***Effectiveness***

616. Overall, the record keeping requirements are being implemented effectively. During on-site inspections, the FSC on-site teams review the record keeping policies and procedures that are in place; ascertain that the information kept by RIs creates a satisfactory audit trail of suspicious ML or TF transactions and sample test customer files to ensure that RIs comply with the requirements under the FTRA.

## **Special Recommendation VII**

### ***Originator information***

617. Section 9 of the FTRA provides that RIs which are banks or money transmission service providers must include accurate originator information when making electronic transfers of funds and they must ensure that such information remains with the transfer.

618. The requirements of section 9 of the FTRA do not apply to electronic funds transfers and settlements between RIs which are banks and where the originator and beneficiary of funds transfer are acting on their own behalf.

619. However, the FTRA does not provide a definition of “accurate originator information” and there does not appear to have been any guidance issued as to the information which must accompany a transfer.

### ***Inclusion of originator information in cross-border and domestic wire transfers***

620. Section 9 (1) of the FTRA provides the legal framework for the inclusion of accurate originator information and other related messages on electronic funds transfers and other forms of funds transfers and requires such information to remain with the transfers.

621. The FTRA does not contain any provisions regarding the inclusion of originator information in domestic wire transfers. However, this is not applicable to the Cook Islands due to the nature of the inter-bank settlement process.

### ***Processing of non-routine transactions***

622. Section 9(1) of the FTRA requires the originator information to remain with the transfer but the FTRA does not provide for cross-border wire transfers where technical limitations prevent the full originator information from accompanying the transfer.

### ***Maintenance of originator information***

623. Section 8(1) of the FTRA requires a RI to pay special attention to wire transfers that do not contain complete originator information.

### ***Measures to monitor compliance***

624. The FSC, jointly with the CIFIU, is responsible for the supervision of financial institutions to ensure compliance with the requirements of the FTRA.

### ***Sanctions***

625. The FTRA does not provide for effective, proportionate and dissuasive criminal, civil or administrative sanctions for non compliance with the FTRA to be available to either the CIFIU or the FSC.

### ***Risk based procedures for transfers not accompanied by originator information***

626. Section 9 of the FTRA does not provide a threshold limit to cross border wire transfers and it therefore includes all incoming and outgoing electronic funds transfers regardless of the amount.

627. It should be noted that although the FTRA contains very limited provisions with regard to wire transfers, section 10 of the FTRA does provide that a RI must, within three working days, report to the CIFIU, the sending out of the Cook Islands or the receipt from outside the Cook Islands, at the request of a customer of any electronic funds transfer exceeding \$10,000, or any other amount that may be prescribed in the course of a single transaction.

### ***Effectiveness***

628. At present, the Cook Islands has no specific provisions that address the requirements in relation to SRVII. The only existing obligations in relation to electronic funds transfers in the FTRA are for:

- banks and money transmission service providers to include originator information on electronic funds transfer and that such information must remain with the transfer;
- RIs to report, within three working days, to the FIU the sending out of the Cook Islands at the request of a customer of any electronic funds transfer exceeding \$10,000; and
- the receipt from outside the Cook Islands of an electronic funds transfer sent at the request of a customer, of an amount exceeding \$10,000.

629. The CIFIU since 2001 has received over 18,000 Electronic Funds Transfer Reports. However, the requirement to report electronic funds transfers does not apply to transfers made by a RI to a person or entity in the Cook Islands, even if the final recipient is outside the Cook Islands. Equally it does not apply to transfers received by a RI from a person or entity in the Cook Islands, even if the initial sender is outside the Cook Islands.

630. The provision of electronic transfer of funds is not widely available in the Cook Islands with only three of the RIs (the three domestic banks) having access to the SWIFT payment system. The SWIFT payment system has mandatory fields which require the RI, i.e. the bank, to include the account number, the account name and the address of the customer before the transfer can be accepted into the system. However, there are no requirements for banks to check that the information provided on incoming transfers meets the provisions of Special Recommendation VII.

### 3.5.2. Recommendations and Comments

631. The competent authorities should issue detailed regulations, consistent with international standards, to ensure that wire transfers are accompanied by accurate and meaningful originator information through the payment chain.

632. Although the Cook Islands domestic banks with an international license operate the Swift system, which has mandatory fields in respect of originator information, there is no detailed instruction in the FTRA as to what constitutes full originator information.

633. The competent authorities should require the beneficiary financial institutions to adopt risk-based procedures for identifying and handling wire transfers that are not accompanied by complete originator information. These procedures must cover, whether a wire transfer or related transactions without complete originator information are suspicious enough to be reported to the CIFIU, and whether the beneficiary financial institutions should consider restricting or terminating relationship with financial institutions that do not comply with SR VII.

634. The sanctions available to the CIFIU for non-compliance with the requirements of the FTRA which would include the limited requirements for RIs in respect of wire transfers are not considered by the Evaluation Team to be effective, proportionate and dissuasive. Such sanctions should be introduced as soon as possible.

### 3.5.3. Compliance with Recommendation 10 and Special Recommendation VII

	Rating	Summary of factors underlying rating
<b>R.10</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>• The requirement in the FTRA is for institutions to retain correspondence relating to transactions and not to business correspondence.</li> </ul>

<b>SR.VII</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• There is no detailed instruction issued by the competent authorities to the banks on the requirements of SRVII.</li> <li>• There is no detailed instruction in the FTRA as to what constitutes full originator information.</li> <li>• There is no requirement in law, regulation or other enforceable means for beneficiary financial institutions to adopt effective risk-based procedures for identifying and handling wire transfers without complete originator information.</li> <li>• There is no appropriate sanction mechanism related to the implementation of SRVII.</li> </ul>
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*Unusual and Suspicious Transactions*

**3.6. Monitoring of Transactions and Relationships (R.11 & 21)**

**3.6.1. Description and Analysis**

**Recommendation 11**

635. Section 8 of the FTRA provides for the procedures which a RI must have in place in order to meet the requirements for the monitoring of transactions.

636. Section 8(a) of the FTRA requires RIs to pay special attention to any complex, unusual or large transactions or attempted transactions or any unusual patterns of transactions or attempted transactions that have no apparent or visible economic or lawful purpose.

637. Section 4.6 of FTRA Guideline No. 2 provides examples of situations and transactions which may be unusual or complex.

638. In addition to paying special attention to complex and unusual transactions, section 8(2)(a) of the FTRA requires RIs to examine as far as possible the background and purpose of the transaction, record its findings in writing and report its findings to the CFIU.

639. There is no explicit requirement in the FTRA for findings resulting from examining complex and unusual transactions to be retained for at least five years. However, section 6 of the FTRA, which provides for the record keeping procedures, requires RIs to maintain records for a minimum period of six years of all transaction records and CDD records as required under section 4 of the FTRA.

**Recommendation 21**

640. Section 8 of the FTRA addresses the issue of RIs establishing business relationships or undertaking transactions with persons from or in countries which do not or insufficiently apply the FATF Recommendations

641. Section 8(b) of the FTRA requires RIs to pay special attention to business relationships and transactions with persons in jurisdictions that do not have adequate systems in place to prevent or deter money laundering and financing of terrorism.

642. In November 2007, the CIFIU issued a letter to all RIs advising them about Iran being listed by the FATF as a country of concern.

643. In July 2008, the CIFIU issued a further letter to all RIs following another statement issued by the FATF with regard to Uzbekistan, Pakistan, Turkmenistan, Sao Tome and Principe, the Northern part of Cyprus, and again including Iran.

644. The letters required RIs to advise the CIFIU of any findings regarding these countries, but to date, no report has been received by the CIFIU.

645. Section 8 of the FTRA requires a RI to pay special attention to business relationships and transactions with persons in jurisdictions that do not have adequate systems in place to prevent or deter ML and TF. Additionally, RIs must examine, as far as possible, the background and purpose of the transactions or business relations and record its findings in writing. Such findings must be reported to the CIFIU or to a law enforcement agency and assist the CIFIU or the law enforcement agency in any investigation relating to a serious, ML or TF offence.

#### ***Ability to apply counter measures***

646. There are no provisions in legislation which provide for the competent authorities in the Cook Islands to apply counter-measures to jurisdictions which have been identified by the FATF as not sufficiently applying the FATF Recommendations.

#### **3.6.2. Recommendations and Comments**

647. Consideration should be given to amending section 8 of the FTRA to require RIs to retain findings of complex, unusual large transactions, or patterns of transactions, that have no apparent or visible economic purpose for a period of at least five years and make them available for competent authorities and auditors.

648. The CIFIU should consider providing RIs with more information on countries' implementation of the FATF Recommendations, such as summaries of weaknesses in AML/CFT programmes as highlighted in Mutual Evaluation Reports.

649. Consideration should be given to providing the CIFIU with a power to issue notices which would require RIs to give special attention and conduct enhanced CDD where relationships are or have been established with persons from countries with which the CIFIU has concerns. These notices should be mandatory in nature.

650. Consideration should also be given to implementing legislation which would provide for the authorities in the Cook Islands to apply counter-measures against jurisdictions which do not sufficiently meet the FATF Recommendations.

### 3.6.3. Compliance with Recommendations 11 & 21

	Rating	Summary of factors underlying rating
<b>R.11</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>No requirement to retain records of findings of complex, unusual large transactions.</li> </ul>
<b>R.21</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>Insufficient information provided to reporting institutions on countries of concern to the CIFIU and FSC.</li> <li>No provision for the application of counter-measures.</li> </ul>

### 3.7. Suspicious Transaction Reports and Other Reporting (R.13-14, 19, 25 & SR.IV)

#### 3.7.1. Description and Analysis

##### Recommendation 13 and SRIV

##### *Legal framework*

651. Section 11 of the FTRA requires that if a RI or a supervisory authority or auditor suspects or has reasonable grounds to suspect that information that the RI has concerning any transaction or attempted transaction may be relevant to an investigation or prosecution of a person or persons for a serious offence, a money laundering offence of a financing of terrorism offence or of assistance in the enforcement of the *Proceeds of Crime Act 2003*, or related to the commission of a serious offence, a money laundering offence or a financing of terrorism offence, the RI must, as soon as practicable after forming that suspicion but no later than two working days, report the transaction or attempted transaction to the CIFIU.

652. FTRA Guideline No.2 issued by the CIFIU provides comprehensive information including, but not limited to, who must report suspicious transactions; what are suspicious transactions; how and when to make a suspicious transaction report (STR); and how to identify a suspicious transaction. It also provides examples of common indicators.

##### *Recommendation 13 and SRIV*

653. Section 11(1)(b) of the FTRA requires RIs to report to the CIFIU any suspicious transactions or attempted transactions as soon as practicable after forming that suspicion that may be of assistance in the enforcement of the *Proceeds of Crime Act 2003* by no later than two working days.

654. Sections 11 (1)(a) & (c) of the FTRA requires RIs to report to the CIFIU any suspicious transactions or attempted transactions as soon as practicable after forming a suspicion that may be relevant to the commission, investigation and prosecution of person or persons for a serious offence, a money laundering offence or financing of terrorism offence.

655. Under section 11(2) of the FTRA, failure by an RI to report is punishable, in the case of an individual, to a fine of up to \$20,000 or a term of imprisonment of up to two years, or both or, in the case of a body corporate, to a fine of up to \$100,000.

***Attempted transactions and STR reporting regardless of the amount of the transaction***

656. Section 11 of the FTRA requires the reporting of all suspicious transactions and attempted transactions to the CIFIU and does not apply any de minimus provisions with regard to the amount involved in the transaction or attempted transaction.

***STR reporting should apply regardless of whether tax matters may be involved***

657. The FTRA does not provide an explicit requirement for RIs to report suspicious transaction regardless of whether they are thought, among other things, to involve tax matters. Equally there does not appear to be any provision in legislation which would prohibit a RI from making a suspicion report which involves tax matters.

***Additional element***

658. RIs are required to report an STR to the CIFIU having reasonable grounds to suspect that funds are proceeds from a serious offence that would constitute a predicate offence to money laundering.

**Recommendation 14**

***Protection for making STRs in good faith***

659. Section 16 of the FTRA protects any person filing a report to the CIFIU in good faith. It provides that no civil, criminal or disciplinary proceedings may be taken against a RI, an auditor or supervisory authority of a RI or an officer, employee or agent of a RI, an auditor or supervisory authority of a RI acting in the course of that person's employment or agency in relation to any action by the RI, the auditor or the supervisory authority of their officer, employee or agent taken under the relevant sections of the FTRA. Section 6.1 of the FTRA Guideline No, 2 provides guidance on confidentiality and immunity when reporting information to the CIFIU.

660. Whilst there is no definition of "director" in the FTRA, the definition of officer provided for in the *Banking Act 2003* includes a director, manager or company secretary.

***Prohibition against tipping-off***

661. Section 14 of the FTRA provides that a RI, its officers, employees or agents or any other person must not disclose to any person that a report has been or may be made, or further information has been given; that the RI has formed a suspicion in relation to a transaction or any other information from which the person to whom the information is disclosed could reasonably be expected to infer that a suspicion has been formed or that a report has been, or may be, made. Contravention of this section is punishable, in the case of an individual, to a fine of up to \$50,000 or a term of imprisonment of up to five years or, in the case of a body corporate, to a fine of up to \$150,000.

***Additional element***

662. Section 15 of the FTRA protects the confidentiality of the any person who has handled a transaction in respect of which a report has been made or who has prepared the report. In addition section

15 (4) provides that no person is required to disclose any information contained in any reports submitted to the CIFIU under section 11 of the FTRA.

663. Section 33 of the FTRA requires a person while he or she is, or after the person ceases to be, the Head, Officer, employee or agent of the CIFIU to keep confidential any information or matter which he or she was privy to unless under certain circumstances.

**Recommendation 25 (Guidance and Feedback Related to STRs)**

664. Section 27 of the FTRA provides that the CIFIU may:

- provide feedback to RIs and other relevant agencies regarding outcomes relating to the reports received;
- conduct research into trends and developments in the area of ML and TF and improved ways of detecting, preventing and deterring ML and TF; and
- educate the public and create awareness of matters relating to ML and TF.

665. FTRA Guideline No. 2, which provides information on suspicious transaction reporting, also includes two extremely comprehensive appendices – one relating to examples of common indicators that may point to a suspicious transaction, the other relating to examples of industry-specific indicators.

666. Section 5.5 of Appendix 2 to FTRA Guideline No. 2, contains insurance-specific indicators of risk. However, the FTRA Guidelines have not, as yet, been issued to the life insurance sector of the RIs.

**Statistics**

667. The CIFIU maintains statistics on STRs, CTRs, EFTRs and BCRs in a computerised database. As of October 2008. Totals are as follows:

- CTRs – 6,609 since 2001
- EFTRs – 18,321 since 2001
- BCRs – 34 since 2004
- STRs – 142 since 2001

668. A summary of STR data reflects that there have been no significant increases since 2006:

**Table 6 – STRS by Year**

<b>Year</b>	<b>Domestic Banks</b>	<b>FSC</b>	<b>International Banks</b>	<b>ARS</b>	<b>TCSPs</b>	<b>Total</b>
2001	3				1	<b>4</b>
2002	1				1	<b>2</b>
2003	18				1	<b>19</b>
2004	7		2		5	<b>14</b>
2005	7		2		6	<b>15</b>
2006	6		3	1	19	<b>29</b>
2007	3	1	2	3	20	<b>29</b>
2008	7	3	2	3	15	<b>30</b>
<b>Total</b>	<b>52</b>	<b>4</b>	<b>11</b>	<b>7</b>	<b>68</b>	<b>142</b>

669. The increase in reporting levels from 2006 was attributed to TCSPs which reported historic legal entities which had failed to reply to requests for additional information to back capture CDD requirements.

670. The Evaluation Team considers the reporting level for STRs to be generally satisfactory, considering the small size of the financial sector in the Cook Islands. However, as noted by the authorities, the level of reporting by the domestic and, in particular, the international banks is on the low side and the FSC has itself come across transactions it regarded as suspicious during its audits of reporting institutions. In addition, as the authorities also acknowledge, the level of reporting from the DNFBP sector (other than TCSPs) is very low.

671. It should be noted that the statistics for STRs reflects the number of individual persons/entities in relation to which STRs have been submitted, not the total number of STRs actually received. For example, if a second or subsequent STRs relate to the same entity, they are attached to the original STR file. These second and subsequent STRs are not considered new STRs for the purpose of statistical capture. For example, the STR which was earlier referred to as disseminated to CIP actually comprised approximately 20 separate reports that were collectively counted as one STR for statistical purposes. Many of these additional reports were received after the initial reports were disseminated to the CIP.

672. The Evaluation Team was given to understand by one of the RIs that the definition of “transaction” was too narrow in that it only referred to transactions, and not to the circumstances surrounding a client or ‘suspicious activity’ more generally. It is possible that this could affect the number of STRs being made.

673. It appeared to the Evaluation Team that the exemption from reporting for both cash transactions and electronic funds transfers which applies to a person or entity in the Cook Islands even if they are outside the Cook Islands is rather confusing and not fully understood by the RIs.

674. Statistical data providing a more comprehensive analysis in respect of CTRs and EFTRs, including year-by-year breakdowns, was unfortunately not available because of the CIFIU database limitations referred to in section 2.5 above.

### **Recommendation 19**

675. Section 10(1) of the FTRA requires that RIs must, within three working days, report to the CIFIU, within a time and in the form and manner that may be prescribed, any transaction of an amount in cash exceeding \$10,000, or any other amount that may be prescribed, in the course of a single transaction, unless the recipient and the sender is a RI.

676. Section 10(1) of the FTRA also requires that RIs must, within three working days, report to the CIFIU the sending and receiving of any electronic funds transfer exceeding \$10,000, or other amount that may be prescribed, in the course of a single transaction.

677. Section 10(6) of the FTRA provides that a person who conducts two or more transactions or electronic funds transfers that are of an amount below the threshold commits an offence, if it would be reasonable for the Court to conclude that the person conducted the transactions, or transfers in that

manner or form for the sole or dominant purpose of ensuring, or attempting to ensure, that no report in relation to the transactions or transfers is required to be made.

678. The CIFIU has issued to RIs FTRA Guideline No. 3 which provides guidance explaining reporting timelines, how reports are to be sent to the CIFIU and what information has to be included in these reports. It also explains who has to report a cash transaction.

#### ***Additional element***

679. All data from transaction reports (CTRs, EFTRs, STRs and BCRs) are being maintained in the CIFIU's computerised database under the immediate supervision of the FIU Intelligence Officer with restricted access to STR data.

680. The CIFIU also maintains a security policy covering building security and computer security issues and data access which all persons employed by CIFIU must adhere to.

681. The CI FIU has also signed a Memorandum of Understanding with the Ministry of Justice for off-site storage of FIU data.

682. There are no specific provisions in respect of the proper use of the information or data that is reported or recorded.

#### **3.7.2. Recommendations and Comments**

683. The Evaluation Team concluded from the interviews conducted with the RIs that the reporting framework currently in place in the Cook Islands was effective and that the importance of such a framework was recognized by the RIs.

684. Consideration could be given to reviewing the definition of "transaction" provided for in section 2 of the FTRA. It was brought to the attention of the assessors by one of the RIs that they felt that the definition of transaction was narrow and it could be widened to make it explicit that it was not necessary for a transaction to be suspicious it could just be the circumstances surrounding a client. Alternatively, consideration could be given to providing a more definitive description of "suspicious transaction report" to make it clear that suspicions of any nature and not just those in respect of a transaction are required to be reported. Such an approach would actually appear to go beyond the requirements of FATF Recommendation 13 and SRIV, but if the Cook Islands were interested in pursuing such an approach, the concept of 'suspicious matter reporting' used in Australia might provide a useful model.

685. The Evaluation Team was advised that most reports made by Trust Companies were submitted in "free form" and not in the manner of the prescribed form. One reason for this is that, as noted in section 2.5 of this report, a number of these reports were actually made under section 5 of the FTRA and related to an inability to identify the customer under section 4 of the FTRA. While treated for statistical purposes as STRs, such reports are not strictly speaking STRs under section 11 of the FTRA as no transaction was involved. It did not appear that the use of "free form" reports of this type by the TCSP sector had undermined the usefulness of the reports from this sector, and the CIFIU indicated that it was happy with the status quo.

686. Consideration should be given to removing the reporting exemption for both cash transactions and electronic funds transfers which applies to a person or entity in the Cook Islands even if they are outside the Cook Islands. It is not clear what assistance this provides and to whom this exemption is intended to apply.

687. The view of the Evaluation Team was that the close working relationship between the banking sector and the CIFIU resulted in feedback being provided to RIs on an individual basis and for there to be consultation between the two parties throughout the reporting process.

688. Additionally, both the FSC and the CIFIU during their on-site examinations discuss any areas of concern which any of the parties involved may have.

689. Consideration should be given to issuing the FTRA guidelines to the insurance sector and for both the CIFIU and the FSC to enter into dialogue with the insurance industry in order to establish a relationship on the same level as they currently enjoy with the banking sector.

### **3.7.3 Compliance with Recommendations 13, 14, 19 and 25 (criterion 25.2), and Special Recommendation IV**

	<b>Rating</b>	<b>Summary of factors underlying rating</b>
<b>R.13</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>• Cascading effect from Recommendation 1 where not all predicate offences are covered.</li> <li>• Low reporting levels from some sectors.</li> </ul>
<b>R.14</b>	<b>C</b>	<ul style="list-style-type: none"> <li>• This Recommendation is fully observed.</li> </ul>
<b>R.19</b>	<b>C</b>	<ul style="list-style-type: none"> <li>• This Recommendation is fully observed.</li> </ul>
<b>R.25</b>	<b>PC</b>	<p><i>NB this is a composite rating</i></p> <ul style="list-style-type: none"> <li>• Guidelines providing information on methods and trends not issued to insurance sector.</li> <li>• No evidence of general or specific feedback being provided by the CIFIU to the insurance sector in respect of STRs.</li> </ul>
<b>SR.IV</b>	<b>C</b>	<ul style="list-style-type: none"> <li>• This Recommendation is fully observed.</li> </ul>

### **3.8. Internal Controls, Compliance, Audit and Foreign Branches (R.15 & 22)**

#### **3.8.1 Description and Analysis**

##### ***Recommendation 15***

690. The FTRA provides for the general requirements for all RIs to undertake CDD, maintain records, monitor transactions, report cash transactions and make suspicious transaction reports.

691. The Guidelines issued by the CIFIU provide comprehensive guidance on topics such as what is a compliance regime, who has to implement one, appointment of a money laundering reporting officer, compliance policies and procedures, review of the compliance policies and procedures, ongoing compliance training, internal/external auditor, the CIFIU's approach to compliance monitoring and enforcement and the penalties for non-compliance

692. Prudential Statement 08 -2006, issued under section 14 of the Banking Act, provides guidance to the banking sector on the required standards. The Prudential Standard mirrors the Basel Committee on Banking Supervision's paper, customer due diligence for banks and sets out clearly the obligations of banks in this area. Paragraph 5 of Prudential Statement 08-2006 requires all banks to have in place adequate policies, practices and procedures that promote high ethical and professional standards and prevent the bank from being used, intentionally or unintentionally, by criminal elements. Certain key elements should be included by banks in the design of KYC programmes. Such essential elements should start from the banks' risk management and control procedures and should include (1) customer acceptance policy, (2) customer identification, (3) ongoing monitoring of high risk accounts and (4) risk management. Banks should not only establish the identity of their customers, but should also monitor account activity to determine those transactions that do not conform with the normal or expected transactions for that customer or type of account. KYC should be a core feature of banks' risk management and control procedures, and be complemented by regular compliance reviews and internal audit.

693. The CIFIU, and the FSC under delegated powers, undertake on-site inspections of RIs and examine the policies and procedures which have been established by the RI to ensure that they are both appropriate and effective. Breaches of policies are discussed with the entity. If they cannot be adequately explained, the FSC conducts a further inspection, usually about 6 months after the initial examination, to assess whether any improvements have been made.

694. The offshore life insurance companies are required to meet the provisions of the FTRA but the CIFIU has not issued the FTRA guidelines or provided any training to the insurance sector.

##### ***Internal procedures, policies and controls to prevent ML and TF***

695. Section 18(1)(a) of the FTRA requires RIs to establish and maintain procedures and systems relating to CDD identification and verification, record keeping, transaction monitoring to identify unusual and suspicious transactions, reporting of cash and electronic funds transfers over \$10,000 and suspicious transaction reporting. With the introduction of the FTRA in 2004, all banks and trustee companies were required to forward a copy of their policies and procedures manual to the CIFIU for approval. On an ongoing basis, banks and trustee companies are required to forward a copy of their policies and

procedures manual to the CIFIU prior to an on-site visit where amendments have been made since the last examination.

696. FTRA Guideline No. 6 issued by the CIFIU has been issued in order to help institutions implement a compliance regime to meet their reporting, record-keeping and client identification obligations.

697. Section 17 of the *Financial Supervisory Commission Act 2003* requires every licensed financial institution to have a Compliance Officer. The definition of 'licensed financial institution' means that this requirement applies to banks, offshore insurers, insurers to whom the *Insurance Act 2008* applies and trustee companies. The duties of the Compliance Officer are to ensure that the institution meets its obligations in respect of customer identification and record keeping and retention.

698. The *Financial Supervisory Commission (Qualifications of Compliance Officers) Regulations 2004* provide that every Compliance Officer required to be appointed by a licensed financial institution pursuant to the provisions of section 17(1) of the Act shall be required to have not less than three years work experience in finance, law, accounting or insurance in or outside of the Cook Islands.

699. Section 18(2) of the FTRA requires an RI to appoint a Money Laundering Reporting Officer (MLRO) for ensuring the RI's compliance with the requirements of the Act. The MLRO and the Compliance Officer may be one and the same person.

#### ***Independent audit function***

700. Section 18(1)(d) of the FTRA requires RIs to establish an audit function to test their AML/CFT procedures and systems.

#### ***Employee training***

701. Sections 18(1)(v) & (vi) of the FTRA require an RI to make its officers and employees aware of the laws relating to ML and the TF, including procedures, policies and audit systems adopted by it to deter ML and TF.

702. Section 18(b) of the FTRA requires an RI to train its officers, employees and agents to recognise suspicious transactions.

703. The FTRA Guidelines issued by the CIFIU include guidance on what is ML and what is TF and include numerous examples and indicators of ML and TF.

704. The institutions which met with the Evaluation Team confirmed that they had comprehensive training programmes in place for all staff and this included induction training for new employees.

#### ***Employee screening***

705. Section 18(c) of the FTRA requires RIs to screen persons before hiring them as employees.

706. Recruitment of employees for financial institutions is difficult in the Cook Islands due to a shortage of qualified personnel. However, the small population means that there is a general awareness of the conduct of persons and any adverse information is generally known.

***Additional element***

707. Section 2 of the FTRA defines a MLRO as a person who is a member of the management of the RI; this would allow him or her to report any compliance issues or developments to management or its board.

**Recommendation 22**

708. Section 29 of the *Banking Act 2003* prohibits a bank licensee, other than a foreign bank, from creating a subsidiary or operating a branch, agency or office outside the Cook Islands unless it has obtained the permission of the FSC. Before the FSC can give approval to such an operation, it has to be satisfied about certain matters – that the supervisor in the host country consents to the establishment of the branch, agency or office, that it will be subject to adequate banking supervision, and that the FSC will have access to information and documents necessary to supervise the licensee under the Banking Act. The FSC is empowered to give approval on such terms and conditions that it considers appropriate.

709. To date, no applications have been received from any licensee to establish a foreign, subsidiary, branch or office. The FSC has not had to come to a view on the terms and conditions under which it would provide approval, outside the statutory conditions set out in section 29 of the Banking Act.

***Additional element***

710. Not applicable. As noted above, to date, no applications have been received from any licensee to establish a foreign, subsidiary, branch or office.

**3.8.2. Recommendations and Comments**

711. The CIFIU should ensure that the FTRA Guidelines are issued to the insurance sector and arrange for training to be given to them in order to identify the particular vulnerabilities of this sector.

712. Section 29 of the Banking Act clearly prohibits a licensee, other than a foreign bank from creating a subsidiary or operating a branch, agency or office in any place outside of the Cook Islands unless it has obtained the prior written approval of the FSC. The FSC may give an approval on such terms and conditions as it considers appropriate. Additionally section 27 of the *Insurance Act 2008* contains similar provisions.

713. Consideration needs to be given as to the approach of the FSC should an application be made by the insurance sector in respect of the creation of a subsidiary or branch outside of the Cook Islands. In this respect it may be prudent to consider the inclusion of a provision in legislation which would deal with such a situation should it occur in the future.

### 3.8.3. Compliance with Recommendations 15 & 22

	Rating	Summary of factors underlying rating
R.15	LC	<ul style="list-style-type: none"><li>The insurance sector has not been provided with guidelines and nor has training specific to this industry been provided.</li></ul>
R.22	N/A	<ul style="list-style-type: none"><li>This recommendation is considered to be non-applicable as no reporting institutions have foreign branches or subsidiaries.</li></ul>

### 3.9. Shell Banks (R.18)

#### 3.9.1. Description and Analysis

##### *Legal framework*

714. Section 23 of the *Banking Act 2003* sets out the ongoing obligations on licensees in respect of the physical presence requirements for banks. The provision contains a definitive list of matters about which the FSC must be satisfied in concluding that the bank has a physical presence in the Cook Islands.

715. In addition, Practice Note 1a – 2004, issued 10 May 2004, sets out more detailed guidance on the criteria that the FSC uses in determining a bank’s compliance with the physical presence requirements provided in section 23 of the *Banking Act 2003*. The Practice Note confirms that the bank must physically maintain its primary official records in the Cook Islands and provides a comprehensive list of such records.

##### *Prohibition of establishment shell banks*

716. Because of the history surrounding offshore banking licences in the Cook Islands (this was an issue of concern to the FATF under its NCCT process), the FSC is very diligent about enforcing the physical presence requirements as an ongoing matter and also for new applicants. In the past year, one banking licence application was refused because, amongst other things, the FSC was not convinced that it was not an attempt to set up a shell bank in the Cook Islands.

717. The provisions of section 23 of the *Banking Act 2003* include a requirement that a licensee must occupy premises in the Cook Islands, approved by the FSC, within 30 days, or such longer period as the FSC allows, after being issued with a licence. The FSC must not give its approval to any premises unless it is satisfied that:

- the premises are located at a fixed address in the Cook Islands; and
- the licensee will carry on banking business under its licence from those premises; and
- the licensee will maintain at those premises operating records including financial statements relating to the banking business conducted under its licence; and
- the employee or employees of the licensee will operate from those premises; and
- those premises adequately symbolize the physical presence of the licensee in the Cook Islands.

### ***Prohibition of correspondent banking with shell banks***

718. Neither the *Banking Act 2003* nor the FTRA prohibits RIs from entering into or continuing correspondent banking relationships with shell banks.

### ***Requirement to satisfy respondent FIs prohibit of use of accounts by shell banks***

719. Neither the *Banking Act 2003* nor the FTRA requires RIs to satisfy themselves that respondent financial institutions in a foreign country do not permit their accounts to be used by shell banks.

### ***Effectiveness***

720. The Evaluation Team was advised by the FSC that an investigation is currently underway regarding a bank which appears to be operating from within the Cook Islands as a shell bank. The bank in question now has licence conditions imposed which mirror the elements of Practice Note 1a and with which it must comply or face enforcement action. Another bank has had action taken against it for a number of matters, including the fact that it demonstrated elements of a shell bank. This indicates the seriousness with which the authorities are enforcing the relevant physical presence requirements.

721. While neither bank exhibited the sum of the characteristics of a shell bank as described in the Basle Banking Committee's Paper on Shell Banks, the FSC was not convinced that the "mind and management" or the complete financing records of either bank was located in the Cook Islands.

722. As a result of discussions with the banking sector, it appeared that those banks which are subject to group policy were prevented from undertaking correspondent banking relationships with shell banks and they were required to have satisfied themselves that respondent financial institutions in a foreign country do not permit their accounts to be used by shell banks. Other banks did not have such policies.

### **3.9.2. Recommendations and Comments**

723. The vigorous enforcement by the FSC of the physical presence requirements contained in the Banking Act effectively prohibits the operation of shell banks in the Cook Islands. However, the Banking Act does not prohibit banks in the Cook Islands from undertaking correspondent banking relationship with shell banks, nor does it require banks to satisfy themselves that respondent financial institutions in a foreign country do not permit their accounts to be used by shell banks.

724. Provisions should therefore be put in place to ensure that banks:

- are prohibited from undertaking correspondent banking relationship with shell banks; and
- are required to satisfy themselves that respondent financial institutions in a foreign country do not permit their accounts to be used by shell banks.

### **3.9.3. Compliance with Recommendation 18**

	<b>Rating</b>	<b>Summary of factors underlying rating</b>
<b>R.18</b>	<b>PC</b>	<ul style="list-style-type: none"><li>• Banks are not required to satisfy themselves that respondent financial institutions in a foreign country do not permit their accounts to be used by</li></ul>

		<p>shell banks.</p> <ul style="list-style-type: none"> <li>• A bank with some attributes of a shell bank (ie the mind and management and the financing records were not located in the CIs) does appear to have been operating from the Cook Islands but the authorities have taken appropriate and effective action against it.</li> </ul>
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**Regulation, supervision, guidance, monitoring and sanctions**

**3.10. The Supervisory and Oversight System - Competent Authorities and SROs: Role, Functions, Duties and Powers (including sanctions) (R.23, 30, 29, 17, 32 & 25)**

**3.10.1. Description and Analysis**

725. Under the FTRA, all reporting institutions are supervised by the CIFIU for AML/CFT purposes. However, the CIFIU has delegated under section 30 of the FTRA to the FSC responsibility for annual on-site inspections of banks and TCSPs for compliance with Part 2 of the FTRA. The CIFIU is fully responsible for supervision of other RIs for AML/CFT purposes.

726. The FSC’s primary role is to licence financial institutions and monitor their compliance with the relevant legislation, namely the Banking Act, the FSC Act, the Offshore Insurance Act and, from 1 January 2009, the *Insurance Act 2008*. The FSC also administers the Trustee Companies Act, the International Companies Act, the International Trusts Act and the Limited Liability Companies Act.

727. The FSC is self-funded from registration and renewal fees collected from the offshore sector and is not dependent on government funding. Should more resources be necessary, the Commissioner would be able to seek to recruit them immediately.

728. Ultimate responsibility for AML/CFT enforcement rests with the CIFIU. However, the FSC, as supervisor of licensed financial entities, carries out on-site inspections under Part 2 of the FTRA under delegation from the CIFIU, sometimes jointly with CIFIU staff who are carrying out inspections under Part 3 of the Act. Reports of these inspections are passed to the CIFIU.

729. Because of the small number of licensed financial institutions in the Cook Islands, each institution is visited every year for an on-site inspection.

***Authorities/SROs - roles and duties & Structure and resources - R.23, 30***

**Recommendation 23 (Supervisory authorities)**

***Designated supervisory authorities and application of AML/CFT measures***

730. The following table sets out the primary areas of responsibility under the FTRA for AML/CFT on a day-to-day basis and for on-site examinations.

**Table 7: Responsibility for day-to-day supervision under FTRA**

<b>Institution</b>	<b>Responsibility</b>
Banks, domestic and offshore	FSC (Part 2); CIFIU (Part 3)
Insurers under Offshore Insurance Act (now repealed)	FSC (Part 2); CIFIU (Part 3)
Insurers under <i>Insurance Act 2008</i>	FSC (Part 2); CIFIU (Part 3)
Trustee companies	FSC (Part 2); CIFIU (Part 3)
Real Estate Agents	CIFIU (Parts 2 and 3)
Dealers in precious stones	CIFIU (Parts 2 and 3)
Accountants	CIFIU (Parts 2 and 3)
Lawyers	CIFIU (Parts 2 and 3)
Motor Dealers	CIFIU (Parts 2 and 3)
Money changers and remittance businesses	CIFIU <sup>15</sup>

***Regulation and supervision of FIs (c. 23.1)***

731. The FSC, under a power delegated to it by the CIFIU, conducts an annual on-site inspection of banks for compliance with Part 2 of the FTRA, the Banking Act, the FSC Act and Prudential Statement 08-2006 and trustee companies for compliance with Part 2 of the FTRA. The Insurance sector has not been the subject of on-site visits. For those entities where a serious problem is identified with compliance, a written report is issued, an interview is conducted and a re-visit is scheduled within the next six months to ascertain whether there has been any improvement. Where there has not been any improvement, the matter is referred to the CIFIU for it to decide whether to take enforcement action against the entity. Although no sanction has yet been applied against an institution for non-compliance with Part 2 of the FTRA as a result of breaches of CDD a Deed of Arrangement was entered into between the FSC and the RI whereby no new customers could be taken on without the FSC first giving its approval.

732. Where any suspicious transactions are identified, reports are made by the FSC to the CIFIU for further investigation. A number of issues have been formally referred to the CIFIU by the FSC – these generally involve either suspicious transactions or customers whose names appear on the Worldcheck database. Action to be taken is the responsibility of the CIFIU.

733. Upon receipt by the CIFIU, STRs submitted by the FSC are entered into the CIFIU database. Where further information is required from the FSC, that information is requested. Several of the STRs submitted by the FSC form part of an ongoing investigation involving the Cook Islands Police and a

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<sup>15</sup> Currently the CIFIU but may change once the Money Changers and Remittance Business Act comes into force in 2009.

foreign law enforcement authority. No sanction has yet been applied against the institution for failing to report the STR.

734. The CIFIU conducts an annual on-site inspection of banks and trustee companies for compliance with Part 3 of the FTRA. As with the FSC, for those entities where a serious problem is identified with compliance, a written report is issued, an interview is conducted and a re-visit scheduled within the next 6 months to ascertain whether there has been any improvement. No sanction has yet been applied against an institution for non compliance with Part 3 of the FTRA.

***Designation of competent authority (c. 23.2)***

735. Under the FTRA, the financial institutions sector is supervised by the CIFIU for AML/CFT purposes. The CIFIU or any person authorized by the CIFIU is empowered under section 30 of the FTRA to examine the records and inquire into the business and affairs of any RI for the purpose of ensuring compliance with Parts 2 and 3 of the FTRA and, for that purpose may enter any premises in which the CIFIU, on reasonable grounds, believes that there are records relevant to ensuring compliance with Parts 2 and 3 of the FTRA.

736. The FSC has powers under the Banking Act, the FSC Act and the Trustee Companies Act and administers Part 2 of the FTRA on behalf of the CIFIU. Under the FSC Act, the FSC has a duty to regulate licensed financial institutions in the Cook Islands in a manner which is to internationally accepted standards. The FSC is required to keep under review the operation of the Cook Islands legislation as it applies to licensed financial institutions and the effectiveness of supervision of licensed financial institutions; to continually monitor the extent to which Cook Islands legislation and the supervision of licensed financial institutions comply with internationally accepted standards and, through the supervision of licensed financial institutions, to protect the public against the use of licensed financial institutions for financial crime and money laundering.

***Structure and resources of supervisory authorities<sup>16</sup>***

737. The FSC has a staff of nine – the Commissioner, the Senior Supervisor, four supervisory staff, the Registrar of International Companies and Limited Liability Companies and two support staff. These numbers are considered adequate for the amount of work involved.

738. The FSC is an independent statutory body that is responsible to the Minister for Finance. It has a board of five non-executive directors and the day-to-day administration is carried out by the Commissioner. Each year, at 31 March, a Statement of Corporate Intent, detailing the next year's budget and strategic direction is provided to the Minister and an Annual Report is also provided to him to table in Parliament. The FSC is funded from registration and renewal fees from offshore entities.

739. As the FSC was only formed in 2003, improving the capacity of the staff has been a high priority. Assistance has been provided by the Australian Prudential Regulation Authority, the Pacific Financial Technical Assistance Centre, the International Monetary Fund and NZ Aid.

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<sup>16</sup> As related to R.30; see s.7.1 for the compliance rating for this Recommendation.

740. As noted in section 2.5 of this report, the Evaluation Team considers that the CIFIU has adequate resources to complete its functions under the FTRA, including its supervisory functions.

***Professional standards of staff of competent authorities***

741. Staff of the FSC are bound by the confidentiality provisions in the Acts administered by it. Staff are employed under the FSC Act. In addition, the Terms and Conditions of Employment document sets out the standard of conduct expected of staff.

***Training of staff of competent authorities***

742. All supervisory staff at the FSC have undertaken the on-line UNODC training provided through the CIFIU. In addition, all supervisory staff have undergone other training on AML/CFT. As noted below, however, RIs in the Cook Islands offshore sector offer a range of complex structures which are attractive to high net worth individuals - it is important to ensure that supervisors (both in the FSC and the CIFIU) have the necessary knowledge and training in order to conduct effective examinations of these institutions.

***Authorities' Powers and Sanctions – R.29 & 17***

**Recommendation 29 (supervisory powers)**

743. The CIFIU is established by the FTRA which provides for its functions, powers and the duties of the Head of the CIFIU. The FTRA provides for the Head to appoint officers and employees of the CIFIU and it also provides for the Head to authorize any person, to carry out any power, duty or function conferred on the Head under the Act. Under the FTRA the CIFIU is authorized to undertake on-site examinations of RIs for the purpose of ensuring compliance with Parts 2 and 3 of the FTRA.

***Powers to monitor compliance***

744. Section 31 of the FTRA empowers the CIFIU to enforce compliance. It requires every officer and employee of a RI to take all reasonable steps to ensure compliance with its obligations under this Act. The CIFIU may direct or enter into an agreement with any RI to implement any action plan to ensure compliance with its obligations under the FTRA. If a RI fails to comply with a directive or fails to implement an action plan, the CIFIU may, on application to the Court, obtain an injunction against all or any of the officers or employees of that RI on the terms that the Court considers necessary to enforce compliance with those obligations. In granting an injunction, the Court may order that, if the RI or any officer or employee of that institution fails, without reasonable excuse, to comply with all or any of the provisions of that injunction, the RI, officer or employee must pay a financial penalty in the sum of \$20,000 or any other penalty that the Court may determine.

***Authority to conduct AML/CFT inspections***

745. Section 30(1) of the FTRA empowers the CIFIU to enter any RI for the purpose of ensuring compliance with parts 2 and 3 of the Act. The CIFIU or any person authorised by the CIFIU may examine the records and inquire into the business and affairs of any RI for the purpose of ensuring compliance with Parts 2 and 3 and, for that purpose, may at any reasonable time without warrant, enter any premises in which the CIFIU or the authorised person believes, on reasonable grounds, that there are records

relevant to ensuring compliance with Parts 2 and 3; use or cause to be used any computer system or data processing system in the premises to examine any data contained in or available to the system; reproduce any record, or cause it to be reproduced from the data, in the form of a printout or other output for examination or copying and use or cause to be used any copying equipment in the premises to make copies of any record.

746. Additionally, the owner or person in charge of premises referred to in sub-section 30(1) and every person found there must give the CIFIU or any authorised person all reasonable assistance to enable them to carry out their responsibilities and must furnish them with any information that they may reasonably require with respect to the administration of Parts 2 and 3 or any regulations made under this Act. Any person who willfully obstructs or hinders or fails to cooperate with the CIFIU or any authorised person in the lawful exercise of the powers under sub-section (1) or any person who does not comply with sub-section (2) commits an offence punishable by, in the case of an individual, to a fine of up to \$20,000 or a term of imprisonment of up to two years, or both and in the case of a body corporate, to a fine of up to \$100, 00.

747. The CIFIU may send any information from, or derived from, an examination to a supervisory authority; the Solicitor-General or a law enforcement agency or a foreign supervisory authority if the CIFIU has reasonable grounds to suspect that the information is suspicious or is relevant to an investigation for non-compliance with this Act, a serious offence, a ML offence or a TF offence.

748. The following table shows the number of Banks and TCSPs which have been the subject of on-site inspections by the CIFIU and FSC in recent years:

**Table 8: On-site examinations of Banks and TCSPs**

<b>Year</b>	<b>No. on-sites</b>
2006	14
2007	15
2008	12
2009	13 (scheduled)

***Power compel production of records***

749. The CIFIU, and the FSC under its delegated authority from the CIFIU under section 30, (1)(c) of the FTRA, are authorised to reproduce any record, or cause it to be reproduced from the data, in the form of a printout or other output for examination or copying records or information that are relevant for ensuring compliance under Parts 2 (CDD, record keeping and monitoring) and 3 (reporting of cash, electronic funds transfers over \$10,000 and suspicious transactions) of the Act. The owner or person in charge of the premises and every person found there must give the CIFIU or any authorized person all reasonable assistance to enable them to carry out their responsibilities and must furnish them with any

information that they may reasonably require to respect to the administration of Parts 2 and 3 or any regulations made under the Act.

750. Section 30 (3) of the FTRA provides sanctions for obstruction or for failing to cooperate with the CIFIU, which is an arrestable offence.

#### ***Powers of enforcement & sanction (c. 29.4)***

751. The FTRA provides sanctions for contravention of provisions including those of identification and verification, record keeping, anonymous accounts, reporting obligations and suspicious transaction reporting.

752. Section 30(3) of the FTRA provides sanctions for obstruction or for failing to cooperate with the CIFIU, which is an arrestable offence.

#### **Recommendation 17 (Sanctions)**

##### ***Availability of effective, proportionate & dissuasive sanctions***

753. . If a RI contravenes the CDD requirements of the FTRA the institution commits an offence punishable by, in the case of an individual, to a fine of up to \$10,000 or to a term of imprisonment of up to 12 months, or both; or in the case of a body corporate, to a fine of up to \$50,000. If a RI contravenes the record keeping requirements the institution commits an offence punishable by, in the case of an individual, to a fine of up to \$5,000 and in the case of a body corporate, to a fine of up to \$20,000.

754. There are no administrative sanctions available to the CIFIU where a RI has contravened any of the provisions of the FTRA.

##### ***Designation of authority to impose sanctions***

755. The CIFIU is the competent authority empowered to apply the sanctions mentioned above.

##### ***Ability to sanction directors & senior management of FIs***

756. Sanctions apply to legal entities including employers and principals under section 38 of the FTRA and directors, controllers and officers of the body corporate under section 39 of the FTRA.

##### ***Range of sanctions—scope and proportionality***

757. The FTRA does not provide the authority to impose disciplinary and financial sanctions or the power to withdraw, restrict or suspend the FI's licence.

758. However, section 31 of the FTRA provides the power to the CIFIU to enforce compliance and the CIFIU may direct or enter into an agreement with a RI on any issues of non-compliance. On failure to comply with the direction, the CIFIU can seek for an injunction against the RI on the terms that the Court considers necessary.

### Market entry – Recommendation 23

759. All banks are required to be licensed under the *Banking Act 2003*. When the Banking Act came into effect on 1 July 2003, all existing banks in the Cook Islands were required to apply to be re-licensed by 31 May 2004, which led to a large drop in the number of offshore banks in the jurisdiction. This is because prior to 2003, banks were licensed but did not have to comply with any prudential standards, and were not supervised.

760. In addition to the requirements set out in Part 2 of the Banking Act, there are also a number of Prudential Standards issued under the Act that apply to the licensing process.

- Prudential Statement 01-2004 – Bank Licensing Requirements – sets out the information that is required in a licence application, and requires applicants to be consistent in the way that the material is provided to the FSC. An application is not considered to be received until all the required information has been provided.
- Prudential Statement 02-2004 – Minimum Eligible Capital – contains the financial requirement for licensees.
- Prudential Statement 06-2005 – Fit and Proper Persons – sets out the minimum requirements for Directors and Management in terms of ‘fitness’ and competence. The FSC conducts independent checks on all applicants and for all references received.

761. Offshore insurers were, up until 1 January 2009, subject to the licensing requirements of the *Off-shore Insurance Act 1981*. This Act was extremely limited in its coverage. While the Commission was required, when considering a licence application, to review the nature and character of the body corporate’s business, its financial standing, stock ownership, the shareholding and management and to obtain such references as they felt appropriate, the requirements of the 1981 Act fell short of requiring a fit and proper test.

762. On 1 January 2009 the *Insurance Act 2008* came into force. This Act is comprehensive in its requirements and provides for the licensing, regulation and supervision of insurance business and of insurance managers and intermediaries and for related purposes.

763. The *Insurance Act 2008* has rigorous licensing requirements and Prudential Statements will be issued for licensing of insurers, branches of insurers, external insurers, insurance managers and insurance intermediaries. Astringent fit and proper test will be applied, the competency elements of which are codified in the Insurance Code. This test will be applied on a retrospective basis to those offshore insurers who have previously been licensed under the *Off-shore Insurance Act 1981*.

764. Any change in ownership or control of licensed entities is required to have the approval of the FSC. New owners are required to submit the same documentation that is required for an initial licence approval and this is assessed in the same way as a licence application. Ownership and control is therefore subject to a consistent assessment regime.

### ***Fit and proper criteria and prevention of criminals from controlling institutions***

765. Section 8 of the *Banking Act 2003* sets out the criteria for issuing a banking licence and provides that the Commission must not issue a licence unless it is satisfied, amongst other things, that the ownership spread, reputation, financial capacity and financial history (if any) of the applicant are satisfactory, and each director and manager of the applicant is a fit and proper person and has sufficient experience in banking to be involved with operations or management of a bank and each associate of the applicant is a fit and proper person to have an interest in a bank.

766. The 'fit and proper' test is applied rigorously and consistently by the FSC to all new directors and senior managers of banks. The test requires certain attestations to be given by the person being assessed and these are independently verified. In the past year, such checks have revealed a fraudulent reference presented to the FSC. Police checks are also required as part of the 'fit and proper' test.

767. Section 10 of the *Insurance Act 2008* provides that the Commission may issue a licence to an applicant if it is satisfied that, amongst other things, the applicant, its directors and key functionaries and any persons having a significant interest in the applicant satisfy the Commission's fit and proper criteria. Additionally, the Commission may refuse to issue a licence if it is of the opinion that any person having a share or other interest in the applicant, whether legal or equitable, does not satisfy the Commission's fit and proper criteria.

### ***Licensing or registration of value transfer/exchange services***

768. Other than banks, the only other business entity that is involved in money-changing and the sending and receiving of remittances is Western Union. Currently, Western Union is registered as a domestic company in the Cook Islands.

769. It is intended that the Money Changers and Remittance Businesses Bill 2008, when enacted, will require the licensing of any business (apart from an institution licensed under the Banking Act) that performs money changing services over a prescribed amount or that receives funds to remit overseas. The fit and proper test criteria will apply to the Directors and Managers of these businesses as part of the licensing process.

770. The major hotels in the Cook Islands all perform limited money changing services for guests but with the increased presence of ATMs in the Cook Islands, this service is diminishing. The hotels impose a 10% administrative fee for performing this service. Generally, hotels maintain a limited amount of float for money changing purpose and usually hotels offer this service after banking hours for the convenience of their guests. A \$100 threshold is applicable per transaction for money changing at hotels. However, since there is neither reporting nor supervision of money changing activities at hotel, it is not possible to ascertain if hotels comply with the threshold.

771. When the hotel carries out any money changing transactions, the hotel will record the name of the customer, room number or if the customer is from another hotel, the name of the hotel.

772. Remittances from family overseas (mainly New Zealand and Australia) are assuming lesser importance in the Cook Islands. Remittances sent overseas are still important, particularly for expatriate workers from Fiji and the Philippines. Amounts remitted are generally small.

### ***Licensing and AML/CFT supervision of other FIs***

773. Apart from banks, insurers, trustee companies, one payday lender and money changers/remittance businesses, there are no other financial institutions in the Cook Islands

### **Ongoing supervision and monitoring – Recommendation 23**

#### ***Application of prudential regulations to AML/CFT***

774. The FSC conducts on-site and off-site supervision of banks. Each bank has an annual on-site inspection under the FTRA and an annual on-site examination under the Banking Act. Frequently these are conducted at the same time, but not always.

775. Banks are expected to comply with their obligations under the Banking Act on a continuous basis. Supervision is in accordance with the Basel Core Principles for Banking Supervision.

776. Offshore insurers are subject to off-site monitoring by the FSC. Insurers are required to submit half-yearly and annual returns, with financial statements. The annual statement for each of the insurers (currently three) is examined and a short note prepared.

777. The Offshore Insurance Act which is no longer in effect was deficient in its powers. However, the *Insurance Act 2008* which commenced on 1 January 2009 provides the FSC with much greater supervisory and regulatory powers. It also provides for domestic insurers to be regulated. The *Insurance Act 2008* has been drafted to reflect the IAIS Core Principles, but is reduced in some areas in order not to stifle the operation of the insurance market. It is important that domestic insurance should still be provided in the Cook Islands once this legislation comes into effect. Given its very recent passage, it was too early for the Evaluation Team to assess the effectiveness of the provisions of the *Insurance Act 2008*.

#### ***Monitoring and supervision of value transfer/exchange services***

778. A Bill has been drafted that will lead to licensing and regulation of moneychangers and (outwards) remittance businesses in the Cook Islands. It is expected that this Bill will be introduced into Parliament early in 2009. The legislation will be administered by the FSC. Currently AML/CFT inspections in this area are performed by the CIFIU under the FTRA.

779. The authorities informed the Evaluation Team that the draft Bill will not cover money changing at hotels in view of the very low limit and higher commission charged by hotels; it is envisaged that the money changing activities at hotels will not be at all significant. The associated risk is also low as the service is mainly offered to the guest for their convenience. However, hotels will be required to report quarterly on the amounts of money that have been changed.

780. The new legislation will allow licensing conditions, including a fit and proper test, to be imposed on owners, directors and managers of moneychangers and remittance business.

### ***Licensing and AML/CFT supervision of other FIs***

781. Businesses providing transfer of money or value, including:

- (i) collecting, holding, exchanging or remitting funds or the value of money, or otherwise negotiating transfers of funds or the value of money, on behalf of other persons;
- (ii) delivering funds; or
- (iii) issuing, selling or redeeming travelers' cheques, money orders or similar instruments;

are captured under section 2 of the FTRA as a RI and are therefore required under the FTRA to be supervised by the CIFIU, and to implement all AML/CFT obligations.

782. The sole money exchange and transfer business in the Cook Islands, namely Western Union, even though not yet licensed, has implemented the requirements of the FTRA on CDD, record keeping, reporting of transactions and putting in place systems, and AML/CFT policies and procedures.

783. As noted above, limited money changing services are available at two hotel resorts, but guests are encouraged to use the banks or Western Union. Only two resorts allow currency exchange for non-guests at a maximum of \$100 of any currency. According to Cook Islands authorities, there has been no evidence that this service has been abused or predominantly used to avoid the use of the same services provided by the banks and Western Union.

***Guidelines – R.25 (Guidance for financial institutions other than on STRs)***

784. On 20 June 2008, the CIFIU issued guidelines to all FI and Designated Non Financial and Business Professions (DNFBPs). The following guidelines were issued:

- FTRA Guideline 1 – Background on ML and TF
- FTRA Guideline 2 – STR Reporting
- FTRA Guideline 3 – CTR Reporting
- FTRA Guideline 4 – EFTR Reporting
- FTRA Guideline 5 – Customer Due Diligence and Record Keeping
- FTRA Guideline 6 – Implementing a Compliance Regime

785. An FTRA Guideline 7 is also being developed specifically for lawyers.

786. The FSC has issued Prudential Statement 08-2006 under the Banking Act to codify its requirements for banks in relation to CDD. A similar Prudential Statement will be issued for insurers.

787. The FSC does not have any power under the Trustee Companies Act to issue Prudential Statements. However, it has told the industry that it expects trustee companies to abide by the Statement of Best Practice for Trust and Company Service Providers, issued by the Offshore Group of Banking Supervisors. It is intended that the Trustee Companies Act be re-written to incorporate provisions that are contained in the Statement of Best Practice. Some preliminary work has been done and funding has been sought, but not yet obtained, for a revision of this legislation.

### *Statistics and effectiveness*

788. The CIFIU and the FSC maintain records of on-site examinations undertaken. The table shows inspections by both the FSC and CIFIU under Part 2 and Part 3 of the FTRA respectively.

**Table 9: On-site inspections by institution type, 2004 – 2007<sup>17</sup>**

<b>Institution</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>
Domestic Banks (3)	3	3	3	3	
International Banks (4)	4	5	5	5	
Trust Companies (6)	6	7	6	7	

789. No entity has ever been fully compliant, but levels of non-compliance tend to be low. Generally, the main issue now is back-capture of data for old accounts (opened pre-2004) and whether accounts can be used if the data is not up-to-date. Specific issues in the past year (2008) have been failure to act where a customer has had a conviction or been barred from acting as a Director, account opening documents that do not make any economic sense, documents that are presented in a language other than English, and documents supplied by an introducer that are suspected of being fraudulent.

790. In general it appeared to the Evaluation Team that both the banking and insurance sectors have good working relationships with both the FSC and the CIFIU. The private sector praised both authorities for their assistance and approachability.

791. The CIFIU has some powers to enforce compliance by the RIs with the requirements of the FTRA. The sanctions available to the CIFIU are however limited to issuing a directive or an action plan. If a RI fails to comply with a directive or action plan, the CIFIU may, on application to the Court, obtain an injunction against all or any of the officers or employees of that RI. In granting an injunction, the Court may order that, if the RI fails to comply with the injunction a financial penalty of \$20,000 may be imposed. To date no such sanction has been issued by the CIFIU to a RI

792. Although, as identified in the above paragraph, no sanctions have been issued by the CIFIU to RIs, the FSC and the CIFIU, assisted by the CIP, in early 2008 has worked on a case for failure to undertake proper CDD, but despite the case now being resolved there is ongoing suppression ordered by the High Court of the Cook Islands until the bank winds-up and therefore the case could not be discussed with the Evaluation Team.

#### **3.10.2. Recommendations and Comments**

793. As the FTRA is currently drafted, the CIFIU only has the ability to enter into an agreement with any RI that has failed to comply with any of the obligations of the FTRA. Where such an agreement or directive is not complied with by a RI then the CIFIU may apply to the Court to obtain an injunction

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<sup>17</sup> In 2007 there were seven Trust Companies and six in 2008

against all or any of the officers of employees of the institution. Other sanctions available to the CIFIU for non-compliance with the FTRA are criminal ones which include substantial fines and imprisonment terms. Such sanctions are not considered to be effective, proportionate and dissuasive. Consideration should be given to providing the CIFIU with the ability to issue a range of proportionate administrative sanctions relevant to the level of breach of the FTRA.

794. Consideration should be given to providing the CIFIU and/or the FSC with the power to impose disciplinary and financial sanctions and the power to withdraw, restrict or suspend the institution's licence where applicable.

795. The FSC and the CIFIU should undertake on-site examinations of the insurance industry as soon as possible in order to ensure that the requirements of the FTRA are being met.

796. Consideration should be given to the FSC reviewing the licences issued to the insurance sector in order to ensure that no criminals or their associates are holding or are the beneficial owner of a significant controlling interest or holding a management function in an insurance institution and to undertake a fit and proper test to licensed insurers as provided for in the Insurance Act 2008.

797. Consideration should be given to issuing the FTRA guidelines to the insurance sector so as to assist them with complying with the requirements of the FTRA.

798. The Evaluation Team, when looking at the risk potential of the insurance sector took into account its size and the fact that they are managed by persons who have received training and who have been subject to on-site examinations in respect of other RIs for which they are responsible.

799. The CIFIU should consider making more use of its website in order to disseminate information to the RIs. The provision of information on current "scams" or schemes which intend to defraud customers of substantial sums of money would be useful and would enable the RIs to be aware of the potential for their customers to be the subject of such schemes.

800. Consideration should be given to reviewing the structure of the supervisory authorities in order to ensure that the available resources are being utilized in the most effective and productive manner. The supervisory authorities should consider whether joint on-sites leads to duplication of effort in some areas of the examination or whether there is the possibility for particular areas of business relationships to be overlooked completely.

801. Whatever approach is taken to AML/CFT supervision (ie a continuation of joint on-site examinations by the FSC and CIFIU, or conduct of the entire AML/CFT examination by either the FSC or CIFIU), the Cook Islands must ensure that the relevant supervisory staff are adequately trained and understand the individual financial sectors and of the products and services offered by those sectors. If the CIFIU does assume responsibility for assessing compliance with both Parts 2 and 3 of the FTRA, it should ensure that additional sector-specific training is provided to its staff (possibly through secondments to the FSC or to larger financial institutions), as well as considering the benefits of seconding staff from the FSC to the CIFIU.

802. The Evaluation Team noted that RIs in the offshore sector in the Cook Islands offer a range of complex structures which are attractive to high net worth individuals. Authorities should ensure that

supervisors, both in the CIFIU and the FSC, have the necessary knowledge and training in order to conduct effective examinations of these institutions.

### 3.10.3. Compliance with Recommendations 17, 23, 25 & 29

	Rating	Summary of factors underlying rating
<b>R.17</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• CIFIU should have the power to issue administrative sanctions for non-compliance with the FTRA.</li> <li>• CIFIU or FSC should have the power to impose disciplinary and financial sanctions and have the power to withdraw, restrict or suspend the institution's licence for depending on the severity of the breach.</li> </ul>
<b>R.23</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>• Insurance sector: Noting that the sector is very small and presents few risks at present, no on-site examinations have been undertaken in respect of the insurance sector.</li> <li>• Non-bank money changers and the money value transfer operator are not registered or licensed and not subject to a regulatory regime other than for AML/CFT under the FTRA.</li> </ul>
<b>R.25</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>• The CIFIU has not issues the FTRA Guidelines to the insurance industry and both the FSC and the CIFIU must enter into dialogue with the insurance sector.</li> </ul>
<b>R.29</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• Powers of enforcement and sanction are not adequate.</li> </ul>

### 3.11. Money or Value Transfer Services (SR.VI)

#### 3.11.1. Description and Analysis (summary)

803. As noted above, there is only one money changer and remittance business in the Cook Islands, namely Western Union. It has eight agents operating on each sister island in the Cook Islands. Western Union also offers a payday loan facility and currently there are three customers signed up for the payday facilities. The payday loan facilities allow a maximum of \$200 to \$300 advance per pay period.

#### *Legal framework*

804. Currently, there is no requirement for money value transfer service business to be licensed or registered. To address this, Cook Islands has drafted the Money Changers and Remittance Business Bill 2008 (the 2008 Bill) which, when enacted, will provide the legislative framework to regulate and supervise money or value transfer service business in the Cook Islands. The 2008 Bill will apply to money changers and remittance operators (outward).

805. For AML/CFT purposes, section 2 of the FTRA incorporates as a RI the business of providing transfer of money or value and money changing. These businesses are thus obligated to perform CDD, record keeping, monitoring of transactions and reporting of suspicious transactions as stipulated in Parts 2 and 3 of the FTRA.

### ***Registration or licensing authority***

806. The FSC will be the designated authority to register and licence money changers and remittance businesses and to ensure compliance with the requirements of the 2008 Bill. For AML/CFT, the CIFIU is currently the authority to ensure compliance with Parts 2 and 3 of the FTRA.

### ***Application of FATF Recommendations***

807. As noted previously, money changers and remittance businesses fall under the definition of a “reporting institution” under sub-section 2(d) of the FTRA and are therefore obligated to ensure compliance with the FTRA. The CIFIU has imposed the same standards as that required of banks.

808. The CIFIU has undertaken three on-site examinations of Western Union for compliance with the FTRA since early 2008. In response to feedback from the CIFIU, Western Union has improved its AML systems and has developed an AML compliance manual and implemented measures to prevent Western Union being used as a conduit for ML. According to authorities, the AML system now adequately addresses the requirements of Part 2 and 3 of the FTRA.

809. The CDD requirements both for inward and outward remittances are implemented according to the FTRA and comply with the FATF requirements for wire transfers.

810. A robust system of monitoring transactions is in place. The system includes appropriate screening of transactions and name match capabilities with its internal watch list, United Nations’ list of terrorists as well as the United States’ OFAC list. The reporting of suspicious transactions has been effective and has resulted in a case where an investigation was pursued that led to successful prosecution of the perpetrator for the predicate drug-related offence.

811. In terms of employee screening, all employees are screened with police background checks (for non-Cook Islanders) and a reference from previous employer, where applicable, is requested. All employees and agents are trained. For agents based in outer islands, an on-line training programme, which is internally developed, is used.

812. Western Union confirmed to the Evaluation Team that its relationship with the authorities is good and the feedback from the CIFIU on its AML/CFT system has been effective and helpful.

813. There has been a recent change in the compliance officer arrangements. The new compliance officer, though having assumed the role of the MLRO under the FTRA, has yet to receive formal confirmation or approval from the CIFIU. Nevertheless, the new MLRO is carrying out the duties as required under the FTRA.

### ***Monitoring compliance and sanctions***

814. Since the money changers and remittance businesses will be supervised and regulated by the FSC once the 2008 Bill comes into effect, it will be jointly supervised with the CIFIU for its AML/CFT obligations under the FTRA, with the FSC taking responsibility for assessing compliance with Part 2 of the Act.

815. As noted above, the CIFIU has conducted three on-site reviews and compliance audits on Western Union since early 2008.

### *List of agents*

816. Western Union maintains a list of agents.

817. Money changers and remittance business are required to maintain records for a period of six years under the FTRA and the same requirement will apply under the 2008 Bill, when enacted.

### *Sanctions*

818. Under the 2008 Bill, money changers and remittance businesses will be subject to the same supervision as any financial institution in the Cook Islands. However, there will be a lesser regulatory regime as capital requirements will not be imposed.

819. As noted in section 3.10 of this report, the CIFIU does not have a range of sanctions available that is proportionate to the severity of non-compliance. The provision for sanctions is stipulated in Section 31 of the FTRA where CIFIU has the power to enforce compliance either through a directive or an agreement for the RI to implement the agreed action plans. If the RI fails to comply with the directive, agreement or action plan, the CIFIU may apply to the Court. The RI may be imposed a penalty of \$20,000 or any other penalty that the Court may determine.

820. The on-site examinations undertaken by the CIFIU have however resulted in the RI taking appropriate steps to rectify the areas where it had been non-compliant with the FTRA. There has been no need to apply sanctions as the issues on non-compliance have been adequately addressed and rectified within the time frame.

### *Additional element*

821. The 2008 Bill does not currently incorporate all the elements of the Best Practices Paper (BPP) for SRVI. It is recommended that Cook Islands consider the BPP and where appropriate amend the Bill or issue regulations under the Bill, once enacted, to incorporate relevant aspects of the BPP.

### *Effectiveness*

822. The first on-site audit was undertaken in March 2007 which identified a large number of areas of non-compliance report with the FTRA. A follow-up onsite was undertaken in February 2008 and another in October 2008, and there has been dialogue with local staff and the Western Union Regional Manager in New Zealand to ensure that the necessary actions to ensure compliance are implemented. During the last on-site, a satisfactory report was issued and, according to authorities, Western Union has significantly improved its systems and procedures to comply with the FTRA.

823. While the licensing and regulatory regime for money changers and remittance operators has yet to be implemented, the AML/CFT compliance requirements in the FTRA are adequately applied by the sole money transfer and exchange business.

### 3.11.2. Recommendations and Comments

824. The FTRA is applicable to money and value transfer services. The obligations set out in Part 2 and 3 of the FTRA are implemented at Western Union, currently the sole provider of such services.

825. It is recommended that the competent authorities establish a range of proportionate sanctions depending on the severity of non-compliance so as to ensure more effective implementation of the FTRA by RIs in the future.

826. Based on the on-site assessment, there is no known operator of money changing (other than two hotels) or money value transfer operators, other than Western Union. Given the current economic and business environment in the Cook Islands, it does not seem likely that there is potential business for unregistered or underground money changing or money transfer operators.

827. While the risks of underground or *hawala* appears low, it is recommended that the authorities bring into effect a legal, regulatory and supervisory framework that complies with international standards within a reasonable time frame.

828. In its rating, the Evaluation Team has placed significant weight on effectiveness issues, taking into consideration that Western Union is the sole non-bank money changer and remittance operator in the Cook Islands, that it has met its AML/CFT obligations under the FTRA, and that it has been subject to regular on-site examinations by the CIFIU. Although there is not yet a legislative framework to enable licensing and establishment of a full regulatory regime, the authorities have nonetheless taken the necessary action to ensure that Western Union has implemented an effective AML/CFT system. This is evidenced by the fact that STRs reported by Western Union have resulted in successful investigations. In addition, Western Union appears to be able to adequately meet the current demand for money changing and remittance services in Cook Islands, meaning there is little business attractiveness for new market players. Until the new Bill is passed there is no approval process. The Bill is expected to go forward in June 2009 sittings of Parliament.

### 3.11.3. Compliance with Special Recommendation VI

	Rating	Summary of factors underlying rating
SR.VI	PC	<ul style="list-style-type: none"><li>• Yet to establish a legal, regulatory and supervisory framework</li><li>• Absence of a range of proportionate sanctions proportionate to severity of non-compliance.</li></ul>

## **4. PREVENTIVE MEASURES—DESIGNATED NON-FINANCIAL BUSINESSES AND PROFESSIONS**

### *General Description*

#### **4.1. Customer Due Diligence and Record-keeping (R.12)**

##### **4.1.1. Description and Analysis**

###### *Overview*

829. As noted in section 1 of this report, there are no casinos in the Cook Islands, but the remaining five categories of DNFBP, as defined by the FATF, are found in the Cook Islands. There are:

- six trust and company services providers;
- 47 lawyers, most of whom are employed in the offshore sector, and seven legal firms operating as businesses;
- six accountancy firms;
- five dealers in precious metals and stones (pearl dealers); four motor vehicle dealers; and
- four registered real estate agents.

830. DNFBPs are included as ‘reporting institutions’ in section 2 of the FTRA. In defining the various types of DNFBPs for the purposes of the FTRA, the Cook Islands has adhered very closely to the definitions contained in the glossary to the FATF Recommendations.

831. The requirements applied to financial institutions in the FTRA are thus similarly applied to DNFBPs. Section 2(t) of the FTRA provides that RIs include persons dealing in motor vehicles or high-value items above a prescribed threshold, including antiques, pearls (a significant industry in the Cook Islands), precious stones and precious metals. At the time of the on-site visit, the CIFIU was still in consultation with the relevant industries to determine the appropriate thresholds. Therefore, the regulations required to prescribe the threshold for dealers, which the CIFIU has identified as being relevant to motor vehicles and pearl dealers, had yet to be effected. In the meantime, however, in practice the CIFIU and these entities are applying the \$10,000 threshold for CDD and cash transaction reporting contained in the FTRA itself.

832. Accountants in the Cook Islands are generally involved in audit work and do not manage clients’ money or undertake work concerning formation of legal persons. Accountants may be involved in providing professional views on financial matters in the buying or selling of a business.

833. Lawyers may be involved in any of the FATF-designated types of activities, although the Cook Islands Law Society has raised an issue as to whether “managing funds” includes the mere receipt of funds into an account and payment out of those funds at the client’s direction, which usually occurs in a buying and selling of real estate. This issue is still being discussed by the CIFIU and the Law Society.

834. ‘Dealers’ in practice refers to pearl dealers who are involved in retailing and wholesaling of pearls. Pearl farmers are excluded from the definition of RIs. According to the Pearl Authority, the government is looking into reviving the industry and is in the process of establishing marketing strategies

that would also include distribution, branding and quality control. Yearly production is estimated to value approximately \$3 million where 90% of the pearls are exported.

835. Anyone can be a real estate agent as there are neither registration nor licensing requirements. There are only two real estate companies operating in Cook Islands and one of the companies interviewed said that the real estate sector is not very active with a total of fewer than 10 transactions undertaken by the company per annum. For transactions involving foreigners, approval must be obtained from the BTIB before any purchase or sale of properties can be concluded. Real estate agents are generally not involved in any financial transactions, as a lawyer will be engaged to carry out buying and selling of properties.

836. Trust and company service providers may be involved in any of the FATF-designated activities.

837. Dealers in motor vehicles refer to business entities involve in the buying and selling of motor vehicles and this sector is discussed below under R20 in section 4.4 of this report.

### ***Legal framework***

838. DNFBPs are captured under section 2 of the FTRA as ‘reporting institutions’. The categories of DNFBP covered in the Cook Islands are:

- accountants;
- lawyers, legal professionals and notaries public;
- dealers in precious metals and stones, in particular, pearls. There are few sales of precious metals and stones in the Cook Islands other than for pearls, which are grown locally;
- real estate agents, when they are involved in transactions for a client concerning the buying and selling of real estate;
- trust company service providers, including trustee companies; and
- motor vehicle dealers (motor vehicle dealers are discussed in section 4.4 of the report as other non-financial businesses).

839. Lawyers, notaries and other independent legal professionals and accountants are covered when they prepare for or carry out transactions for a client in relation to the following activities:

- buying and selling real estate;
- managing client funds, securities or other assets;
- management of bank, savings or securities accounts;
- organisation of contributions for the creation, operation or management of companies;
- creation, operation or management of legal persons or arrangement, and buying and selling of business entities.

840. Trust and Company Services Providers, including acting as a trustee company as defined in the *Trustee Companies Act 1981*, are covered in relation to:

- the formation or management of legal persons;
- acting as (or arranging for another person to act as ) a director or secretary of a company, a partner in a partnership or a similar position in relation to some other legal persons or arrangements;

- providing a registered office, business address or accommodation, correspondence or administrative address for a company, a partnership or some other legal persons or arrangements;
- acting as (or arranging for another person to act as ) a trustee of an express trust;
- acting as (or arranging for another person to act as ) a nominee shareholder for another person.

841. There is neither any casino nor any form of gaming outlet in the Cook Islands.

***CDD measures for DNFBPs (applying R5)***

842. Sections 4, 5 and 7 of the FTRA and the FTRA Guideline No. 5 on customer due diligence apply to all categories of DNFBPs. Currently, the CDD requirements in the FTRA are implemented equally for all customers and not varied based on risk.

843. As noted in section 3 of this report, however, the draft FTRA Risk Based Regulation 2009 would require RIs to implement a risk-based approach when the regulation comes into force in early 2009. At the point of the on-site visit, this regulation was still very much in draft format.

844. For dealers in precious metals and stones, including pearl dealers, the CIFIU informed the Evaluation Team during the on-site visit that it is considering requiring CDD to be conducted when undertaking cash transactions equal or exceed \$2,000. However, the threshold has yet to be specified formally to the dealers by way of regulation and in practice dealers are carrying out CDD in accordance with the general requirements of the act (ie when undertaking cash transactions exceeding \$10,000). This requirement is conveyed by CIFIU to the dealers during training and awareness programmes.

When is CDD required?

845. All DNFBPs are required to identify and verify their customer based on independent source documents, data or information or other evidence as is reasonably capable of verifying the identity of the customer in the circumstances as stipulated for financial institutions (see section 3.2 of this report). Anonymous transactions or accounts are prohibited under section 37 of the FTRA.

846. Section 4(d)(ii) of the FTRA stipulates that if the customer is a trust, a reporting institution must obtain information relating to nature of the trust and its beneficiaries. It does not however specifically require that the reporting institution collect identification information on the beneficial owners of a trust. Notwithstanding this, the Evaluation Team confirmed with the authorities and the TCSPs that in practice, information on the beneficial ownership of a trust is collected. A more detailed analysis of this issue is further provided in section 5.2 of this report.

Customer identification and verification

847. Similar to financial institutions, DNFBPs are required under section 4 of the FTRA and FTRA Guideline No. 5 to identify and verify all natural and legal persons, their legal status and the beneficial owners. This includes obtaining information relating to principal owners, directors, beneficiaries and the control structure of a legal entity. If the DNFBP has reasonable grounds to believe that the person is undertaking the transaction on behalf of another person, then the DNFBP must verify the identity of the other person or persons for whom, or for whose ultimate benefit, the transaction is being conducted.

848. The FTRA is silent with regard to timing of verification and there is no provision that allows for delayed verification. The authorities (CIFIU and FSC) confirmed that verification must be completed before any business relationship is established or transaction is to be conducted.

849. The FTRA further specifies that if the evidence of identity is not satisfactorily produced or obtained, the DNFBP should not proceed any further with the business relationship or transaction, and should consider reporting the matter to the CIFIU. The implementation of this requirement is evidenced from the STRs submitted by the TCSPs for transactions that failed to satisfactorily complete the CDD.

#### Ongoing due diligence

850. Similar to financial institutions, DNFBPs are required under section 4 of the FTRA to undertake ongoing due diligence on the business relationship and conduct ongoing scrutiny of any transaction being conducted to ensure that the transaction is consistent with the DNFBP's knowledge of the customer, the customer's business and risk profile, including where necessary, the source of funds.

851. There is no provision in the FTRA concerning CDD with regard to existing customers. The CIFIU confirmed that customer due diligence must be conducted for all existing customers. However, if the customer is a domestic person and known to the DNFBP, than simplified due diligence is accepted. However, if the customer is a foreign person, the full range of CDD as stipulated in the FTRA is required. In reality, the TCSPs and lawyers are facing challenges, in particular among customers that are resident outside of the Cook Islands. The completion of CDD for existing customers is a very slow process.

#### ***CDD measures for DNFBPs (applying R. 6 & 8-11)***

852. Similar to financial institutions, all DNFBPs are required under section 4 of the FTRA and FTRA Guideline No. 5 to put in place appropriate risk management systems to identify and verify politically exposed persons (PEPs). Senior management approval should be obtained before establishing business relationship and reasonable measures are taken to establish the source of funds. It is required that enhanced monitoring on PEPs relationships must be conducted.

853. The opportunity for the misuse of technological developments and the risks posed by non-face to face business in relation to domestic customers are not significant in the Cook Islands as transactions with domestic customers are all conducted through face to face contact. Hence, no reference is made in the FTRA on these issues. For foreigners, however, the CDD requirements are the same as those for face to face transactions.

854. Section 4 of the FTRA requires a DNFBP that relies on a third party or an intermediary to undertake its CDD obligations to ensure that it can immediately obtain the necessary information required and that copies of the identification information be made available upon request without delay.

855. Similar to financial institutions, DNFBPs are also required under section 6 of the FTRA to maintain records of all transactions and correspondence as well as CDD information to be kept for a minimum of six years from the date the account is closed or business relationship ceased, whichever is the later. DNFBPs are required to be able to reproduce records kept immediately upon request by the relevant authorities.

856. DNFBPs are also required under section 8 of the FTRA to pay special attention to any unusual, complex or large transactions. The background and purpose of any unusual transaction must be examined and the findings recorded.

### *Effectiveness*

857. On 20 June 2008, the CIFIU issued all DNFBPs with a copy of the FTRA Guidelines Nos. 1-6, which cover background on ML and TF; STR, CTR and EFTR reporting; CDD; and recording keeping and implementing a compliance regime. Each DNFBP has been given six months from the date of its on-site examination visit by the CIFIU to comply with the FTRA. Awareness training on the requirements of AML/CFT was also provided by the CIFIU to all DNFBPs. Generally, the DNFBPs are fully aware of their obligations.

858. Concerns about the risks posed by trust arrangements are analysed in detail in section 5.2 of this report. In relation to Recommendation 12, and the application of Recommendation 5 by TCSPs, as noted in section 5.2 of this report, while the current practices of TCSPs to collect beneficial ownership information when registering trusts, and on-site inspections of TCSPs by the FSC and CIFIU under the FTRA, go some way to meeting some of these concerns, serious risks remain, particularly in relation to some of the more complex trust structures and 'flee trusts' on offer.

859. As a result of the awareness training provided by the CIFIU, DNFBPs have highlighted their concerns in complying with some of the CDD requirements. Specifically two issues were highlighted by the Law Society in the meeting during the on-site assessment:-

- that the FTRA is not clear whether the definition "transaction" is wide enough to include the activities that do not involve transactions per se but simply relate to carrying out some form of business relationship such as formation of legal persons or advisory in nature. Therefore, the question arises whether or not the reporting of such activities, if suspicious, would in effect be going beyond the FTRA (see also section 3.7 of this report).
- The need for the CIFIU to issue more specific guidelines, especially the peculiarity of certain types of transactions that relate to land ownership where the beneficial owners are approved by the Court. It would seem duplicate or redundant to perform CDD when the Court has already approved beneficial owner.

860. The DNFBPs also highlighted the need for guidance with regards to the extent of CDD required if business were to originate from countries that have a well regulated AML/CFT regime and circumstances where the customers are well-known to the lawyers. The concern is generally on the cost of having to perform CDD as required in the FTRA.

861. The CIFIU informed the Evaluation Team that it is working with the Law Society and the Trustee Association to develop more specific risk-based CDD guidelines for the industries.

862. While the concerns raised by the DNFBPs are under consideration by the CIFIU, the CIFIU has proceeded to conduct on-site visits (starting in 2008) to ascertain whether the AML/CFT measures that have been put in place by the DNFBPs are compliant with the FTRA.

863. The CIFIU will continue with its on-site visits to all DNFBPs (at least once) and review the compliance status, within the next five months (January – June 09).

864. The CIFIU also indicated that it will be developing specific guidelines for pearl dealers to specify the cash threshold for CDD requirements. During the on-site visit to a pearl dealer, the dealer informed the Evaluation Team that more often than not, the payment for purchase is done by way of credit card. So far, the dealer had only one cash transaction of \$10,000 in which case the buyer and the dealer went to a bank to deposit the cash for the purchase. A CTR was lodged by the bank.

865. From the experience of the pearl dealer, generally the maximum paid by cash for a retail transaction is about \$500. Anything above that is usually by way of credit card. Wholesale transaction is settled through the banking system, usually by way electronic fund transfer.

#### **4.1.2. Recommendations and Comments**

866. The CIFIU should consider as a matter of priority issuing sector specific guidelines for certain categories of DNFBPs to provide more guidance to address specific business operations that may require either simplified or enhanced CDD. Specifically, in view of the various types of trust arrangements operating with different degrees of risk, it is recommended that sector specific guidance to allow for enhanced CDD in line with the uniqueness of the business operations of the TCSP sector be developed by the CIFIU and the FSC in consultation with the trustee association.

867. It is recommended that CI explicitly provide in the FTRA the requirement to collect information on the beneficiaries and to ascertain the beneficial owners of trusts.

868. It is recommended that the CIFIU addresses the relevant issues highlighted by the Law Society and the Trustee Association as a matter of priority to ensure effective implementation of the FTRA.

869. The CIFIU should consider issuing appropriate guidance for certain categories of DNFBPs on CDD for existing customers.

870. It is recommended that enhanced and ongoing CDD be conducted for more complex trust arrangements, such as “flee trusts” or those that involved using a trust account from which payment of a mortgage of real estate is made where the source of funds cannot be adequately ascertained. Such trust arrangements provide a mechanism to layer and distance any proceeds of crime from its origin. It may be reputational risk for the trustee company in the event of misuse of such arrangements.

871. It is recommended that trustee companies be required to take into consideration the implementation of the FATF standards in the country of origin of its co-trustees to determine the extent of CDD. It could also be a factor for the trustee company to consider the risk it is exposed to if the co-trustee is from a jurisdiction that has deficient AML/CFT measures.

#### **4.1.3. Compliance with Recommendation 12**

	<b>Rating</b>	<b>Summary of factors relevant to s.4.1 underlying overall rating</b>
<b>R.12</b>	<b>PC</b>	<ul style="list-style-type: none"><li>• There is no explicit legal requirements to collect information on beneficiaries of trusts</li></ul>

		<ul style="list-style-type: none"> <li>• No ongoing due diligence on the settlor, beneficiaries and transactions for trust arrangements in cases where the trustee has no control over the administration of the trust.</li> <li>• The FTRA is silent on CDD for existing customer and neither implementing regulations nor guidance have been issued.</li> <li>• Effectiveness is not fully ascertained since compliance audit has recently begun and time is given by the CIFIU for the reporting institutions to comply with the FTRA’s CDD requirements.</li> <li>• Lack of effective implementation of the FTRA among lawyers, real estate agents and dealers as the CIFIU has yet to address the issues highlighted by these entities.</li> </ul>
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## 4.2. Monitoring Transactions and other Issues (R.16) (Applying R.13 to 15 & 21)

### 4.2.1 Description and Analysis

#### *Applying Recommendation 13 - requirement to make STRs*

872. All DNFBPs (as “reporting institutions” under section 2 of the FTRA) are required under section 11 of the FTRA to report any transaction or attempted transactions if there are reasonable grounds to suspect that information concerning that transactions may be relating to a serious offence, ML or TF offence, irrespective of amount. There is no legislative exemption for reporting even if it involves fiscal matters.

873. Section 17 of the FTRA on privileged communication provides provisions to legal professional privilege or legal professional communication or secrecy. Lawyers are not required to disclose privileged communication.

874. Lawyers, notaries, other legal professionals and accountants are required, under section 11 of the FTRA, to submit STRs to the CIFIU directly in the form provided. Reporting is not done through SRO.

875. Section 12 of the FTRA provides for supervisory authority or auditor to report any transaction or attempted transactions if there are reasonable grounds to suspect that information concerning that transactions may be relating to a serious offence, money laundering or terrorism financing offence, irrespective of amount. There is no exemption for reporting even if it involves fiscal matters.

#### *Applying Recommendation 14*

876. DNFBPs are required under the FTRA to implement the requirements of FATF Recommendations 14, 15 and 21. These include not to disclose any STR related information, ensuring that employees understand and know the policies and procedures on AML/CFT, having an independent audit system, providing ongoing AML/CFT training, and to give special attention to business relationships with customers from jurisdictions that do not apply or insufficiently apply the FATF Recommendations.

877. Section 16 of the FTRA protects persons reporting in good faith from civil, criminal or disciplinary proceedings.

878. Section 14 of the FTRA prohibits a RI, its officers, employees or agents or any other person to disclose to any person reports made under section 11 of the FTRA.

*Additional Element*

879. Section 15 of the FTRA protects the confidentiality of the any person who has handled a transaction in respect of which a report has been made or who has prepared the report. In addition section 15 (4) provides that no person is required to disclose any information contained in any reports submitted to the CIFIU under section 11 of the FTRA.

***Applying Recommendation 15***

880. Section 18(1) of the FTRA obliges the RI to establish procedures and systems for CDD, record keeping, transaction monitoring, reporting of transactions under section 10 and 11 of the FTRA as well as employees training for AML/CFT. Section 18(2) mandates the appointment of a Money Laundering Reporting Officer (MLRO) in every RI.

881. The monitoring of transactions by the DNFBPs is generally by way of cash threshold as opposed to having a robust system that incorporates systematic checking of transaction trends with the customer profile.

882. Section 18(1)(d) of the FTRA requires the RI to establish an audit function to test its AML/CFT procedures and systems.

883. All trustee companies are subjected to external and internal audit on a yearly basis. The internal audit includes compliance checks for the obligations under the FTRA. The same practice is not implemented by the other categories of DNFBPs.

884. Ongoing employees training is required under section 18(1)(b) of the FTRA for AML/CFT matters, including the reporting of suspicious transactions.

885. Employee screening is required under section 18(1)(c) of the FTRA before hiring of staff.

*Additional Element*

886. The Compliance Officer is required to be a person at senior management level who is able to carry out the functions independently and effectively.

***Applying Recommendation 21***

887. The CIFIU has neither circulated the UNSCR Consolidated Lists nor the FATF public statements on countries that have deficiency in their AML/CFT regime to DNFBPs.

888. The CIFIU has not issued any guidance on enhanced due diligence for transactions with higher risk customers.

889. The CIFIU has not established any policies or counter-measures applicable for DNFBBPs with regard to countries not sufficiently applying FATF Recommendations.

*Additional element*

890. An auditor of a RI is required to report any suspicious transactions to the CIFIU under section 12 of the FTRA.

*Statistics and effectiveness*

891. AML/CFT awareness training has been provided to trustee companies, pearl dealers, accountants, real estate agents and lawyers by the CIFIU.

892. On-site visits have been conducted by the CIFIU and the FSC (for trustee companies) to ascertain compliance with the FTRA CDD and reporting requirements. Only one on-site inspection of a lawyer has been undertaken by the CIFIU.

893. No STRs have been submitted by DNFBBPs with the exception of trust companies. As of 2008, trust companies have submitted a total of 68 STRs, out of which 48% concerned incomplete CDD information. The STRs were submitted from only one company.

894. The CIFIU's procedures require it to provide training to the nominated MLROs and to formally appoint them prior to giving approval for the nominated MLROs. However, this process is not effectively implemented as a number of RIs indicated (during on-site visit) that they had not received the required approval letter confirming their appointment as MLRO by the CIFIU.

895. MLROs are approved by the CIFIU. It is a requirement for the MLRO to be of senior executive level. In the approval process, the CIFIU requests a copy of the nominated MLRO's job description and qualifications to ascertain if the nominated officer is suitable to be a MLRO. The CIFIU keeps a database of all MLRO as the MLRO is the point of contact for any matters relating to AML/CFT. However, the CIFIU appears not to have been able to keep its database up to date as the institutions interviewed during the on-site visits have informed that the CIFIU had not requested for such information. This may be due to staff turnover that resulted in a change of the MLRO.

896. It is left to the RI to screen its employees to ensure "fit and proper" for the role of an MLRO. Generally, due to the Cook Islands being a small place, almost everyone knows everyone. Therefore, the screening process tends to be informal although in some cases a reference is obtained from previous employers.

897. The CIFIU has not provided any feedback to DNFBBPs on areas of concern or advice relating to counties that have deficiencies in their AML/CFT regime.

**4.2.2. Recommendations and Comments**

898. The DNFBBPs would benefit from more guidance and feedback from the CIFIU with regard to ML trends and techniques as well as implementing an effective monitoring system to detect unusual transactions.

899. It is recommended that the CIFIU circulate to DNFBPs regularly any information concerning countries that have deficiencies in their AML/CFT system or which insufficiently apply the FATF standards.

900. It is recommended that the CIFIU provide more comprehensive guidance on the role and responsibilities of the MLRO and general criteria on employee screening.

901. It is recommended that the CIFIU ensure that the approval process for MLROs is completed as and when there is any change in the MLRO and that it maintains an up to date list of MLROs.

#### 4.2.3. Compliance with Recommendation 16

	Rating	Summary of factors relevant to s.4.2 underlying overall rating
<b>R.16</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• Special attention and counter measures for countries with deficiencies in their AML/CFT system have not been implemented.</li> <li>• System of monitoring unusual transactions is generally based on cash threshold rather than analysis of transactions against client profile.</li> <li>• Other than trustee companies, independent audit to test compliance has not been implemented effectively.</li> </ul>

### 4.3. Regulation, Supervision, and Monitoring (R.24-25)

#### 4.3.1. Description and Analysis

##### Recommendation 24 (Supervision of DNFBPs)

###### *Legal framework*

902. Section 27(p) of the FTRA requires the CIFIU to conduct compliance audits for all RIs that are not under the supervision of any competent authorities. Therefore, with the exception of trustee companies (examination of Part 2 is conducted by the FSC), all other category of DNFBPs comes under the purview of the CIFIU.

903. Section 30 of the FTRA empowers CIFIU to conduct examination of DNFBPs for the purpose of ensuring compliance with Part 2 and 3 of the FTRA.

904. Section 31 of the FTRA provides sanction powers to the CIFIU for the failure of the RI to comply with Part 2 and 3 of the FTRA. The FTRA empowers the CIFIU to enter into an agreement with the RI to ensure compliance and, if there is a failure to comply, the CIFIU may make an application to the Court to obtain an injunction against all or any of the officers or employees or the institution itself.

###### *Regulation and supervision of casinos*

905. There is no casino in the Cook Islands.

### ***Monitoring systems for other DNFBNs***

906. The CIFIU is responsible for the supervision of DNFBNs in the Cook Islands to ensure compliance with the requirements of the FTRA.

907. The CIFIU's compliance framework essentially consists of three stages:-

- Industry training and awareness – 2-day workshop;
- On-site reviews (conducted for DNFBNs other than trustee companies, which are shared with the FSC) – 3-4 days;
- Compliance audit controls and processes (for trustee companies) – 1 week.

908. As noted in section 3 of this report, compliance audits for trustee companies are undertaken jointly with the FSC. In such cases, Part 2 is conducted by the FSC while Part 3 is conducted by the CIFIU. Two separate reports are produced, one by the FSC and another by the CIFIU.

909. To date, neither the CIFIU nor the FSC has applied for sanctions to be imposed for non-compliance by a DNFBN. In view that the supervision began only in 2008, the authorities have to date taken the approach to provide a non-compliance report for breaches and for the RI to rectify the breaches within a reasonable time frame.

910. The CIFIU does not have any administrative sanctions framework to enforce more effective compliance of the FTRA among the DNFBNs. The CIFIU needs a court injunction to enforce compliance should the RI fail to comply even after both parties have entered into an agreement.

911. A study undertaken by the CIFIU indicates that the risk of ML or TF in the DNFBNs sector, other than for trustee companies sector, is low since almost all customers are domestic and known to the DNFBN. The business sector in the Cook Islands is also very small and is mostly known to the CIFIU.

912. The CIFIU has adequate manpower to perform its compliance functions; however, its staff require technical training to gain a better understanding of the various products and services undertaken by the various DNFBNs.

### **Recommendation 25 (Guidance for the DNFBN sectors)**

913. On 20 June 2008, the CIFIU issued guidelines to all DNFBNs in the Cook Islands as follows:

- FTRA Guideline 1 – Background on ML and TF
- FTRA Guideline 2 – STR Reporting
- FTRA Guideline 3 – CTR Reporting
- FTRA Guideline 4 – EFTR Reporting
- FTRA Guideline 5 – CDD and Record Keeping
- FTRA Guideline 6 – Implementing a Compliance Regime

914. Awareness training has been provided to all DNFBNs by the CIFIU. In addition, the UNODC computer-based training is available for the DNFBNs at the CIFIU.

915. DNFBPs are able to contact the CIFIU easily (by way of phone) to seek clarification on any AML/CFT matters.

916. The CIFIU is in the process of discussion with lawyers and trustee companies to draft specific guidelines, which will consider ML/TF risks for lawyers and trustee companies.

### ***Effectiveness***

917. The CIFIU has established its compliance framework and audit programme. As shown in the following table, implementation, though not completed for all DNFBPs, commenced in 2008 and is in progress.

**Table 10: DNFBP Onsite Audits undertaken by the CIFIU**

<b>DNFBP</b>	<b>No. of on-site visits</b>
Accountants	3
Motor Vehicle Dealers	2
Lawyers	2
Trustee companies	6

918. There are approximately 15 pearl dealers in the Cook Islands. The CIFIU has yet to start on-site examinations of the pearl dealers.

919. The current sanctions regime (section 31 of the FTRA) cannot be considered sanctions which are effective and proportionate to the severity of the non-compliance.

920. The DNFBPs are well aware of the CIFIU's role and are cooperating with the CIFIU and the FSC to implement the requirements of Parts 2 and 3 the FTRA.

921. With regard to providing feedback on STRs, the CIFIU has not conducted focus workshops on STRs that include feedback on statistics, money laundering trends, quality of STRs or information on current techniques or methods of money laundering.

### **4.3.2. Recommendations and Comments**

922. The CIFIU may wish to consider enhancing its coordination with the FSC to avoid any ambiguity with regard to its supervisory role for trustee companies. While the current arrangements are working well, there may arise duplication or possibilities of omission if one depends on the other to perform certain task, in particular with regard to assessing the RI's transaction monitoring mechanism.

923. The authorities may consider developing a graduated enforcement regime for the CIFIU to ensure effective compliance, for example, establishing appropriate administrative sanctions depending on the severity of non-compliance.

924. In view of the complexities of some of the products and services undertaken by DNFBPs, in particular the trustee companies and lawyers, the staff in the compliance section would benefit from more

technical training to gain a more in-depth understanding on the features and associated risk arising from such products or services.

925. The CIFIU may consider organizing more regular feedback to all the MLROs that would include sharing information on STRs (general assessment on the quality as well as statistics), ML trends and other issues that the RI should be looking out for.

#### 4.3.3. Compliance with Recommendations 24 & 25 (criteria 25.1, DNFBP)

	Rating	Summary of factors relevant to s.4.3 underlying overall rating
<b>R.24</b>	<b>PC</b>	<ul style="list-style-type: none"> <li>• While the current supervisory approach to give time for reporting institutions to comply is fully acceptable, it remains to be seen if this approach is effective in ensuring full compliance.</li> <li>• Lack of an effective enforcement framework to ensure compliance.</li> <li>• Lack of technical training for the staff in understanding the product and services offered by the DNFBPs.</li> </ul>
<b>R.25</b>	<b>PC</b>	<p><b>(NB This is a composite rating)</b></p> <ul style="list-style-type: none"> <li>• Yet to establish specific guidance to address business practices for lawyers and trustee companies.</li> <li>• Lack of guidance to deal with countries that have deficient AML/CFT system.</li> <li>• Lack of feedback with regards to STR mechanism and its outcome.</li> </ul>

#### 4.4. Other Non-Financial Businesses and Professions—Modern-Secure Transaction Techniques (R.20)

##### 4.4.1. Description and Analysis

###### *Legal framework*

926. As noted above, section 2 of the FTRA provides the legislative framework for DNFBPs to comply with the AML/CFT obligations. In relation to other non-financial businesses and professions, section 2 of the FTRA provides that dealers of motor vehicles or high value items above a prescribed threshold, including antiques, pearls, precious stones and precious metals, shall be included as “reporting institutions” under the FTRA.

927. Pearl dealers are discussed in sections 4.1 to 4.3 of this report, as dealers in precious metals and stones. This section of the report examines the AML/CFT obligations as they apply to motor vehicle dealers as ‘other non-financial businesses and professions’. There are no pawnshops in the Cook Islands

928. Though not yet prescribed in regulations, the FTRA has in fact been implemented in relation to dealers in motor vehicles and efforts have also been taken by the dealers to establish internal AML/CFT

controls that included CDD measures. The CIFIU is currently considering an appropriate threshold for dealers to capture them as reporting institutions under the FTRA

929. In the meantime, the reporting of cash transactions has been implemented on the dealers and CIFIU has to date received CTRs from the dealers but low in numbers.

***Application of standards to other non-financial businesses and professions***

930. There are five dealers in motor vehicles in the Cook Islands. The average value per transaction is approximately \$30,000. The on-site visit interview with one company indicated that on average the company sells six to seven vehicles in a month.

931. The CDD measures undertaken by motor vehicle dealers involve obtaining information on the buyer such as name, address and are verified against the passport, driver’s license or ID card. Sales to foreigners are rare. By way of example, the company met with by the Evaluation team has put in place a AML/CFT policy which incorporates monitoring of unusual transactions where, for example, it would be a “red flag” should a person buys three vehicles at one go.

932. The CIFIU has provided awareness training to the dealers and conducted on-site visits to two companies. However, the CIFIU has not imposed any sanctions for non-compliance as the approach taken is to give time for the RIs to rectify the gaps.

933. To date, no STRs have been submitted by the dealers in motor vehicles.

***Modern and secure techniques for conducting financial transactions***

934. The state of the infrastructure in the Cook Islands has inhibited the development of more modern techniques for financial transactions. Furthermore, the small population base has not made it worthwhile for financial institutions to invest in the roll-out of more modern technology, except in rather limited cases.

935. The CIFIU has to date received over six thousand CTRs over a period of seven years and the use of cash to purchase high value items is generally low.

**4.4.2 Recommendations and Comments**

936. While dealers have made efforts to comply with the FTRA, it is recommended that the CIFIU legally prescribe an appropriate threshold for dealers as required under section 2(t) of the FTRA. .

**4.4.3. Compliance with Recommendation 20**

	<b>Rating</b>	<b>Summary of factors underlying rating</b>
<b>R.20</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>While dealers have made efforts to comply with the FTRA, the CIFIU has yet to decide on and prescribe by regulation the appropriate threshold to capture dealers as reporting institutions as required under section 2(t) of the FTRA.</li> </ul>

## 5. LEGAL PERSONS AND ARRANGEMENTS & NON-PROFIT ORGANIZATIONS

### 5.1. Legal Persons—Access to Beneficial Ownership and Control Information (R.33)

#### 5.1.1. Description and Analysis

937. This section of the report addresses only profit-seeking organisation recognised as legal persons. Trusts and non-profit organisations will be discussed in sections 5.2 and 5.3 respectively. This section will, therefore, analyze only corporations and the matters that apply to corporations.

#### *Legal framework*

938. The *Companies Act 1955* as amended in 1970-71, No 23 provides the legislative framework to register domestic companies, including those with foreign ownership in the Cook Islands. The *International Companies Act 1981* provides the legislative framework for the registration and operation of international companies.

939. As at 31 December 2008, there were 890 international companies and 25 limited liability companies registered in the Cook Islands. In addition, there were 110 domestic companies registered with the MOJ, and 350 companies with more than one third foreign ownership registered with the BTIB.

#### *Measures to prevent unlawful use of legal persons*

940. There are three government agencies involved in the different types of legal persons, namely:

- (i) Ministry of Justice (MOJ) – maintains the registry for domestic companies (majority of shareholders are local). There are 1.5 staff positions at the MOJ undertaking the task of company registration.;
- (ii) Business Trade and Investment Board (BTIB) – maintains the registry for domestic companies where greater than one-third of shareholders are foreigners; and
- (iii) Financial Supervisory Commission (FSC) – maintains the registry for international companies, LLCs and partnerships.

#### Domestic companies

941. The following information is collected prior to registration/incorporation of the company:

- Company Directors and Secretary must be clearly identified;
- capital must be shown;
- shareholders must also be clearly shown together with their respective shares;
- the shares held by the shareholders must be the total of the capital shown on the Memorandum of Association.

942. Under the *Companies Act 1955*, a company seeking registration must deliver a Memorandum and Articles of Association to the Registrar of Companies who retains and registers them.

943. Most incorporations in the Cook Islands are done through legal practitioners. The Memorandum sets out the names and addresses of the initial members of the company. The Registrar's role is primarily administrative, ensuring that the required formalities have been complied with. MOJ does not maintain a centralised database of its information.

944. Companies are required to keep a register of members under section 118 of the Companies Act 1955. The register of members must record the name and address of all members and, in the case of a company limited by shares, a statement of the shares held by each member. Under section 125 companies are prohibited from entering any notice of a trust in the register of members and such notice may not be received by the Registrar. Information about nominee shareholdings is also not recorded in the register of members. A company's register of members may be inspected by members of the public for a small cost.

945. Companies may also issue share warrants to bearer under section 93 of the Companies Act. A share warrant entitles the bearer to the shares listed on the share warrant, and the shares listed on the share warrant may be transferred to the bearer by surrendering of the share warrant to the company.

946. Under section 200 of the Companies Act 1955, companies must maintain a register of directors and secretaries at their registered office. The register of directors and secretaries must include particulars of a director's name, former names, residential address, nationality and occupation in the case of individual directors, or the director's corporate name and registered or principal office for corporate directors. The register must also include particulars of a secretary's name, former names and residential address for individual secretaries, or corporate name and registered or principal office for corporate secretaries.

947. There is no requirement in the Companies Act for verification of beneficial owners, nor is there a requirement to undertake background checks for directors of the companies. Information concerning the beneficial ownership of companies that include by nominee shareholders may not be held by the MOJ. Such information may have been captured by the solicitor who facilitates the incorporation of the company however this information may not be held on public record.

948. Companies are required to submit Annual Returns and to update changes on a yearly basis. The critical information that is checked and noted is as follows:

- a Director and Secretary must sign the form or their agent (Solicitor or Accountant on their behalf only);
- capital of the Company is noted;
- all the shares are subscribed for and the total adds up to the capital noted;
- value of the shares must be noted;
- annual return form is filed annually.

949. The MOJ permits inspection of the company records of domestic companies. These records are public records and there are no restrictions as to public access. .

#### Companies with foreign ownership

950. The BTIB is responsible for the registration of companies with more than one third foreign ownership. The BTIB's main functions include approval of foreign investment, sourcing markets for locally produced goods, stimulating local trade as well as developing the business plan for Cook Islands.

951. The foreign enterprise registry in the BTIB holds information on a foreign investor and their shareholdings in a foreign enterprise. Names and addresses of foreign shareholders are collected and verified with their passports.

952. Shareholders may have access to their information at the BTIB. The BTIB permits inspection of its records upon written request only from individuals related to the entity and from authorities, for example, law enforcement agencies and the Ministry of Finance and Economic Management.

953. The BTIB identifies and verifies the directors and majority shareholders along with the beneficial owners of any shares before approving the registration of the company. Police background checks are required as part of the submission to BTIB. The veracity of information is checked including sighting and holding a copy of the person's passport to verify that the shareholders are who they say they are. A copy of a police report is also required from their home country along with character references.

954. The BTIB has an MoU with the Immigration Department to facilitate verification and background checks of foreigners. If necessary, the BTIB will conduct checks through the Pacific Island Forum Secretariat to verify the identity of directors and shareholders.

955. The BTIB has set-up a Compliance Section to monitor submission of Annual Returns. As a general rule, de-registration for non-compliance is the last resort as the BTIB prefers to work with the company to ensure compliance with requirements of the *Companies Act 1955*. The company license is renewed on a yearly basis.

#### International companies

956. The *International Companies Act 1981-82* provides a parallel legal regime for international companies-which cannot be beneficially owned by residents or citizens of the Cook Islands. International companies are registered with the Registrar of International Companies, located in the FSC. All registration of international companies must be conducted through a trustee company. The role of the Registrar at the FSC is primarily to ensure compliance with the *International Companies Act 1981-82*.

957. International companies are required to have a register of members which records the names and addresses of the members, a statement of the shares held by each member and the amount paid or agreed to be considered as paid on the shares of each member. The register is also required to record the date of entry of each person on the register, the date at which any person previously a member ceased to be a member during the previous seven years, and the date of every allotment of shares to members (s.105 International Companies Act). Unless the Registrar of International Companies otherwise directs, the register has to be kept at the registered office of the company in the Cook Islands. If the register is kept at a place other than the registered office, the Registrar has to be advised within two days.

958. The register is open to inspection by any members for the purposes of looking at that member's interests, but no member is able to inspect the particulars of any other members or the membership interest of any other member without that person's written consent. Any member may request the company to furnish him/her with a copy of the register, but only insofar as it relates to names, addresses, number of shares held and amounts paid on shares. The company is permitted to charge a fee for this service (s.107 International Companies Act).

959. Shares in an international company registered in a register kept in the Cook Islands or in a branch register (s.111) and held by a trustee in respect of a particular trust may, with the consent of the company, be marked in the register in such a way as to identify them as being held in respect of the trust. Apart from this provision, no notice or any trust shall be entered on to the register.

960. International companies are required to lodge annual returns with the Registrar's Office within 28 days of the anniversary of the company's incorporation. The form is required to be in the format prescribed by Regulation. The Annual Return is to be accompanied by a certificate from a registered company auditor relating to the accounts of the company and a certificate from a director as to solvency.

961. The FSC allows inspection directly for related parties and through written consent from trustee companies for non-related parties, for a fee. Trustee companies registered under the Companies Act can be searched same as the domestic companies – public access (for a fee).

962. The *International Companies (Evidence of identity) Regulations 2004* require a trustee company to identify and verify the person for whom a share is held on trust or in respect of the bearer of a bearer instrument. A comprehensive range of documentation for verification is stipulated in section 2 and 3 of the regulations.

963. For nominee shareholdings, the identity of the nominee needs to be verified and in such circumstances, the beneficial owner of the company must be disclosed and the appropriate CDD must be performed on the beneficial owner.

964. The FSC conducts an annual audit on each of the trustee companies to ensure compliance with the *International Companies Act 1981-82*, the related CDD Regulations and Part 2 requirements of the FTRA. Samples of customer files are examined for compliance with the FTRA requirements.

#### ***Access to information on beneficial owners of legal persons***

965. Domestic company records are public documents which therefore are available to the public. A fee is charged for access to the records.

966. BTIB has no prohibition for disclosure of information to competent authorities.

967. The FSC allows inspection directly for related parties and through written consent from Trustee Companies for non-related parties, both for a fee. The FSC allows access to all the company records it holds pursuant to the *International Companies Act 1981-82*. Company records held include: a certificate of incorporation; certificate by the trustee company; memorandum and articles of association; notice of registered office; return of particulars of directors and secretaries; annual return; and application for renewed certificate of incorporation.

968. The company records that are kept with the FSC are records that are required by the International Companies Act to be lodged by the registered office (which is also the Trustee Company) with the Registrar of International Companies. However, these company records do not include a shareholder register. The International Companies Act requires the register to be kept at the registered office of the company in the Cook Islands unless the Registrar of International Companies otherwise directs. If the register is kept at a place other than the registered office, the Registrar has to be advised within two days.

969. Section 7 of the *International Companies Amendment Act 2004* overrode a number of secrecy provisions relating to international companies. The amendments retained the secrecy provisions, however they also provided that such privacy shall not apply if disclosure of such information is made pursuant to a search warrant. Competent law enforcement authorities, upon application, can seek a search warrant pursuant to section 79 of the *Criminal Procedures Act 1980-81* or in relation to proceeds of crime a

Production Order Pursuant to section 79 of the POCA to obtain access to information relating to beneficial ownership of international companies.

### ***Prevention of misuse of bearer shares***

970. Bearer shares are permitted for international companies (including banks with international banking licence) as provided for in section 3 of *International Companies Amendment Act 2003 No. 5*. However, section 35 of International Companies Act provides that the international company is not allowed to deliver bearer instruments to any person other than a Custodian and no Custodian shall hold any bearer instrument unless the Custodian has first received satisfactory evidence on the identity of the bearer of the bearer instrument. A Custodian is defined in the Act as any person which is, from time to time, a licensed financial institution.

971. Section 35A(2) of the International Companies Act stipulates that when the bearer of a bearer instrument requests that the ownership of the bearer instrument be transferred, the Custodian holding the instrument will meet the request only upon satisfactory evidence as to the identity of the new beneficial owner. Section 35A(2) of the International Companies Act states that the Custodian holding the said instrument shall take such steps as may be required of the Custodian to meet the request upon receipt of satisfactory evidence as to the identity of the new beneficial owners.

972. Once the satisfactory evidence of the beneficial owners is received by the Custodian, the Custodian is then required pursuant to Section 36 (2) of the International Companies Act (as amended by the *International Companies Amendment Act 2006 No. 03*) to make the request to the company, who upon the surrender of the share warrant, shall issue and enter on the register of members, shares bearing the same number (if any) as the share warrant surrendered.

973. There is no reference in the Companies Act to bearer shares, however they are not expressly prohibited under this Act.

### ***Additional element***

974. Company records with MOJ are publicly available to anyone.

975. The FSC allows inspection directly for related parties and through written consent from Trustee Companies for non-related parties, both for a fee.

976. A financial institution identifies and verifies ownership of bearer shares by registering its beneficial owners. A register of beneficial owners for the shares are kept in the custody of the financial institution, i.e. the trustee company itself.

### ***Effectiveness***

977. The CIFIU, on a monthly basis, receives a statement for new companies registered with the MOJ including details of the shareholders, directors, registered office and nature of the business activity. This information forms part of CIFIU's database in carrying out its analysis functions.

978. While it is mandatory for locally incorporated companies to update company records at the MOJ on yearly basis, effectiveness is lacking as the MOJ has limited resources and does not conduct yearly

checks to ensure that company records are in fact updated for the 110 companies contained in its Registry. The registration system is not fully computerized, which may contribute to time consuming searches for records or information.

979. The BTIB conducts compliance checks for the 350 companies with foreign ownership so that the authority keeps itself updated with the development of trade and businesses on the islands.

980. In line with the Cook Islands' government's plan to develop its economic and trade activities, foreign ownership in domestic companies is comprehensively reviewed by BTIB. In addition, BTIB is also concerned with land alienation issues (foreigners cannot own land in Cook Islands) and for this purpose conducts stringent checks on foreign equities as a means to detect any potential misuse of corporate vehicles to own land.

981. The FSC has three dedicated staff members who operate the International Companies Registry which contains 890 international companies and 25 limited liability companies. The registry is maintained in a searchable electronic database that records all key information including the names of directors and shareholders along other relevant key information. In addition, all company files are retained on-site and can be immediately retrieved should that be required. Annual returns are filed annually which are attached to the physical files.

982. International companies are required to renew registration and pay a fee each year. The database has a facility where the Registrar of International Companies is advised when fees and returns are due. Should fees and returns not be filed within 90 days of the due date the company is automatically struck from the register.

983. In December 2007 an audit was undertaken of 800 international companies to check and reconcile records held by the FSC and the respective trustee company. This audit identified that there was only one discrepancy in the 800 files reviewed.

### **5.1.2 Recommendations and Comments**

984. The largely manual system of recording and updating information in relation to domestic companies at the MOJ is an impediment to ensuring timely access to records in relation to domestic companies. Other concerns are that there is no requirement in the Companies Act to disclose nominee shareholders, and there is no express prohibition in the Companies Act in relation to bearer shares.

985. It cannot be ascertained that records kept at the MOJ, in particular on directors and shareholders are up to date as the onus is on companies to submit updates and MOJ has not implemented a system that is able to monitor non-submission.

986. It is recommended that:

- the MOJ work with other relevant agencies to conduct a review of the domestic company registry system in with a view to obtaining and checking a wider range of information on shareholders and shareholdings and recording that information on a computerised database; and

- the MOJ be required to maintain information as to whether shares of registered entities are held beneficially and if so, to maintain details of the beneficial owner and require company registers to maintain records of the same information.

### 5.1.3. Compliance with Recommendations 33

	Rating	Summary of factors underlying rating
R.33	PC	<ul style="list-style-type: none"> <li>• Measures are not adequate to ensure that there is sufficient, accurate and timely information held on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities.</li> <li>• Information on the domestic companies register pertains only to legal ownership/control (as opposed to beneficial ownership), is not verified and is not necessarily reliable.</li> <li>• The generally manual system of recording and updating information for domestic companies at the MOJ is an impediment to ensuring timely access to records.</li> <li>• It cannot be ascertained that records kept at the MOJ, in particular on directors and shareholders are up to date as the onus is on companies to submit updates and MOJ has not implemented a system that is able to monitor non-submission.</li> <li>• There is no requirement in the Companies Act to disclose nominee shareholders.</li> <li>• There is no express prohibition in the Companies Act for bearer shares.</li> </ul>

## 5.2. LEGAL ARRANGEMENTS—ACCESS TO BENEFICIAL OWNERSHIP AND CONTROL INFORMATION (R.34)

### 5.2.1 Description and Analysis

#### *Legal Framework*

#### *Statutory framework*

987. Trust law in the Cook Islands is sharply divided into two areas:

- Domestic trust law: The common law of trusts in the Cook Islands is substantially similar to the law of trusts in New Zealand, which is based upon British common law. Under constitutional arrangements, the Cook Islands applies New Zealand's *Trustee Act 1956* and *Trustee Amendment Act 1957*. As in most common law countries, domestic trusts are not required to be registered.

- **International trust law:** The *International Trusts Act 1984* (as amended 2004)<sup>18</sup> applies to international trusts which are defined in the Act as requiring non-resident beneficiaries. This statute makes substantial changes to the otherwise applicable common law of trusts. International trusts must be registered under Part III and must include accompanying documentation before they are recognised in law.

988. As at 31 December 2008, the, the number of international trusts was 2,440 - an increase of 72 from the previous year.

#### *Basic requirements*

989. Trust property can be any form of property whether real or personal, tangible or intangible (definition of “property” - s 2 of Trustee Act 1956 and s 2 International Trusts Act).

990. Under Cook Islands domestic and international trust law, a settlor may transfer legal title to specific property to a trustee but transfer beneficial ownership to other specified parties: beneficiaries. Any, or all, of these constituent trust elements (settlor, trustee, beneficiaries) may be natural or legal persons. Under the International Trusts Act an international trust may also utilize a “protector” which may be a legal person as well. A “protector” has the power to appoint or remove a trustee, or directly or indirectly control, whether by power of veto or otherwise, the trustees’ exercise of one or more of their powers, functions or discretions under the trust (ss 2 and 20). There is no restriction on who may act as a protector of an international trust. It may therefore be the settlor of the trust.

991. There are currently six trustee companies authorized under the *Trustee Companies Act 1981-82* that may act in the role of trustee or trust and company service provider (TCSP), and, therefore, provide services such as trust formation, registration of international trusts, international partnerships and limited liability companies and other related services. In order to meet the requirement of having a resident licensed trustee under the *International Trusts Act 1984* the international trust is required to use one of the six registered trust companies as mentioned.

992. As noted previously in this report, that trustee companies are reporting entities under the FTRA and the FSC undertakes an annual inspection at every trustee company to assess compliance with the requirements of the FTRA.

#### ***Measures to prevent the unlawful use of trusts - adequate transparency concerning beneficial ownership and control***

##### *Domestic trusts*

993. As is typical in common law jurisdictions, there is no central registry for domestic trusts in the Cook Islands or a requirement to register or disclose a trust instrument when opening a bank account in the name of a trust. In addition, the Cook Islands authorities did not provide any statistics on the number, or approximate number, of domestic trust arrangements in the country.

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<sup>18</sup> References to the *International Trusts Act 1984* include references to the most recent amendments in 2004.

994. There is no general legal requirement that domestic trusts be evidenced in writing. For those that are evidenced in writing, a trust instrument such as a declaration or trust agreement (including a deed), setting out the rights and obligations of the trustees and beneficiaries, and in some cases certain third parties, is usually employed as the appropriate vehicle. Trusts are not separate legal entities. Trustees are persons responsible for the trust property; hence, the trustee is liable for the obligations incurred in the name of the trust.

995. Section 4(2)(d) of the FTRA requires that, if the customer is a trust, a reporting institution must adequately obtain information relating to:

- (i) the trust's name and registered office or address for service;
- (ii) the nature of the trust and its beneficiaries; and
- (iii) the name, address, occupation, national identity card or passport or other applicable official identifying document of each settlor and trustee.

996. Financial institutions are not however required to collect any identification information on the beneficiaries or ultimate beneficiaries of a domestic trust.

#### *International trusts*

997. An international trust is defined in the International Trust Act 1984 (ITA), Part One, s 2 as a trust or disposition which is registered under this Act and in respect of which:

- (a) at least one of the trustees, donors or holders of the power of appointment or power of maintenance or power of advancement is either:
  - (i) a registered foreign company; or
  - (ii) an international company; or
  - (iii) a trustee company; and
- (b) the beneficiaries are at all times non-resident.

998. "Foreign companies" and "international companies" referred to in the above section must be companies registered under the Cook Islands' International Companies Act 1981-84. A "trustee company" refers to a company registered as a trust company under the Cook Islands' Trustee Companies Act 1981-82, and includes a wholly owned subsidiary of the same. Hence, Cook Island registered companies must act as trustees under an international trust (either solely or jointly with another company).

999. To obtain the protection of the Cook Islands' laws, the trust must be registered with the Registrar of International Trusts (located within the FSC) within 45 days of its creation in accordance with s 15. But registration must be accompanied by "a certificate that the trust will be an international trust upon registration" (s 15(2)). The trust can adopt a name for itself (s13(1)) and the property which is the subject of the trust may be registered in the name of the trust rather than in the name of the trustee(s) (s 13(2)). This would effectively permit the shielding of any information about persons involved in an international trust.

1000. All international trusts must have non-resident beneficiaries. The *Trustee Companies (Due Diligence) Regulations 1996* issued under the ITA requires the officers and employees of a registered trust company to take reasonable precautions to ensure that an international trust is not being used to shelter assets derived from drug smuggling, money laundering or other serious crime. The

regulations do not, however, require the trustee to obtain identification information on the trust's beneficiaries. Regulation 4 merely states that:

4. Prior to registration of an international trust pursuant to the Act, and upon any disposition to that trust thereafter, a trustee company shall be satisfied that:
  - (a) the settlor of an international trust has full right and title to transfer the assets to the trust;
  - (b) the settlor remains solvent and able to pay reasonably anticipated debts after the transfer of the assets to the trust;
  - (c) the assets being transferred to the trust are not derived from any of the activities specified in the annexure to the Second Schedule;
  - (d) any financial or other information provided by the settlor is true and correct; and
  - (e) the settlor has provided full disclosure of all existing or reasonably anticipated legal proceedings against him.

For the purposes of these Regulations and the Act, the information referred to in Regulation 4, received by facsimile, or by an agent or attorney for the trustee company, shall be sufficient for the purposes of satisfying this regulation.”

1001. The Evaluation Team held some concerns that the receiving of information by facsimile for the purposes of Regulation 4 could be construed as not requiring trustee companies to verify the information received in that manner. However, the Team was satisfied that the FSC interpreted the facsimile provision as facilitative only and not constituting prima facie satisfaction of the requirements.

1002. It should be noted that these Regulations pre-date the passage of the FTRA, section 36 of which provides that where there is a conflict between certain specified Acts, including the International Trusts Act, the FTRA will prevail. As noted above, section 4(2)(d) provides expressly for the circumstances where the customer is a trust. However, the FTRA s 4(2)(d) only requires that trust companies “adequately obtain information relating to: (i) the trust's name and registered office or address for service; (ii) the nature of the trust and its beneficiaries; and (iii) the name, address, occupation, national identity card or passport or other applicable official identifying document of each settlor and trustee”. It does not require that the trust company collect identification information on the beneficial owners (or ultimate beneficial owners) of a trust – it refers only to “the nature of the beneficiaries” (i.e. whether the beneficiaries are natural persons, legal persons, limited partnerships, etc).

1003. As mentioned Section 3.10.1 of this report, the Financial Supervisory Commission expects trust companies when acting as TCSPs to abide by the Statement of Best Practice for Trust and Company Service Providers, issued by the Offshore Group of Banking Supervisors (OGBS). Included in this best practices paper is a requirement for TCSPs to have proper procedures for:

- customer identification;
- verification of identity of customer;
- risk profiling of customers (e.g. politically exposed persons);
- establishing the source of wealth;
- establishing the source of funds;
- ongoing monitoring of a customer's activities; and
- adequate documentation to meet KYC requirements.

1004. The best practice paper also indicates that specific issues on which attention should focus relate to information on the ultimate beneficial owner and/or controller of companies, partnerships and other legal entities, and the settlor/protector/beneficiaries of trusts, which should be known to the Service Provider and be adequately documented. However, this is only an expectation and not a legal requirement.

1005. It should be noted that all the TCSPs with which the Evaluation Team met during the on-site visit indicated that, in practice, they do in fact take steps to collect information concerning the beneficiaries of a trust prior to registration, and the FSC checks annually on the policies and procedures that the trustee companies have in place to meet their compliance obligations. This practice goes some way towards meeting these concerns concerning criterion 34.1. However, the scope of the requirement under the FTRA is limited to the direct beneficial owner and doubts remain as to the accuracy/completeness of information concerning the ultimate beneficial ownership of some of the more complex trust structures offered by the TCSPs, especially given the deficiencies noted in section 3.2 of this report regarding the general CDD requirements.

1006. Under s 7 of the International Trusts Act a trust instrument need not be executed by all the parties for it to be valid. The instrument "...may be executed by the settlor, trustee and any other parties at different times and in different places whether within or outside the Cook Islands..." and a trust instrument so executed is "deemed valid as if [it] were executed by the parties simultaneously..." Section 5(2) of the ITA is a savings provision which states that "a trust registered under this Act shall be valid trust notwithstanding that it may be invalid according to the law of the settlor's domicile or residence or place of current incorporation."

1007. The execution of such an instrument at different times is not followed by a proviso in the statute that the execution must be within a certain specified time. Hence it is conceivable under this law that a trustee company could sign a trust instrument without the settlor ever doing so (or vice versa). However, the Evaluation Team was informed that the Registrar of International Companies would not in practice register a trust that had not been executed by all parties.

1008. Where funds are transferred to a trustee company prior to formation of a trust, the trustee company would be bound by its obligations to identify its customer, the proposed settlor, and the purpose of the transaction under section 4(2) (a) and 4(4) of the FTRA. When a distribution is made post-formation, section 4(2)(d) of the FTRA would only apply to the financial institution, not the trustee company, as the customer is a "trust". It is noted that section 4(2)(d) of the FTRA is deficient in that it only requires identification of the "nature of the beneficiary" rather than the beneficiary per se.

1009. The Evaluation Team ascertained from its meetings with the TCSPs and the FSC that notwithstanding the deficiencies in the FTRA, their practice was to identify and take reasonable measures to verify identities of beneficiaries as if 4(2)(d) FTRA imposed this obligation on them. The Evaluation Team also noted the existence of Prudential Statement No. 08-2006 which although is not considered as other enforceable means provides guidance to the banking sector and that paragraph 23 of this Statement required that identification of a trust should include the trustees, settlers/grantors and beneficiaries.

*“Flee” provisions*

1010. Part III of the *International Trusts Act 1984* makes other changes to the common law and equitable rules applicable to trusts. Of particular note, for the purpose of Recommendation 34, are the following. The Act:

- provides that a trust deed may contain a choice of laws provision whereby different aspects of the trust may be governed by laws of different jurisdictions (s13G).
- provides that a change in the governing law of an international trust may also be triggered upon “the occurrence of a specified event”. In a trust this may be employed to construct what is commonly known as a “flee clause”(s13G(12)) and any change in the governing law shall not affect the validity of the trust (s 13G(5)).
- further provides at s 13(5) that should a trust move to the Cook Islands, that the two year limitation date under s 13K may be defeated. That is, the date of a trust moving to the Cook Island remains as the original date of trust and not the date of entry into the jurisdiction.

1011. Together these raise serious concerns for Recommendation 34. International trust instruments may contain clauses that vest discretion in the trustee(s) or a trust protector (s 20) to change the location and, hence, the applicable law of a trust, including its trust property, immediately when an enquiry is made by a law enforcement authority (or for that matter a creditor) into the terms of the trust or the property subject to the trust.

*International cooperation - foreign judgments*

1012. The *International Trusts Act 1984* s 13D provides that

13D. **Foreign judgements not enforceable** - Notwithstanding the provisions of any treaty or statute, or any rule of law, or equity, to the contrary, no proceedings for or in relation to the enforcement or recognition of a judgement obtained in a jurisdiction other than the Cook Islands against any interested party shall be in any way entertained, recognised or enforced by any Court in the Cook Islands to the extent that the judgement -

- (a) is based upon the application of any law inconsistent with the provisions of this Act or of the *Trustee Companies Act 1981-2*; or
- (b) relates to a matter or particular aspect that is governed by the law of the Cook Islands.

1013. The term “judgment” is defined in s 2 of the Act as including civil and criminal judgments or orders. Whilst section 21 of the *International Trusts Act 1984* was amended in 2004 to provide that the suite of AML legislation including the POCA and MACMA may impose obligations on international trusts, the effect of that amendment upon section 13D is unclear. Whether those amendments would operate to prevent section 13D interfering with the registration of a foreign forfeiture order is not beyond doubt. The Evaluation Team was informed that the majority of trust assets are held off-shore (ie not in the Cook Islands) thereby mitigating the potential impact of section 13D.

### *Access to information on the beneficiaries and control of trusts*

1014. Access to beneficial ownership information in relation to international trusts in the Cook Islands is limited both for supervisory authorities and for law enforcement agencies as there is no legal requirement for trustees or TCSPs to collect and hold information on the beneficiaries of a trust. As noted above, they may do this in practice but they are not specifically, legally obliged to identify the ultimate beneficial owner/beneficiaries of the trust.

1015. While s 23 the *International Trusts Act 1984* provides that international trust information may be disclosed for the purpose of any body exercising a statutory function (for instance, the FSC under s 20 Financial Services Commission Act), the information available may be of limited value. Law enforcement authorities are required to secure a search warrant or court order to secure this information (potentially triggering a trust flee) which is a requirement that to a large extent undercuts the effectiveness of a central registry for such trusts.

1016. In addition, any information in relation to trusts (both domestic and international) held by the Cook Islands' taxing authority is subject to tax secrecy and not available to supervisory authorities or law enforcement authorities.

1017. It is not clear whether section 23 of the *International Trusts Act 1984* is applicable to statutory functions is also applicable to law enforcement authorities. It appears that if law enforcement wishes to secure information relevant to an international trust that the law enforcement authority must apply for a court order under s 23. If an international trust has properly constructed "flee" clause to avoid collection of information by law enforcement, then access to trust information in that case will be defeated almost entirely, assuming the application for the order under s 23 must be served on the trustees – the Act does not provide that court orders may be issued ex parte.

#### **5.2.2. Recommendations and Comments**

1018. Trust law in the Cook Islands, particularly international trust law, is complex. There are inadequate safeguards in the international trust system to mitigate the risk posed by the regime that it may, or will, be exploited by criminals. Information available to law enforcement is limited and/or protected from disclosure by a variety of mechanisms including tax secrecy.

1019. While the current practices of TCSPs to collect beneficial ownership information when registering trusts, and on-site inspections of TCSPs by the FSC and CIFIU under the FTRA, go some way to meeting some of these concerns, serious risks remain, particularly in relation to some of the more complex trust structures and 'flee trusts' on offer.

1020. The Cook Islands should:

- Amend the FTRA to require trustees of trusts (including international trusts) to collect full identification information on the beneficial owners and beneficiaries of trusts;
- Implement measures to ensure that adequate, accurate and timely information is available to law enforcement authorities concerning the beneficial ownership and control of trusts;
- Establish mechanisms to mitigate the clear ML/TF risks created by many of the measures in the *International Trust Act 1984*.

### 5.2.3. Compliance with Recommendations 34

	Rating	Summary of factors underlying rating
R.34	PC	<ul style="list-style-type: none"> <li>• There are no legal requirements for reporting institutions to ascertain the ultimate beneficial owners/beneficiaries of domestic or international trusts.</li> <li>• Section 4(2) of the FTRA does not place any obligation on a TCSP to identify the parties to a trust other than the settlor who is the customer of the TCSP.</li> <li>• The regime of international trusts establishes a number of ML/TF risks which are not mitigated by other legal measures in Cook Islands' law.</li> <li>• The system of central registration of international trusts is not accompanied by other measures to mitigate money laundering and terrorist financing risks and in fact establishes some serious risks that the system could be exploited for these crimes.</li> <li>• The regime of international trusts raises concerns in relation to international cooperation and the enforcement of foreign confiscation orders/judgments.</li> </ul>

## 5.3. Non-Profit Organisations (SR.VIII)

### 5.3.1. Description and Analysis

#### *Legal framework*

1021. The *Incorporated Societies Act 1994* (ISA) provides the legislative framework for the incorporation of societies which are not established for the purpose of pecuniary gain. Section 3 of the ISA provides that any society consisting of not less than fifteen persons associated for any lawful purpose but not for pecuniary gain may, on application being made to the Registrar of Incorporated Societies in accordance with the Act, become incorporated as a society under the Act. The Registrar is located within the Ministry of Justice (MOJ).

1022. It is not however compulsory for NGOs to register as incorporated societies, nor is registration as an incorporated society required in order to obtain tax benefits under the *Income Tax Act 1972* (section 48(g) – 48(j)) or the *Value Added Tax Act 1997*.

1023. The Cook Islands authorities indicated in their mutual evaluation questionnaire response that NPOs are included in the definition of 'reporting institutions' under section 2 of the FTRA as 'friendly societies', and the CIFIU has issued guidelines and undertaken outreach to the CIFIU sector on this basis. However, there is no definition of 'friendly society' in the FTRA nor, it appears, in other Cook Islands legislation. While the term 'friendly society' may, on some definitions, encompass the activities undertaken by NPOs in the Cook Islands, it would be preferable either to define this term or to use another term or terms (such as 'non-profit organisation') and to define its scope more clearly. In addition, in the definition it would seem sensible to make specific reference to 'incorporated societies' if they are meant to be captured as reporting institutions under the FTRA.

1024. In any case, in practice the NGO sector in the Cook Islands has not disputed the application of the FTRA to it, the FTRA guidelines have been issued to the NGO sector, and outreach has taken place.

### ***Review of NPO sector***

1025. For a small jurisdiction, the Cook Islands has a relatively large and diverse NPO sector which plays an important role in society. NGOs include church, youth, women's, cultural, sporting, welfare, disability and industry-based groups (eg for fishermen, growers etc). Most NGO activities are for domestic purposes only, though on a few occasions funds are raised to assist countries suffering from natural disasters. Only two NPOs are branches of an internationally recognised organisation (Red Cross and the World Wide Fund for Nature). Several NGOs do however receive external funding through aid organisations such as NZAID, AusAID, Canada Fund and the European Union.

1026. A review of the Cook Islands NPO/NGO Sector was completed by the CIFIU in October 2008. It revealed that about 300 NPOs were registered with the MOJ under the ISA and 70 (both incorporated societies and otherwise) were members of the main NGO umbrella organisation, the Cook Islands Association of Non Government Organisation (CIANGO). Over 200 NPOs were unregistered. In January 2009, the MOJ went through a process of striking off a large number of incorporated societies which were known to be inactive or which had not been fulfilling their responsibilities under the ISA, in particular to lodge an annual financial statement. This left only 20 or so incorporated societies under the ISA, but a number of dissolved societies were re-registering with the MOJ as at the time of the on-site visit. It is anticipated that at the end of the process, there may be approximately 50 active societies registered with the MOJ.<sup>19</sup>

1027. The national study identifying the risk or threat of ML and TF in the Cook Islands commissioned in 2008 by the CIFIU (the ML Risk Analysis Report) indicates that the ML/FT risk in the NPO sector is very low. The CIFIU review of the NPO sector came to a similar conclusion. As noted above, most NPOs in the Cook Islands operate domestically and have no links to other foreign NPOs apart from the Red Cross and the World Wide Fund for Nature. The amounts of money involved are normally quite small, although the amounts received from international donors were quite large. There is also no evidence to suggest that an NGO in the Cook Islands has been used as vehicle for ML or TF.

1028. The CIFIU review of the NPO sector identified some shortcomings in completeness and accuracy of information held by the MOJ. These shortcomings were confirmed during the on-site visit. The data held by the MOJ was limited to the name of the organisation, registration date and contact person. When applying for registration as incorporated societies, NPOs are not required to supply information concerning those persons who own, control or direct their activities, including senior officers, board members and trustees. It would be advisable for the ISA to be amended or for regulations to be issued under the ISA requiring this information to be provided as part of the registration process. In practice, as part of the current re-registration process now under way, the MOJ is requiring societies to provide this information, but it is not being recorded on the MOJ's database of incorporated societies because of resource constraints.

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<sup>19</sup> The Cook Islands authorities advised in June 2009 that there currently 82 societies now registered under the ISA.

### ***Outreach to the NPO Sector***

1029. The CIFIU has provided awareness workshops to NGOs both on the main island of Rarotonga and the outer islands since 2005 and during the CIFIU Outreach Program undertaken in 2008. The workshop held in Rarotonga in November 2008 was specifically for NGOs whereas the seven workshops held on the outer islands in 2005, 2006 and 2008 included other stakeholders such as financial institutions, law enforcements and the judiciary. A cross-section of all NGOs on each island including the main island Rarotonga from churches, sports, youth groups and NGOs with international associations such as Red Cross and others attended the November 2008 workshop.

1030. The core objectives of these workshops have been:

- raising awareness of the requirements under the FTRA, ML, TF and the operations of CIFIU;
- discussing a new AML/CFT compliance regime proposal – CIANGO as the self regulating body, with the main focus on creating an incentive for NGOs to register with CIANGO.

1031. The most recent workshop was held in December 2008. Feedback from the NGO sector provided to the Evaluation Team by the NPO sector on the content of the workshops and the general willingness of the CIFIU to engage with the sector was very positive, however both the CIANGO and the CIFIU noted that attendance was relatively low. As a result, plans have been put in place for a second workshop to ensure a majority of NGOs have been put through the CIFIU's training and awareness program.

1032. The CIFIU has issued copies of the FTRA Guidelines to NGOs and is working closely CIANGO to act as the Self Regulatory Organisation (SRO) for registration and administration of all NGOs in the Cook Islands for AML/CFT purposes.

1033. The CIFIU also took the initiative to assess the structure, status and risk vulnerability of NGOs on the main island of Rarotonga to identify the areas of concern and focus. In late 2008, the CIFIU issued over 20 questionnaires to NGOs listed on the Incorporated Societies list. There was a low response (less than 50%) to the questionnaires issued. The results that were received however indicated a low level of financial activity other than one of the respondents (a world renowned NGO) which had relatively large and regular off shore financial activity. The results were insufficient to make a sound overall assessment of the structure, status or risk vulnerability of the NGO sector.

### ***Supervision/monitoring of NPOs***

1034. While recent efforts have been made by the authorities to improve the quality of information regarding the NPO sector, insufficient financial data is held for authorities to know with certainty the total size of the NPO sector and which NPOs account for a significant portion of the financial resources under control of the sector.

1035. Under section 25 of the ISA, societies are required to submit an annual financial statement setting out, *inter alia*, the income and expenditure and assets and liabilities of the society. The Evaluation Team was informed that many societies had failed to lodge annual returns for a number of years. In addition, many of the NGOs registered with the MOJ were in fact inactive, but had not been dissolved in accordance with section 30 of the ISA. These issues are now being addressed in the MOJ's current dissolution/re-registration process.

1036. In relation to the sector's international activities, as noted above these constitute only a small part of the sector's activities. Apart from occasional fundraising for international causes, only two Cook Islands NGOs are branches of an internationally recognised organization. A few NGOs receive aid funding through NZAID, AusAID, Canada and the European Union. Such funding is subject to strict reporting requirements by both the Cook Islands Government and donor organisations.

1037. The Cook Islands has not established a single supervisor responsible for all entities within the NPO sector. There are however a number of supervisory/monitoring measures in place:

- registration of incorporated societies under the *Incorporated Societies Act 1994*. Under section 37A of the ISA, the Registrar has strong powers of inspection;
- the taxation system – some information is held by the tax authorities concerning charitable organizations, but the data is not extensive or aggregated;
- application of the FTRA (noting the issue of the definition of NPOS/friendly societies referred to above); and
- some measure of self-regulation by the umbrella organization (CIANGO).

1038. The review of the NGO sector conducted by the CIFIU in October 2008 found that the amount and quality of data held by authorities needs to be improved. The review noted that “there needs to be a collective effort to improve the existing registration and monitoring process. A careful assessment of the legal framework governing NGOs will provide CIFIU and relevant government agencies with the essential setting to develop measures and controls to ensure organisations are identified and captured. This should lead to the development of an effective database as the key tool for monitoring. Resources can be allocated more efficiently and effectively in terms of assessing risk, training and awareness, and ultimately, compliance.” The Evaluation Team supports these observations and suggests that the relevant government agencies (MOJ, IRD, CIFIU) work together more closely to consolidate their information holdings and processes as they relate to the NPO sector

#### ***Information to be maintained by NPOs***

1039. Information concerning NPOs registered with the MOJ, the IRD and CIANGO is publicly available.

1040. For those NPOs which are incorporated societies, section 5 of the ISA requires a society to establish rules which provide for various matters, including the objects for which the society has been established. These rules must be lodged with the Registrar (MOJ) as part of the application for incorporation. Under section 24 of the ISA, a society is required to maintain a register of its members containing their names, addresses and occupations and the dates on which they became members.

1041. As noted above, the data held by the MOJ is limited to the name of the organisation, registration date and contact person. When applying for registration, societies are not required to supply information concerning those persons who own, control or direct their activities, including senior officers, board members and trustees. These needs to be addressed through amendment to the ISA or through regulations.

1042. The tax laws as they apply to charities are based on New Zealand law. NGOs must apply for tax exemption status to the Internal Revenue Department (IRD). They must submit a copy of their constitution or trust deed and the IRD must be satisfied that the organisation's activities fits the criteria

for tax free status listed in section 48 of the Income Tax Act. Where necessary, the IRD will ask for alterations to the constitution/trust deed so that the criteria for tax exemption are met.

1043. The IRD maintains a file of organisations granted tax free status, but not a register per se. NGOs granted tax exemption are required to have their accounts available for inspection and the IRD has the power to ask for the accounts of an NGO at any time. The IRD informed the Evaluation Team that on occasions, when a fundraising activity is clearly for a charitable purpose, the IRD may not require the organisation to formally apply for tax exempt status, especially if the fundraising is for a one-off cause. The IRD will however investigate a fundraising activity if it suspects that it is not in fact for a charitable purpose.

1044. NPOs are captured under the FTRA (though as noted above the use of the term “friendly society” in the FTRA is somewhat problematic) and are therefore required to ensure compliance.

1045. NPOs which are members of CIANGO are required to report on their activities at the annual general meeting of CIANGO. CIANGO has also recently introduced a follow up process to check on the progress of all projects for which CIANGO has obtained external funding. In addition, donor agencies as a matter of policy require CIANGO and/or individual NPOS to report on their activities. Where CIANGO itself provides funds to a community-based organization on behalf of a donor, it requires that organisation to provide a financial report.

### *Sanctions*

1046. The ISA contains some sanctions for violations of the ISA. Fines may be applied for:

- improper use of the word “incorporated” (section 13);
- failure to have a registered office (section 20);
- operating beyond the scope of the society as defined in its rules (section 21);
- engaging in operations involving pecuniary gain (section 22); and
- failure to lodge an annual financial statement (section 25).

1047. In practice, however, the small penalties (fines) available under these provisions are rarely if ever enforced.

1048. The NGOs which are captured as RIs under the FTRA are liable to the sanctions available under the FTRA for non-compliance with reporting and other obligations (see section 3.7 of this report). No such sanctions have been applied to the NPO sector and no on-site visits to NPOs under the FTRA have taken place to date. Plans are however in place for an on-site programme. During the on-site visit, the Evaluation Team was informed that NPOs had been given some time to put in place systems before the on-site programme would commence.

### *Licensing or registration of NPOs*

1049. NPOs in the Cook Islands are not licensed but, as noted above, some are registered with the MOJ as incorporated societies under the ISA. A registration and administration process is currently being discussed with CIANGO for the purposes of the FTRA, and the CIFIU has compiled a database of NGOs using information held by both MOJ and CIANGO.

***Maintain and make available records for at least five years***

1050. There are no record keeping requirements under the ISA. However, an NPO is required to keep records for a period of six years under the FTRA.

***Effective investigation and gathering of information***

1051. The CIFIU is responsible for the AML/CFT supervision of NPOs in the Cook Islands and the Police have the necessary powers to gather further information and evidence if required.

***Domestic cooperation, coordination and information sharing***

1052. Domestic cooperation for a multi-agency investigation or intelligence gathering can be initiated and coordinated by Police under CLAG and by the CIFIU under CIFIN should a TF (or ML) concern arise in the NPO sector.

1053. There is no legal barrier to police of other agencies obtaining and sharing information in the course of an investigation.

***International requests for information***

1054. The CIFIU is the point of contact to exchange information with other CIFIUs or law enforcement agencies domestically and internationally.

**5.3.2. Recommendations and Comments**

1055. The risk of TF (and ML) through the NPO sector in the Cook Islands is very low and there is no evidence to suggest that any NPO in the Cook Islands has been used as a vehicle for TF or ML.

1056. Notwithstanding the very low level of risk, the Cook Islands has taken some important steps to meet the requirements of SRVIII. A review of the NPO sector has been undertaken and NPOs have been included as 'reporting institutions' under the FTRA (although possible problems with the use of the term 'friendly society' to capture NPOs have been noted and should be addressed). Inclusion of NPOs as RIs actually goes beyond what is required under SRVIII in a number of respects and in practice some of the requirements may be difficult for NPOs to meet without significant training and support. The FTRA Guidelines have been issued to the NPO sector and outreach to the sector has already commenced. Discussions are under way with the peak NPO umbrella organization (CIANGO) for it to act as the SRO for the entire NPO sector. The active approach taken to apply AML/CFT measures to the NPO sector in the Cook Islands must be acknowledged, particularly considering the low level of risk

1057. On the other hand, it is clear that the authorities still lack comprehensive and meaningful formal data on the size and activities of NPOs in the Cook Islands, with many NPOs not being registered and with many of those which are registered as incorporated societies having ceased to operate and/or to have submitted the required financial and other information. While the small size of the Cook Islands means that the activities of the NPO sector are generally well known, it is difficult for authorities to know with any precision the true extent of the sector and those NPOs which account for a significant proportion of its resources. Even those NPOs which are registered are not explicitly required under the ISA to

maintain information on the identity of persons who own, control or direct their activities, including senior officers, board members and trustees.

1058. The CIFIU’s recent review of the NPO sector identified a number of these issues and the need to address them. It is recommended that a coordinated approach be taken by the relevant authorities (the CIFIU, MOJ, IRD and CIANGO) to:

- Identify, share and consolidate their current data holdings on the NPO sector;
- Identify and address information gaps;
- Review the Incorporated Societies Act, and any other relevant legislation, policy and procedures, to ensure that it provides a sound and comprehensive basis for supervising and monitoring the activities of the NPO sector;
- Ensure that adequate supervisory and monitoring mechanisms are in place for unregistered NPOs, either directly or through a self-regulatory organization, to comply with the requirements of the FTRA.

1059. The Evaluation Team supports these recommendations. It is also recommended that:

- the ISA be amended or regulations be issued under the ISA to provide that organizations applying to be incorporated societies be required to supply information concerning those persons who own, control or direct their activities, including senior officers, board members and trustees, and that this information be kept on the database maintained by the MOJ;
- use of the term ‘friendly society’ in section 2 of the FTRA be reviewed to ensure that it meets its intended purpose of capturing the entire NPO sector in the Cook Islands;
- further outreach be undertaken to the NPO sector to increase awareness of possible ML/TF risks and the sector’s obligations under the FTRA.

### 5.3.3 Compliance with Special Recommendation VIII

	Rating	Summary of factors underlying rating
SR.VIII	PC	<ul style="list-style-type: none"> <li>• A review of the NPO sector has been conducted but significant information gaps remain on the size and activities of the sector.</li> <li>• There is limited supervision or monitoring of NPOs.</li> <li>• Weak implementation of the existing requirements for incorporated societies to report constitutional, programmatic or financial information.</li> <li>• Registration requirements do not include obligations to record the details of persons who own, control or direct NPOs.</li> <li>• Sanctions available to competent authorities for breaches of controls over NPOs are ineffective.</li> </ul>

## **6. NATIONAL AND INTERNATIONAL CO-OPERATION**

### **6.1. National Co-operation and coordination (R.31)**

#### **6.1.1 Description and Analysis**

1060. There is no overarching legal framework which obligates policy makers, the CIFIU, law enforcement, supervisors and other competent authorities to co-operate and where appropriate co-ordinate domestically with each other concerning the development and implementation of policies activities to combat money laundering and terrorist financing. However, coordination mechanisms have been established at both policy and operational levels.

#### **Recommendation 31**

##### ***Policy coordination***

1061. At the policy level, on 4 March 2004, the Cabinet approved the establishment of the Coordinating Committee on Combating Money Laundering and Terrorist Financing (CCAM) in the Cook Islands. The members of CCAM consisted of the following Heads of Ministries:

- i. Airport Authority
- ii. Audit Office
- iii. Cook Islands Investment Corporation
- iv. Crown Law Office
- v. Business Trade & Investment Board
- vi. Financial Intelligence Unit
- vii. Financial Supervisory Commission
- viii. Ministry of Finance and Economic Management (Including Customs).
- ix. Ministry of Foreign Affairs & Immigration
- x. Ministry of Justice
- xi. Ministry of Police.

1062. On 15 June 2007, the Ombudsman was included as the 12th member on CCAM.

1063. CCAM meets when required. It met four times in 2007 with one out of session update, and three times in 2008. The focus by CCAM since 2007 has been the Cook Islands Mutual Evaluation where outstanding issues and progress on certain projects were discussed such as the drafting of new legislation and amendments to existing AML/CFT related legislation, a Law Enforcement Training Workshop, the National Money Laundering and Terrorism Financing Threat Assessment and other related issues.

##### ***Operational coordination***

1064. National cooperation at the operational level for any multi-agency investigation is coordinated by the CIP under the Combined Law Agency Group (CLAG). The CLAG has an operational focus designed at the sharing of intelligence and the development of effective relationship to enhance the

sharing of information. The CLAG was however dormant for a period of 18 months and has only recently been re-established.

1065. The Cook Islands Financial Intelligence Network (CIFIN), which includes members from Customs, Immigration or other agencies, was initially established by the CIFIU in response to a specific STR and meets as required in respect of specific operational tasks.

1066. In addition to these general coordination mechanisms, there are MOUs are between various agencies; for example, the CIFIU has MOUs with the FSC, CIP, Customs, and Immigration. This provides a mechanism for the exchange of information between these agencies. There is a close working relationship between the CIFIU and the FSC.

#### ***Additional element***

1067. Consultations by the CIFIU and the FSC with financial institutions on AML/CFT issues is ongoing and takes place through training, meetings on specific topics and through the on-site examination process.

#### ***Statistics/reviews of effectiveness***

1068. The CIFIU is the lead agency for AML/CFT issues in the Cook Islands and it maintains statistics on cash transaction and electronic funds transfer reports over the \$10,000 threshold, and suspicious transaction reports received from reporting institutions. It is also receives border cash reports for over \$10,000 threshold from Customs.

1069. The Crown Law Office formally administers the Terrorism Suppression Act, Proceeds of Crime Act and the Mutual Assistance in Criminal Matters Act. However the implementing agency is the Cook Islands Police and both agencies should maintain statistics on terrorism, proceeds of crime matters and international requests.

1070. The CIFIU, CLO and the CIP are members of CCAM where AML/CFT issues are discussed and on an operational basis, the three agencies meet independently to discuss operational issues on AML, CFT, terrorism, proceed of crime and where necessary, international requests.

#### ***Resources (policy makers)***

1071. CCAM has the authority to be the overall policy making body on AML/CFT matters, but in reality is guided by the CIFIU. The CIFIU is the agency with best access to the latest developments in AML/CFT and closest liaison with other AML/CFT bodies, for example, the Egmont Group and the APG. Policy proposals and the drafting of legislation is undertaken by aid-funded drafters or by the Crown Law Office in consultation with the CIFIU and then submitted to Cabinet.

1072. CCAM is the policy decision making body on AML/CFT in the Cook Islands. Secretariat services are provided by the CIFIU which has sufficient resources and office space for its meetings. CCAM has operational independence and is required to report to Cabinet on its annual activities.

1073. All members of CCAM are Heads of Government Ministries or statutory bodies and they are required to maintain a high professional standard and integrity including when dealing with confidential matters.

1074. Some training on AML/CFT has been provided to key agencies but other agency-specific training needs to enhance staff capacity are still required to ensure effective implementation of the AML/CFT regime and when investigating a serious offence, ML or TF offences, or proceeds of crime investigations.

***Effectiveness***

1075. Generally, there is a good level of cooperation and coordination in the Cook Islands, with appropriate mechanisms having been created at both the policy and operational levels. The CCAM in particular has acted as an important coordination mechanism, and there is a strong working relationship between the CIFIU and the FSC in the implementation of the FTRA.

1076. There is however some duplication between the CIFIN (CIFIU chair) and CLAG (Police chair), both of which have an operational focus. During the on-site visit it became apparent that despite the formation of these groups to share and co-ordinate information and intelligence, there had in practice been a lack of co-ordination which had inhibited an effective response to referrals from the CIFIU.

1077. Commitment from all partners involved in ML, TF and POC recovery is required to enable effective and timely response to matters when appropriate.

**6.1.2. Recommendations and Comments**

1078. Consideration should be given to merging CIFIN and CLAG, with the ability of all members to call additional 'specific special operational' meetings as required.

1079. A more collaborative approach to the resolution of ML and predicate offending is required. The CLAG mandate should be used to share resource and skills to permit a whole of government collaborative focus to addressing criminal matters. Mechanisms under CLAG to permit greater sharing of skills and resources between key agencies to support each could enhance the effectiveness of the CLAG approach. In a small jurisdiction where resources are limited, what is required is an 'expert team' not a 'team of experts'. For example, better utilization of the combined skills of Police (investigative), CIFIU (analysis) and Audit (forensic accountancy) to address financial crimes that are large and complex would enhance overall effectiveness and capability.

**6.1.3. Compliance with Recommendation 31**

	<b>Rating</b>	<b>Summary of factors underlying rating</b>
<b>R.31</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>Operational co-ordination could be more effective to avoid the duplication of function and maximise use of existing resources and expertise.</li> </ul>

## **6.2. The Conventions and UN Special Resolutions (R.35 & SR.I)**

### **6.2.1. Description and Analysis**

#### ***Legal framework***

1080. The Cook Islands has enacted a suite of legislation directed at addressing its obligations under the relevant UN Conventions and Security Council Resolutions, namely the *Proceeds of Crime Act 2003*, *Mutual Assistance in Criminal Matters Act 2003*, *Extradition Act 2003*, *Terrorism Suppression Act 2004* and *Financial Transactions Reporting Act 2004*, together with amendments made to the *Crimes Act 1969*.

#### ***Ratification of UN Conventions***

1081. The Cook Islands acceded to the United Nations Convention against Illicit traffic in Narcotic drugs and psychotropic substances 1988 (the Vienna Convention) on 22 February 2005. The Convention entered into force on 23 May 2005.

1082. The United Nations Convention against Transnational Organized Crime (the Palermo Convention) was acceded to on 4 March 2004. The Convention entered into force on 3 April 2004.

1083. The Cook Islands signed the International Convention for the Suppression of the Financing of Terrorism (the Terrorist Financing Convention) on 24 December 2001. It was ratified on 4 March 2004 and entered into force on 3 April 2004. At the time of ratification, the Cook Islands declared that the Convention not apply to five of the nine treaties listed in the Annex to the Convention as it was not at that time a signatory. Since that time, the Cook Islands has become a signatory to two further treaties specified in the Annex to the Convention.

#### ***Implementation of Vienna Convention***

1084. The Cook Islands has implemented the majority of requirements of the Vienna Convention. Money laundering is criminalized by s280A of the Crimes Act and extends to a broad range of predicate offences above a threshold. As discussed in section 2.1 of this report, not all of the designated categories of offences are presently covered, however, the application is generally broad and the offence provisions do have extra-territorial operation. The range of sanctions available could be broader for natural persons in recognition of the gravity of such offences.

1085. The Proceeds of Crime Act 2003 (POCA), although untested in domestic matters, operates to provide a conviction-based regime for seizure and restraint of property, enhanced investigative tools and for the making of forfeiture and pecuniary penalty orders. Some deficiencies in the mechanisms are identified elsewhere in this report. The Mutual Assistance in Criminal Matters Act 2003 (MACMA) enables the Cook Islands to provide a broad range of assistance to requesting countries and for reciprocal requests to be made where dual criminality exists. The MACMA operates in conjunction with the POCA to enable assistance to be provided for proceeds of crime investigations, the obtaining of interim restraining orders and the registration of orders arising out of foreign proceedings. A threshold approach is also adopted and dual criminality is necessary for the provision of the assistance specified in the Act. There is no requirement to have obtained a conviction except in the registration of forfeiture and

pecuniary penalty orders. Any secrecy provision in other legislation is expressly overridden by the MACMA.

1086. The Extradition Act 2003 also has a general threshold and applies a slightly relaxed approach to the dual criminality requirement. Prosecution in lieu of extradition may occur and evidence may be disseminated to the foreign country for the purpose of a prosecution where extradition to the Cook Islands is refused. Special provisions operate in respect of terrorism offences. Evidentiary requirements vary depending upon the requesting country and simplified procedures apply for South Pacific countries.

1087. In addition to the legal framework, there are extensive informal relationships that are used in the provision of both domestic and regional policing responsibilities. The Cook Islands is a member of the Pacific Islands Chiefs of Police Forum and therefore has established relationships with other police services in the region. This affords a mechanism for informal co-operation and sharing of information when required. The Cook Islands also has the ability to seek assistance from the Pacific Trans National Crime Co-ordination Centre with which it has a close relationship and this affords a further regional mechanism for seeking informal co-operation. Having a close relationship with New Zealand, the Cook Islands is also able to utilise the Interpol network via New Zealand to seek informal international assistance when required. The Cook Islands has also assisted, and sought informal assistance from, foreign law enforcement agencies as a result of direct police to police relationships.

#### ***Implementation of Terrorist Financing Convention***

1088. Financing terrorism has been criminalized by the Terrorism Suppression Act 2004 (TSA), along with other terrorism offences. Although criminal responsibility for legal persons is specifically recognized in the TSA, there is no specified penalty for legal persons and no apparent mechanism to convert the sanction applicable to natural persons to corporate entities.

1089. The offence of financing of terrorism insofar as it relates to financing a terrorist act may be restricted by a requirement in one limb of the definition of “terrorist act” that the conduct be committed for the purpose of “advancing a political, ideological or religious cause.” Whilst the definition is otherwise broad and takes in all offences within the scope of the counter terrorism offences listed in Schedule I this aspect of the definition appears unnecessary, particularly as it is not a convention requirement and the convention requires that the relevant criminal conduct not be under any circumstances be justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

1090. The convention definition of “funds” has been picked up in the definition of “property” in the financing of terrorism offence. Provision of funds or property to be used by a terrorist organisation or a terrorist has been addressed by a further offence which criminalizes the provision or collection by any means, directly or indirectly, any property, intending, knowing or having reasonable grounds to believe that the property will benefit an entity that the person knows is a specified entity, which extends to entities specified on the UN SC consolidated list or in respect of whom a declaration has been made in the Cook Islands High Court.

1091. Other offences including dealing with terrorist property and harbouring terrorists (including persons intending to commit acts) have also been created. All offences have potential extra territorial

operation, although one category of such operation is not presently covered, namely the commission of offences in respect of overseas missions.

1092. Special provisions apply to the provision of mutual assistance or extradition in respect of terrorist financing and other terrorism offences. No request for mutual assistance can be refused on grounds alone of bank secrecy. Where extradition is refused, cases must be referred to the Solicitor General for prosecution and the offences may not be regarded as fiscal. The offences may also not be regarded (for extradition or mutual assistance purposes) as offences of a political character, connected to a political offence or inspired by political motives, which conflicts with the “terrorist act” definition discussed above.

1093. The TSA creates a regime for the making of “control” orders in respect of “terrorist property” and for the forfeiture of such property in the absence of conviction for any offence. Amendments to the POCA also permit the seizure of “terrorist property”. This regime does not derogate from the POCA confiscation regime which would also enable the restraint and forfeiture of terrorist funds or property of individuals in connection with the prosecution of a terrorist offence. The ability to obtain a control order, particularly in respect of entities other than those specified in the UNSC consolidated list, may not be as timely as an administrative exercise might otherwise have been. The Act, nor any regulations under the UNSCR Act, does not make provision for the circulation of the list.

1094. Article 18(b) of the Terrorist Financing Convention also requires states to require financial institutions and other professions involved in financial transactions to have efficient customer identification mechanisms in place. As noted previously, in Section 3 of this report, there are some deficiencies in the Cook Islands’ customer due diligence. Of relevance here are the deficiencies noted with respect to •supervision of the insurance sector, the lack of a requirement to obtain information on the purpose and intended nature of the relationship, no requirement for enhanced CDD to be undertaken for higher risk customers, business relationship or transactions; and no requirement for reporting institutions to apply CDD requirements to existing customers.

1095. The current regime for detection and monitoring cross border currency and bearer negotiable instruments is in need of enhancement and further training. It is understood that draft legislation is being prepared and that a greater focus on this requirement will be undertaken.

### ***Implementation of Palermo Convention***

1096. The Cook Islands has implemented a large proportion of the requirements of the Palermo Convention. Participation in an organized criminal group has been criminalized as have people trafficking and smuggling, the subject of the Annexes II & III to the Convention.

1097. Where there has been cooperation in respect of a proceeds of crime matter, the POCA and MACMA enable the Cook Islands to enforce conviction based forfeiture and pecuniary penalty orders (but not orders for payment in lieu of forfeiture unless expressed as a forfeiture order) and to enter into equitable sharing arrangements. The proceeds recovered by Cook Islands may be applied for law enforcement purposes.

1098. Whilst a number of penal sanctions are available to the Financial Services Commission, (FSC), the absence of a broader range of sanctions has been noted in section 3 of this report and is considered to

have a limiting effect on the ability of the FSC to discharge its functions. The ability to disqualify or suspend Directors is also absent.

1099. The Cook Islands does not appear to have a generic code of conduct which applies to all public servants, across all departments undermining the function of the Public Service Commissioner to promote and ensure integrity within public entities. Procedures for the granting of tenders and other procedures which might otherwise serve to prevent conflicts of interest arising did not appear to be strictly or evenly applied.

1100. Whilst lawyers practicing in the Cook Islands are subject to the Law Practitioners Act 1993/94, no audits of trust accounts have been conducted. It is understood that an independent auditor has or is being appointed to undertake this task.

### ***Implementation of UN SCRs relating to terrorist financing***

1101. The regime created by the TSA enables the freezing and confiscation of terrorist property associated with those specified on the UN Consolidated list along with others the subject of declarations made by the High Court of the Cook Islands on application of the Solicitor General.

1102. Terrorism financing has been criminalized along with other offences which include providing more general support to terrorists. Some deficiencies in the offence provisions have been identified elsewhere in this report.

1103. Information exchange is enhanced under the TSA.

1104. The Cook Islands has also become a signatory to nine of the treaties specified in the Annex to the Terrorist Financing Convention, although it is noted that it has criminalized offences (such as under the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents Act) which it has apparently not signed. At least two further treaties have been signed since the Convention was ratified.

### ***Additional element***

1105. The Cook Islands is not a signatory to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime or the 2002 Inter-American Convention against Terrorism. It would not be expected given its geographical location that the Cook Islands would have signed the Council of Europe convention in any event.

### ***Effectiveness***

1106. The Cook Islands has sought to satisfy a large number of its obligations under the UN Conventions and SC resolutions and has made a great deal of progress in this area in the period from 2004. Many of the provisions are yet to be tested and whilst there may be a very low risk of TF, scope to apply and test the ML offence provisions and POCA regime exists.

## 6.2.2. Recommendations and Comments

1107. As the Cook Islands now has the underlying legislation for a largely effective AML/CFT regime, competent authorities of the Cook Islands should identify the impediments to the practical application of these provisions. They may also wish to consider developing procedures to ensure for example that ML offences or confiscation are always considered and that appropriate cases are identified.

1108. A number of technical issues with the operation of the ML, TF, POCA and MACMA regimes have been identified elsewhere in this report and should be addressed to ensure effective implementation.

1109. Competent authorities should also consider taking steps to strengthen and promote integrity within government departments. A generic mandatory code of conduct with appropriate sanctions would assist in minimizing risks in this area.

1110. In addition, regulators must be provided with a broad range of sanctions so that they may readily take steps to ensure compliance.

## 6.2.3. Compliance with Recommendation 35 and Special Recommendation I

	Rating	Summary of factors underlying rating
<b>R.35</b>	<b>LC</b>	<ul style="list-style-type: none"><li>• Relevant articles largely implemented, but with some technical deficiencies.</li><li>• A lack of practical application of offences and confiscation provisions.</li><li>• A strengthening and promotion of integrity within government departments also required.</li><li>• A broad range of sanctions is required by regulators.</li></ul>
<b>SR.I</b>	<b>LC</b>	<ul style="list-style-type: none"><li>• Relevant articles largely implemented, but with some technical deficiencies.</li><li>• A lack of practical application of offences and confiscation provisions.</li><li>• Lack of process in circulation of UNSCR consolidated list.</li><li>• There is no specific provision in the TSA control order regime for access for funds for basic purposes consistent with UNSCR 1452 although orders can be made subject to conditions.</li></ul>

## 6.3. Mutual Legal Assistance (R.36-38, SR.V)

### 6.3.1. Description and Analysis

#### *Legal framework*

1111. The *Mutual Assistance in Criminal Matters Act 2003*, as amended by the *Mutual Assistance in Criminal Matters Amendment Act 2003* and the *Mutual Assistance in Criminal Matters Amendment Act 2004* (MACMA), provides the framework for requesting and the provision of mutual assistance in the

Cook Islands. The competent authority for the purposes of the Act is the Attorney General who has delegated his functions to the Solicitor General (SG) pursuant to s58 of the MACMA.

1112. “Authorized officers” authorized in writing by the Attorney-General are responsible for the execution of requests under the Act such as search warrants.

***Provide the widest possible range of mutual assistance***

1113. The MACMA enables the Cook Islands to provide a broad range of assistance to requesting countries both in respect of criminal matters and proceeds of crime matters.

**Criminal Matters**

1114. The trigger for the provision of assistance in relation to a criminal matter is the existence in the foreign country of a “proceeding” or investigation in respect of a “criminal matter” as defined. As can be seen from the definitions below, it is not necessary for a conviction to have been obtained in the proceeding or for a charge to have been laid in the investigation for assistance to be provided.

1115. A “proceeding” or “proceedings” for the purposes of MACMA has the same meaning as the term “proceedings” as defined in the Proceeds of Crime Act 2003 (POCA), namely:

“proceedings” includes any procedure (including an inquiry, investigation, or preliminary or final determination of facts) conducted by or under the supervision of a Judge or Justice or Registrar of the Court in connection with:

- (a) an alleged or proven offence;
- (b) property derived from that offence.

“criminal matter” means an offence against a provision of –

- (a) any law of the Cook Islands, for which the maximum penalty is imprisonment for a term of not less than 12 months or a fine of more than \$5,000;
- (b) a law of a foreign country, in relation to acts or omissions, which had they occurred in the Cook Islands, would have constituted an offence for which the maximum penalty is imprisonment for a term of not less than 12 months, or a fine of more than \$5,000.

1116. The AG may authorize the provision of the following types of assistance to a requesting country in respect of a proceeding or investigation in a criminal matter :

- (a) the taking of evidence;
- (b) production of documents or articles;
- (c) issue of search warrants;
- (d) the transfer of a person undergoing a sentence of imprisonment (whether in custody or not) or a person in custody pending trial or sentence to the requesting country to give evidence in a proceeding or to assist with the investigation, (provided the person consents).

1117. There is no provision in MACMA dealing with the service of documents on behalf of a foreign country, although section 4 clearly states that the Act does not limit the provision or obtaining of international assistance other than assistance of a kind that may be provided or obtained under the MACMA, nor is the absence of any treaty a bar to the provision of assistance.

1118. A further provision enables the AG to seek assistance on behalf of a defendant in respect of a criminal matter. Where a court certifies that it would be in the interests of justice for the AG to request assistance from a foreign country in the taking of evidence, production of articles or documents or seizure of things or to make arrangements for the attendance of witnesses on behalf of a defendant, the AG must make the relevant request.

#### Proceeds of crime matters

1119. Where a proceeding or investigation in respect of a “serious offence” has commenced in a foreign country, the AG may authorize the following forms of investigative assistance in respect of proceeds of crime matters:

- (a) issue of a search warrant for tainted property;
- (b) a production order or a search warrant for property tracking documents.

1120. Where a proceeding has commenced in the requesting country for a serious offence or the AG believes on reasonable grounds that a proceeding is about to commence and that property which may be made the subject of a foreign restraining order is located in the Cook Islands, the AG may also apply to a court for an interim restraining order against the property under the POCA (s45 MACMA).

1121. Requesting countries may also seek assistance in the registration and enforcement of foreign orders made in respect of serious offences, namely:

- (a) a foreign forfeiture order;
- (b) a foreign pecuniary penalty order;
- (c) a foreign restraining order.

1122. A “serious offence” is defined to have the same meaning as in the POCA, which is substantially similar to the definition of a “criminal matter” in that it extends to acts or omissions in the Cook Islands punishable by more than 12 months’ imprisonment or a fine in excess of \$5,000 and to foreign offences, which had they been committed in the Cook Islands would have constituted an offence punishable in the same manner.

1123. Foreign forfeiture and pecuniary penalty orders may not be enforced unless a person has been convicted of the offence and the conviction and order are not subject to appeal in the foreign country.

1124. “Foreign restraining order” is defined as “an order made under the law of a foreign country, about an offence against the law of that country, restraining a particular person, or all persons, from dealing with property.

1125. In the case of the exercise of investigative functions, making of applications and enforcement of foreign orders, specified provisions of the POCA apply to the application authorized to be made under the MACMA and to the enforcement of the foreign orders.

1126. Corresponding provisions of the MACMA permit the Cook Islands to seek assistance from foreign countries in respect of proceedings or investigations for criminal matters or for assistance with POCA matters in respect of serious offences.

1127. The Cook Islands has received requests for mutual assistance from Australia, India and the United States of America in respect of criminal matters and one request in respect of a proceeds of crime matter. It has made one request itself for the provision of mutual assistance in the period 2006 to date. The SG advised the Evaluation Team that the Crown Law Office had not encountered significant delays in dealing with mutual assistance requests to date. In the course of the onsite visit, the team also received a copy of feedback provided by Australia to the FATF in December 2008 in respect of international cooperation provided to it by the Cook Islands. The feedback indicated that Australia had received high quality, timely assistance in admissible form from the Crown Law Office in respect of two requests.

***No unreasonable or unduly restrictive conditions on mutual assistance***

1128. Section 8 of the MACMA provides that assistance provided to a foreign country may in whole or in part be subject to any conditions the AG determines. Assistance may also be refused or postponed on the basis that the request might interfere with the sovereignty of the Cook Islands or prejudice the conduct of an investigation or proceeding in the Cook Islands.

1129. The MACMA enables assistance to be provided in respect of investigations and in proceedings without a conviction having been obtained. It does require the relevant offending to fall within the definition of a criminal matter or serious offence which requires the acts or omissions to constitute an offence punishable by more than 12 months or a fine in excess of \$5,000 had they occurred in the Cook Islands.

1130. Section 45 of the Terrorism Suppression Act 2004 (TSA) makes clear that for the purpose of mutual assistance and despite anything in the MACMA, an offence which would constitute a terrorist act is taken not to be an offence of a political character or an offence connected with a political offence or an offence inspired by a political motive, or a fiscal offence. Further, that no request may be declined on the basis of bank secrecy alone.

1131. The excessive secrecy provisions previously found within various Acts which might otherwise have affected an information gathering exercise also appear to have been substantially modified by amending Acts in the course of 2004.

1132. A new section 60A was inserted into MACMA by the 2004 amending Act which expressly provides for the overriding of secrecy:

“60A (1) For the avoidance of doubt, a reporting institution must comply with the requirements of this Act despite any obligation as to secrecy or other restriction on the disclosure of information imposed by any written law or otherwise.”

(“reporting institution” has the same meaning as in the *Financial Transaction Reporting Act 2004* which has a very broad application.)

### ***Efficiency of processes***

1133. Section 7(2) of the MACMA sets out the nature and form of the information required to be provided to the AG when making a request. The Act also provides that if a request is made to the High Court by a foreign country, the Court must refer the matter to the AG where it is taken to have been a request made to the AG.

1134. In the course of the on-site visit, the Evaluation Team was informed that some requests for assistance had been directed to the CIFIU rather than the AG or SG. These were advised to the SG as the delegate of the AG as a matter of course.

### ***Provision of assistance regardless of possible involvement of fiscal matters***

1135. The MACMA does not make specific provision for refusing assistance on the basis that the offence involves a fiscal matter, notwithstanding the terminology employed in section 45 of the TSA and referred to at paragraph 1066 above, however, nor does it state that a request will not be refused on the basis alone that the conduct is of a fiscal nature. The Evaluation Team was informed that no mutual assistance request had been refused by the Cook Islands.

### ***Provision of assistance regardless of existence of secrecy and confidentiality laws***

1136. Section 60A of the MACMA makes it clear that a reporting institution (as defined under the FTRA 2004) must comply with the requirements of the MACMA, notwithstanding any obligation as to secrecy or other restrictions on the disclosure of information imposed by any written law or otherwise. This provision was apparently intended to revise secrecy obligations and to remove impediments to local and international investigations.

1137. Amendments were also made during 2004 to the secrecy provisions of acts such as the *International Companies Act 1981-82* revising secrecy provisions to ensure that the disclosure of information would not constitute an offence if made for the purpose of discharging functions or duties under any Act or was required or authorized by Court order or search warrant. A further amendment recognized that international companies were now subject to the operation of Acts such as the *Crimes Act 1969*, POCA, MACMA, TSA, *Criminal Procedure Act 1980-81*, *Financial Supervisory Commission Act 2004*, *Extradition Act 2003* and *Financial Transactions Reporting Act 2003*. Corresponding amendments made to the *International Trusts Act 1984* may have been less effective and may require review

1138. Notwithstanding the amendment made to MACMA and the modification of the secrecy provisions in Acts such as the *International Companies Act 1980-81*, the Evaluation Team had some reservations about the ability of investigators to obtain information or to enforce foreign orders in relation to international trusts. It is noted that whilst an amendment was made to the secrecy provisions of the *International Trusts Act 1984*, a further amendment which purported to acknowledge the operation of Acts including POCA and MACMA does not appear to have been effectively made.

1139. As noted in Part 5.2 of this report, the information required to be provided and collected in respect of beneficiaries of international trusts may be deficient and as a consequence, would not be available to investigators. In addition, the ability to enforce a foreign proceeds of crime order involving assets of an international trust may be severely limited by the restriction on registration of foreign orders

imposed by s13D of the *International Trusts Act 1984* if that provision was not effectively subject to the operation of other Acts such as POCA and MACMA however declarations that entities are “specified entities” under section 6(3) of the TSA must be published as must revocations.

1140. It is also noted however that it was apparent to the Evaluation Team from information provided those trustees interviewed, that the property of most if not all international trusts was not held in the Cook Islands, with such property held in the country of the settler or beneficiary of the trust. As a consequence, whilst the international trust would be required to be served with relevant process, enforcement of the foreign order would take place in the country where the assets were held.

#### ***Availability of powers of competent authorities***

1141. The powers available to competent authorities to obtain search warrants in relation to a criminal investigation and to obtain search warrants in respect of tainted property, production orders and search warrants for property tracking documents are available to be applied in response to a request for mutual assistance. Each of these powers may be exercised in respect of financial institutions.

#### ***Avoiding conflicts of jurisdiction***

1142. Section 9 of the MACMA may assist in avoiding conflicts with other jurisdictions by enabling the AG to postpone a request for mutual assistance in whole or in part on the ground that granting the request immediately would be likely to prejudice the conduct of an investigation or proceeding in the Cook Islands.

1143. Various provisions of the *Extradition Act 2003* and the TSA may also assist in avoiding conflicts by ensuring that where extradition is denied, prosecution take place in the Cook Islands and where extradition is denied to the Cook Islands, that they cooperate by providing relevant evidence to the country undertaking the prosecution.

#### ***Additional element***

1144. Where a request is made to a Court for international assistance, the MACMA provides that the request must be referred to the AG to be treated as a request to the AG under the Act.

1145. The provision of assistance in respect of compulsory evidence or information gathering does appear to be limited to the MACMA having regard to section 4 MACMA, which provides:

“This Act does not prevent the provision or obtaining of international assistance in criminal matters *other than assistance of a kind that may be provided or obtained under this Act*”.

1146. Where a corresponding investigation is being conducted in the Cook Islands and investigators gather material for their own purposes which may be relevant to an investigation in another jurisdiction, investigators may and where appropriate do share intelligence on a police to police basis.

## **SRV**

### ***International Cooperation under SR V (applying R36)***

1147. The Cook Islands is able to provide assistance in respect of offences committed in foreign countries and which involve the financing of terrorism, terrorist acts and terrorist organizations, provided the relevant offence would fall within the criminal matter or serious offence definition specified above. The nature of that assistance is broad and is set out in respect of Rec 36.1 above. It is noted that the definition of “terrorist act” which applies in the financing of terrorism offence does contain an additional element not required by the convention and which might cause difficulties.

1148. Although the mechanisms are as yet not much tested, it is not anticipated that a request of this nature would be subject to delay or restrictive conditions.

1149. The provision of mutual assistance is not subject to any requirement for a charge to have been laid (in respect of investigations in criminal matters) or a conviction having been obtained (in respect of proceedings). In terrorism matters, the TSA specifically provides that notwithstanding anything in the MACMA, an offence under the TSA is taken not to be an offence of a political character or an offence connected with a political offence or an offence inspired by political motives, or a fiscal offence. Further, subsection 45(2) provides that no request for mutual assistance in relation to an offence under the TSA may be declined solely on the basis of bank secrecy.

1150. The powers of competent authorities required under FATF Recommendation 28 are available provided the prerequisites as to the existence of a proceeding or investigation into a criminal matter or a serious offence are met.

### ***Additional element***

1151. The only relevant mechanism to potentially avoid conflicts of jurisdiction is section 9 of the MACMA.

## **Recommendation 37**

### ***Dual Criminality and Mutual Assistance***

1152. A prerequisite for the provision of mutual assistance is the requirement that the request relate to a proceeding or investigation in respect of a “criminal matter” or that a proceeding in respect of a “serious offence” has commenced. The relevant definitions are substantially the same and require, in the case of a foreign offence, that had the conduct occurred in the Cook Islands, the acts or omissions would have constituted an offence for which the maximum penalty was imprisonment of not less than 12 months or the imposition of a fine of more than \$5,000. The requirement does not vary for any of the available measures.

1153. In relation to SRV, as set out above, the foreign offence must fall within the definition of “criminal matter” or “serious offence” to enable mutual assistance to be provided. In respect of terrorism offences however, the *Extradition Act 2003* provides a more relaxed test in the definition of “extradition offence”, namely:

5(1) An offence is an extradition offence if –

(a) It is offence against a law of the requesting country punishable by death or imprisonment for not less than 12 months or the imposition of a fine of more than \$5,000; and

(b) The conduct that constitutes the offence, if committed in the Cook Islands, would constitute an offence (however described) in the Cook Islands punishable by death or imprisonment for not less than 12 months or the imposition of a fine of more than \$5,000.

1154. Importantly, sub-section 5(2) goes on to provide that “in determining whether conduct constitutes an offence, regard may be had to only some of the acts and omissions that make up the conduct”. Sub-section 5(4) also provides that an offence may be an extradition offence when it involves taxation, customs duties or other revenue matters even though the Cook Islands does not impose a duty, tax, impost or control of that kind.

### **Recommendation 38**

#### ***Requests for provisional measures including confiscation***

1155. The MACMA and POCA provide the framework to provide mutual assistance in response to a request from a foreign country for:

- (a) Search warrants for tainted property;
- (b) Production orders & search warrants for property tracking documents;
- (c) Interim restraining orders;
- (d) Registration of foreign forfeiture pecuniary penalty and restraining orders.

1156. Action may be taken where there is an investigation or proceeding in a foreign country in respect of a “serious offence”. Subject to falling within this definition, which applies to money laundering and financing terrorism offences, this broad range of assistance may be provided if the SG acting under a delegation from the AG so authorizes.

1157. Some deficiencies in the money laundering and terrorism financing offence provisions noted elsewhere in this report may limit the ability to provide mutual assistance. Some deficiencies in the definitions of “proceeds” and “realizable property” in the POCA, noted elsewhere in this report may also affect effectiveness.

1158. Whilst there has been no application of the POCA regime to domestic matters, mutual assistance has been provided in one matter involving proceeds of crime.

#### ***Property of corresponding value***

1159. There is no provision in the MACMA which would enable an order representing a payment in lieu of forfeiture (as appears at s23 of the POCA) to be enforced on behalf of a foreign country. Where however the foreign order was a forfeiture of property in lieu of forfeiture of tainted property, it may well fall within the definition of a “foreign forfeiture order” being “an order made under the law of a foreign

country, for the forfeiture of property because of an offence against the law of that country.”. If the forfeiture in lieu order fell within this definition it could be enforced under MACMA.

### ***Coordination of seizure and confiscation actions***

1160. Although the MACMA provides that the Cook Islands may render assistance in the absence of any treaty, agreement or other arrangement, the Government of the Cook Islands has approved the signing of an Agreement with the Polish Authorities for Mutual Legal Assistance in Criminal Matters. In addition, s9 of the MACMA provides that assistance may be postponed if it might prejudice a Cook Islands investigation.

### ***International Cooperation under SR V***

1161. The discussion above in respect of Recommendation 38 relates also to financing of terrorism and other terrorism offences.

### ***Asset Forfeiture Fund***

1162. Section 100 of the POCA creates the Confiscated Assets Fund. The POCA monies paid to the Crown by way of payment in lieu of forfeiture, a pecuniary penalty order and under an equitable sharing arrangement to be paid into the Fund. The POCA does not require the proceeds of realization of a forfeiture order to be paid into the Fund.

1163. Monies may be paid out of the Fund by the Financial Secretary with the approval of the Minister of Finance for purposes related to law enforcement, including the investigation of suspected cases of money laundering, to satisfy an obligation with a foreign country, to pay the remuneration and expenses of the Administrator, to pay compensation or costs awarded under the Act or to cover costs associated with administration of the Fund.

### ***Sharing of Confiscated Assets***

1164. Section 36(2) of the MACMA provides that the AG may enter into an equitable sharing arrangement with a foreign country to share the proceeds of forfeiture and pecuniary penalty orders which are registered in a foreign country with that country.

1165. Where foreign orders are registered in the Cook Islands, they are enforced and have effect as if they were orders made in the Cook Islands. The AG may also enter into arrangements to share the proceeds of the realization of such orders with a foreign country.

### ***Additional elements***

1166. Although the objects of the MACMA were amended by the 2004 amending Act to insert as an additional object - “the forfeiture or confiscation whether on a civil or criminal basis, of property that is the proceeds of a serious offence against the law of the foreign country”, no other amendments were made to the Act to give effect to this object in so far as recognition of non conviction based orders was concerned.

1167. Foreign forfeiture and pecuniary penalty orders do not preclude non conviction based orders by definition, however they cannot be registered under section 38 MACMA unless the AG is satisfied that a person has been convicted of the offence and the conviction is not subject to appeal. Equally, a foreign non conviction based restraining order might be capable of registration, however, the forfeiture or pecuniary penalty order relating to it would not ultimately be enforceable.

1168. Where forfeiture of property or assessment of benefit resulted from the operation of reverse onus provisions in the foreign country, there would be nothing to prevent registration of the order provided the order fell within the definition of a foreign forfeiture or pecuniary penalty order. The foreign order must however be court ordered, and would consequently exclude what is sometimes referred to as “automatic forfeiture” where the forfeiture occurs by operation of the legislation upon the person being unable to satisfy certain requirements and no actual forfeiture order is made.

1169. It is noted that there is an intention to introduce non conviction based confiscation legislation during 2009 which will require consequential amendments to the MACMA.

1170. The discussion above applies equally to assistance provided in respect of the enforcement of confiscation orders in terrorism financing and other terrorist offence proceedings. It is noted also that the control and forfeiture provisions of the TSA can extend to acts committed in foreign countries where the “terrorist property” is located in the Cook Islands. As such, there is no requirement to register an order as the Cook Islands takes the action in the absence of any criminal proceedings itself. Property forfeited under the TSA regime may be disposed of and proceeds dealt with in accordance with directions of the SG.

***Resources (central authority for sending/receiving mutual legal assistance/extradition requests)***

1171. The AG has delegated responsibility as the central authority under MACMA to the SG, the head of the Crown Law Office (CLO). Investigative actions required by MACMA requests are carried out by the Cook Islands Police (CIP).

1172. The CLO has three qualified legal staff in addition to the SG and two support staff. It has responsibility for coordinating all prosecutions (with prosecutions of less complex matters undertaken by the CIP), conduct of civil litigation on behalf of the government, including civil recovery actions and for developing and drafting legislation.

1173. The CLO has previously had a lack of resources and expertise in dealing either with complex financial crime or ML, but the skill level has recently been augmented by the appointment of a senior criminal prosecution lawyer from New Zealand for a fixed period. Revenue management investigations and prosecutions are undertaken by the Treasurer or briefed out to private sector legal counsel.

1174. CLO legal staff are required to be registered to practice under the Law Practitioners Act 1993-94.

1175. Two CLO legal staff attended the Proceeds of Crime, Money Laundering & Terrorist Financing Training Workshop held in Auckland in June 2008 and administered by the Pacific Islands Forum Secretariat.

## *Statistics*

1176. The CLO confirmed that it had provided assistance in respect of requests from three foreign countries in criminal matters and one proceeds of crime matter.

### **6.3.2. Recommendations and Comments**

1177. The MACMA enables the Cook Islands to provide a broad range of assistance to requesting countries in the investigation and prosecution of criminal matters and in respect of proceeds of crime investigations and proceedings. Important steps have been taken to remove obstacles to provision of assistance created by excessive secrecy provisions. Some deficiencies arise as a result of offence definitions and provisions in the POCA.

1178. There is no provision in the MACMA for assistance with service of documents however this would not preclude the provision of assistance of this nature. Nor is there a specific provision for enforcement of orders made in lieu of forfeiture however, such an order may be enforceable if it was made in the foreign country as a forfeiture order.

1179. The provisions of the MACMA and POCA are intended to operate together where requests are made for assistance of the type contemplated by the POCA. As the AG has delegated his functions under the MACMA to the SG, the application for what is regarded as an interim restraining order in respect of a foreign offence under s45 of the MACMA may be made by the SG. Section 61 of the POCA however envisages that the application be made by the SG if authorized by the AG. Some clarification of functions and of the precise wording of section 45 of the MACMA is required to ensure that these provisions can operate without uncertainty.

1180. Some deficiencies in the restraining order provisions have been identified. In respect of the interim restraining order provisions, it is noted that the concept of “realizable property” as it appears in other sections of the POCA applies. As noted elsewhere in this report, that definition is limited only to property of the defendant or property derived from the offence which has been gifted to another person by the defendant. This deficiency is significant in the context of restraint of property effectively controlled by the defendant and with proceeds and instruments of the offending which are not otherwise property of the defendant. The definition of “proceeds” is also unduly narrow and may also be limiting.

1181. In the case of matters involving the proceeds or instruments of offences of financing of terrorism, these deficiencies will affect the power to seize property as “tainted property” and to restrain as proceeds or instruments where they are not property of the defendant or caught by the gift provisions. Instruments of terrorist financing offences may however be seized as “tainted property” under the POCA, but then be made subject to a control order and potential forfeiture under the TSA as falling within the definition of “terrorist property”. Such an outcome would not fall within the mutual assistance request of the foreign country, however, the alternate regime could be invoked to achieve a satisfactory outcome. Similar considerations apply in respect of a money laundering matter, however it must be remembered that this deficiency will not affect the ability of the Cook Islands to register a foreign restraining order.

1182. It is also noted that the current definition of a foreign restraining order is ‘in personam’ and may exclude the registration of a foreign restraining order expressed in ‘in rem’ terms.

1183. Under the POCA, the court may order the payment of a sum of money in lieu of forfeiture in certain circumstances. There is no provision in the MACMA to recognize a request to register an order of this type.

1184. Whilst there have been few requests for mutual assistance, the CLO has had the capacity to deal with these requests in a timely and efficient manner, as attested to by feedback from Australia. There has also been one request involving a proceeds of crime matter. The MEQ noted that some further understanding of the process was required. To assist in improving the understanding and role of all agencies in the process, competent authorities may wish to consider issuing a simple guideline for procedures for stakeholder agencies.

1185. It is recommended that the Cook Islands consider the various technical issues highlighted above in section 6.3.2 of this report and determine whether amendments to the MACMA and POCA are required to address them.

### 6.3.3. Compliance with Recommendations 36 to 38 and Special Recommendation V

	Rating	Summary of factors relevant to s.6.3 underlying overall rating
<b>R.36</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>Some deficiencies in offence provisions and the consequent application of the POCA may limit effectiveness.</li> <li>Some clarification of processes and roles is required.</li> </ul>
<b>R.37</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>The MACMA requires dual criminality, however a relaxed test applies to extradition.</li> </ul>
<b>R.38</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>Some deficiencies in the POCA may limit effectiveness.</li> </ul>
<b>SR.V</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>A broad range of assistance is available, subject to dual criminality and any deficiencies in offence provisions</li> </ul>

## 6.4. Extradition (R.37, 39, SR.V)

### 6.4.1. Description and Analysis

#### *Legal framework*

1186. The *Extradition Act 2003* sets out the procedures for the extradition of individuals from and to the Cook Islands in respect of the commission of an “extradition offence”. Relevant decisions under the Act are required to be made by the Attorney General (AG). The Extradition Regulations (No 2 of 2004) prescribe certain time limits and the form of endorsement for an original arrest warrant.

#### *Money laundering as extraditable offence*

1187. Money laundering, which is punishable in the case of a natural person by imprisonment of up to five years or a fine of up to \$50,000, is an “extradition offence” for the purposes of the Act. Sub-section 5(1) of the Act defines such offences (in substantially similar terms as the definition of “serious offence” in the POCA and “criminal matter” in the MACMA), namely:

Ss 5(1):

“An offence is an extradition offence if-

- (a) it is an offence against a law of the requesting country punishable by death or imprisonment for not less than 12 months or the imposition of a fine of more than \$5,000; and
- (b) the conduct that constitutes the offence, if committed in the Cook Islands, would constitute an offence (however described) in the Cook Islands punishable by death or imprisonment for not less than 12 months or the imposition of a fine of more than \$5,000.”

1188. In determining whether certain conduct constitutes an extradition offence, sub-section 5(2) of the Act permits some relaxation of the dual criminality requirement by providing that regard may be had to only some of the acts and omissions that make up the relevant conduct. In addition, the Act provides that certain offences against the law of the requesting country involving taxation, customs duties or other revenue matters or foreign exchange control may be extradition offences regardless of whether the Cook Islands imposes a duty, tax, impost or control of that kind.

1189. Where however the ML offence committed in the requesting country involved a predicate offence which was not a predicate offence for the purposes of the comparable Cook Islands offence, such conduct would not be captured as an “extradition offence”.

1190. The scheme of the Act provides in general terms for:

- (a) A requesting country, either directly or via ICPO-Interpol to notify the Cook Islands of its intention to make an extradition request and of the believed whereabouts of the person;
- (b) An application to be made on behalf of the requesting country and the issue by a Judge or Justice of a provisional arrest warrant;
- (c) The arrest and remand or bail of the person;
- (d) Search and seizure warrants;
- (e) The Judge or Justice to notify the Attorney General (AG) and to provide to him a copy of the documents upon which the provisional arrest warrant was based;
- (f) The AG to direct release of the person or give authority to proceed with extradition proceedings;
- (g) The person may consent to surrender to the requesting country, or a Judge or Justice may conduct extradition proceedings;
- (h) The Judge or Justice, upon being satisfied that the requesting country is an extradition country, the offence is an extradition offence, of the identity of the person and that supporting documents have been produced which satisfy the requirements of the Act, may then order that the person be held in custody until a surrender determination is made or refused;
- (i) The exercise of the discretion of the AG in making a surrender determination and the issue of a surrender warrant;
- (j) The transfer of the person.

1191. Different requirements and/or provisions apply in respect of requests made by Commonwealth, South Pacific and treaty countries, which are specified in schedules to the Act. The Act further provides for extradition of persons to the Cook Islands.

### ***Extradition of nationals***

1192. The Act does not prevent the extradition of Cook Island nationals, however, it is a factor which may give rise to the prosecution or punishment of the person in the Cook Islands in place of extradition. In circumstances where the AG has refused to order the surrender of the person on the basis that the person is a national of the Cook Islands and where dual criminality exists, the person may be prosecuted and punished in the Cook Islands for the offence. In addition, the AG or Solicitor General (SG) must be satisfied of the sufficiency of the available evidence and consent to the prosecution of the person in the Cook Islands.

1193. Other relevant factors giving rise to a potential prosecution in lieu of extradition outcome are the potential for prejudice to the person because of race, nationality, political opinions, sex or status, the fact that the person has been submitted to cruel and inhuman treatment in the requesting country, death penalty issues, the person has been convicted in absentia and/or the extraordinary or ad hoc nature of the potential court or tribunal.

1194. If surrender has been refused on the basis of nationality or previous cruel or inhuman punishment, the person may also be surrendered for the purpose of trial only and return to the Cook Islands upon conviction. This will occur if a court makes a finding that the person should not be surrendered because the prison conditions of the requesting country are not substantially equivalent to minimum Cook Islands' standards.

### ***Cooperation for prosecution of nationals***

1195. Where another country has refused to surrender a person to the Cook Islands but is prepared to prosecute the person for the relevant offence, the AG is required to provide the other country with all available evidence to enable the prosecution of the person.

### ***Efficiency of extradition process***

1196. The Extradition Act does not differentiate between the different offences falling within the definition of "extradition offence". Various time limits are prescribed for the conduct of the various steps in the extradition process which should ensure that undue delay is not occasioned or persons held in custody for extended periods.

### ***Additional elements***

1197. A person may, at any time, advise a Judge or Justice that he consents to being surrendered to the requesting country in respect of the specified extradition offence. If the Judge or Justice is satisfied that the indication is given voluntarily, he may commit the person to prison without conducting any extradition proceedings. A similar indication may be given after the extradition proceedings have commenced.

1198. A simplified procedure known as “backing of warrants” exists for the extradition of a person from the Cook Islands to a South Pacific country (being a country which is a member of the Pacific Islands Forum which is specified in Schedule 2 to the Act). The procedure involves the endorsement of the original warrant issued in the South Pacific country for the purposes of provisional arrest and obviates the need for provision of the same level of supporting documentation as required for Commonwealth and treaty countries or any other country.

1199. Where the requesting country is a Commonwealth country listed in Part 1 of Schedule I to the Act, the Judge or Justice is obliged not to determine eligibility for surrender unless also satisfied that, if the offence was committed in the Cook Islands, there would be sufficient evidence to place the person on trial. This is referred to as the prima facie evidence scheme. An alternate scheme referred to as the “record of case scheme”, which requires a copy of all supporting evidence, applies to the balance of Commonwealth countries listed in Part 2 of Schedule I to the Act.

1200. Terrorism financing, as criminalized by the Terrorism Suppression Act 2004 (as amended) (TSA), is punishable by imprisonment of up to 14 years. Such an offence would be an extradition offence for the purposes of the Act provided it fell within the definition of “extradition offence” specified above. In this regard it is noted that in determining whether conduct constitutes such an offence, sub-section 5(2) enables regard to be had to only some of the acts or omissions that make up the conduct. Provided this sub-section was interpreted to apply to the conduct constituting the Cook Islands offence and/or the foreign offence, any elements of the Cook Islands terrorism financing offence which might otherwise be seen as additional need not affect an application of the extradition provisions.

1201. Offences of TF, amongst others in the TSA, also attract an obligation to extradite or prosecute. If the AG refuses a request for extradition in respect of such conduct, the AG must submit the matter to the SG for prosecution. In addition, subsection 45(a) of the TSA provides that despite anything in the Extradition Act, offences which constitute terrorist acts are taken not to be offences of a political character or an offence connected with a political offence or an offence inspired by a political motive.

1202. The simplified procedures discussed in respect of criterion 39.5 of the Methodology apply equally to offences of this nature.

### ***Dual criminality and mutual assistance***

1203. Whilst dual criminality must be observed for offences to fall within the definition of “extradition offence”, the offence need not be described in the same manner in each country and regard may be had to only some of the acts and omissions making up the conduct in determining this issue.

1204. Section 61 of the Act enables the AG to authorize a Judge or Justice to take evidence at the request of another country for the purpose of criminal proceedings in that country. The term “criminal proceedings” is not defined in the Act and may therefore not require the existence of dual criminality.

### ***Statistics***

1205. The Crown Law Office is the appropriate agency to maintain statistics in respect of extradition requests and proceedings. In the course of the on-site visit, the Evaluation Team was advised that one

person had been extradited to the Cook Islands whereas the cost of extradition was a factor in another matter. Further, that no other requests had been received.

#### 6.4.2. Recommendations and Comments

1206. The *Extradition Act 2004* permits the Cook Islands to cooperate in respect of extradition with a large number of countries and enables additional countries to be classified as extradition countries for the purposes of the Act. The applicable procedures may be simplified in certain circumstances and time limits are applied to ensure that persons do not remain in custody for extended periods during the extradition process. Nationals of the Cook Islands may be extradited, but may also be subject to prosecution in the Cook Islands provided certain conditions are met.

1207. By virtue of the definition of “extradition offence” and the operation of sub-section 5(2) of the Act, the dual criminality requirement is relaxed, but applicable. Offences of ML in the foreign country involving a designated category of predicate offence which would not constitute an offence in the Cook Islands, (other than those involving revenue offences for which the Cook Islands has no equivalent offence) would not constitute an “extradition offence” for the purposes of the Act.

1208. Provided sub-section 5(2) applies equally to Cook Islands and foreign offences, the element additional to convention requirements contained in the Terrorism Financing offence (created by virtue of s4(2)(c) in the definition of “terrorist act” in the TSA) need not constitute any impediment to extradition in respect of a foreign terrorism financing offence.

#### 6.4.3. Compliance with Recommendations 37 & 39, and Special Recommendation V

	Rating	Summary of factors relevant to s.6.4 underlying overall rating
<b>R.39</b>	LC	<ul style="list-style-type: none"> <li>As not all designated categories of offence are covered by the current ML offence provision (s280A Crimes Act 1969 as amended), assistance will be reduced to a small extent.</li> </ul>
<b>R.37</b>	LC	<ul style="list-style-type: none"> <li>Dual criminality, albeit modified, is required.</li> </ul>
<b>SR.V</b>	LC	<ul style="list-style-type: none"> <li>Simplified procedures available in respect of terrorist financing offences depending on requesting country.</li> </ul>

#### 6.5. Other Forms of International Co-operation (R.40 & SR.V)

##### 6.5.1. Description and Analysis

###### *Legal framework*

1209. Provisions exist in various pieces of legislation, including the FTRA, the FSC Act, the TSA and the Extradition Act, which permit other forms of international co-operation.

1210. Section 29 of the FTRA permits the CIFIU to disclose information to an institution or agency of a foreign state or of an international organisation established by the governments of foreign states that has

powers and duties similar to those of the CIFIU. The terms and conditions would be set out in the agreement or arrangement between the CIFIU and that foreign state or international organisation regarding the exchange of information. The information may be provided for the purposes of an investigation, prosecution or proceedings relating to a serious offence, a ML offence or a TF offence.

1211. Under section 29 of the FTRA, the CIFIU may also transmit any information from, or derived from, a compliance audit or supervisory review to the appropriate domestic or foreign law enforcement authority if the CIFIU has reasonable grounds to believe that the information is suspicious or is relevant to an investigation for non-compliance with the FTRA, a serious, ML or TF offence.

1212. The provisions of section 28 of the FSC Act permit the FSC to disclose information to an overseas regulatory authority, including for the conduct of civil or administrative investigations and proceedings to enforce laws, regulations and rules administered by that authority.

1213. In addition to formal mutual assistance, the Terrorism Suppression Act 2004 (TSA) enables the Solicitor General (SG) to disclose information relating to terrorist groups and terrorist acts in certain circumstances. If the SG has information in his possession relating to any of the following:

- (a) the actions or movements of terrorist groups or person suspected of involvement in the commission of terrorist acts;
  - (b) the use of forged or falsified travel papers by persons suspected of involvement in the commission of terrorist acts;
  - (c) traffic in explosives or other lethal devices by terrorist groups or persons suspected of involvement in the commission of terrorist acts;
  - (d) the use of communication technologies by terrorist groups; and
- the communication of which is not prohibited by any provision of law and would not prejudice national security or public safety, the SG may disclose the information to the appropriate authority of a foreign country.

1214. Where a foreign country determines to prosecute in lieu of extradition, the *Extradition Act 2003* also provides that the Attorney General (by his delegate, the SG) can provide the foreign country with all of the available evidence to support the prosecution.

#### ***Competent authorities able to provide widest range of international cooperation***

1215. The CIFIU has responded quite expeditiously to requests from other FIUs and law enforcement agencies upon receiving requests. The CIFIU has received nine requests for information via the Egmont Group mechanism and 11 such requests outside of Egmont (these requests may include multiple subsequent requests relating to the same file but are only counted once for statistical purposes).

1216. The FSC generally channels requests for international cooperation through the CIFIU; however, some international assistance has been obtained from a NZ government agency in relation to suspected illegally acquired passports. This enquiry, which is still pending, involved a number of international bodies and other governments. The FSC also obtains international cooperation from other financial regulators in relation to due diligence checks for financial background on shareholders, directors etc, to assist with “fit and proper” tests and travel movements with NZ Customs.

1217. Police to police international cooperation occurs with well established relationships existing with the New Zealand Police, Australian Federal Police, US Federal Bureau of Investigation and other police organizations in the Pacific Region. Assistance in the form of sharing of intelligence and undertaking enquiries in the Cook Islands on behalf of overseas police services occurs. Intelligence in particular is exchanged through the Pacific Transnational Crime Center in Apia, Samoa and through the New Zealand Interpol office in Wellington, New Zealand.

***Inquiries on behalf of foreign counterparts***

1218. The CIFIU, Customs and Police are authorised to conduct intelligence gathering and investigation on behalf of foreign counterparts.

***FIIU authorized to make inquiries on behalf of foreign counterparts***

1219. The CIFIU is authorised under the FTRA to have access to publicly available information including commercial and government database and to undertake follow-up with RIs about reports that has been received by the CIFIU.

***Conducting of investigations on behalf of foreign counterparts***

1220. The CIFIU, Customs and Police are authorised to conduct intelligence gathering and investigation on behalf of foreign counterparts.

***Conditions on exchanges of information***

1221. Section 29 of the FTRA does not limit the power of the CIFIU to disclose its information for the investigation of a serious offence, ML and TF offences.

***Grounds for refusing requests for co-operation***

1222. The exchange of financial intelligence or information is captured in the MOUs signed with other CIFIUs. While “fiscal” or “tax” matters are not specifically mentioned in MOUs, if the financial transaction relates to a tax matter and if it falls under the definition of a “serious offence”, then that information is shared under the MOU.

1223. Section 25 of the FTRA overrides any secrecy or other restrictions on the disclosure of any information imposed by any written law.

1224. Section 60A of the MACMA Amendment 2004, No.8 also overrides any secrecy or other restrictions on the disclosure of any information imposed by any written law.

***Safeguards in Use of Exchanged Information***

1225. Section 60 of the MACMA restricts the use of information and section 61 prohibits the disclosure of any requests for international assistance without the approval of the Attorney-General.

### *Additional elements*

1226. The CIFIU is authorised under section 29(2)(b) of the FTRA to exchange information with foreign institutions where an agreement or arrangement has not been entered into on such terms and conditions at the time of exchanging the information.

1227. The CIFIU is authorised under the FTRA to collect information that is relevant to the investigation of a serious offence, ML or TF offences. It may also request information from any law enforcement agency, and supervisory authority for the purposes of the FTRA.

### *Statistics and effectiveness*

1228. Specific statistics are not available however the Cook Island Police estimate that approximately 200 requests for co-operation occur on a yearly basis. Like the Police, the CIFIU does not retain accurate statistics in respect of informal co-operation requests however the CIFIU estimates that 60-70 such request occur each year. The Cook Islands Customs Service was unable to provide statistics in relation to informal requests for assistance.

1229. The CIFIU however has also maintained statistics for formal international requests received by the CIFIU.

<b>Country</b>	<b>Type of request</b>	<b>Receiving and executing agency</b>
Australia	Evidence gathering	CLO/CIP
Argentina	Information to be used for prosecution.	FIU
Singapore	Evidence and investigation	FIU
India	Evidence gathering and investigation.	FA/CLO/FIU
USA	Information to be used for prosecution.	FIU

1230. Insufficient information was provided to assess overall effectiveness. However, the Evaluation Team notes that, as part of the preparation for this assessment, inquiries were made and no adverse comments were received from APG members concerning the Cook Islands' cooperation with other jurisdictions.

### **6.5.2. Recommendations and Comments**

1231. Cook Islands authorities (enforcement and regulatory) are able to provide a wide range of international cooperation to their foreign counterparts and generally have clear and effective gateways to facilitate the prompt and constructive exchange of information, both spontaneous and upon request.

1232. These arrangements appear to be working well. Given the lack of statistical data, however, the Evaluation Team was not able to determine that the mechanisms for international cooperation are fully effective.

1233. It is recommended that all relevant enforcement and regulatory authorities collect sufficient statistics and other evidence to demonstrate that the Cook Islands' mechanisms for international cooperation are fully effective.

### 6.5.3. Compliance with Recommendation 40 and Special Recommendation V

	Rating	Summary of factors relative to s.6.5 underlying overall rating
<b>R.40</b>	<b>LC</b>	<ul style="list-style-type: none"> <li>Given the lack of statistical data, the evaluation team was not able to determine that the mechanisms for international cooperation are fully effective.</li> </ul>
<b>SR.V</b>	<b>LC</b>	(This is a composite rating and does not derive from the issues covered here.)

## 7. OTHER ISSUES

### 7.1. Resources and Statistics

1234. The text of the description, analysis and recommendations for improvement that relate to Recommendations 30 and 32 is contained in all the relevant sections of the report, i.e. all of Section 2, parts of Sections 3 and 4, and in Section 6. There is a single rating for each of these Recommendations, even though the Recommendations are addressed in several sections. Section 7.1 of the report contains the boxes showing the rating and the factors underlying the rating.

	<b>Rating</b>	<b>Summary of factors underlying rating</b>
<b>R.30</b>	<b>PC</b>	<ul style="list-style-type: none"><li>• There is a need for greater commitment of resources, training and awareness-raising to be provided to relevant agencies to address the lack of money laundering investigations and action under the POCA.</li><li>• Police identify the need of a Forensic Accountant function.</li><li>• Customs require an IT platform and additional equipment resources.</li><li>• CIP, CIC and CLO all identify training deficiencies.</li></ul>
<b>R.32</b>	<b>LC</b>	<ul style="list-style-type: none"><li>• Inability to generate year by year statistics for CTRs, EFTRs</li><li>• Lack of statistics regarding informal international co-operation</li><li>• Some uncertainty as to completeness/accuracy of statistics for formal international cooperation.</li></ul>

**Table 1. Ratings of Compliance with FATF Recommendations**

<b>Forty Recommendations</b>	<b>Rating</b>	<b>Summary of factors underlying rating<sup>20</sup></b>
<b>Legal systems</b>		
1. ML offence	<b>LC</b>	<ul style="list-style-type: none"> <li>• A threshold approach has been adopted which ensures that the offence extends to a very broad range of predicate offences, however, not all designated categories of offence are covered.</li> <li>• Whilst the opportunities to pursue the prosecution of money laundering may be limited, no charges have been laid and the offence provisions have not been tested.</li> </ul>
2. ML offence—mental element and corporate liability	<b>LC</b>	<ul style="list-style-type: none"> <li>• The penalty for natural persons is at the lower end of the range and not proportionate or dissuasive</li> </ul>
3. Confiscation and provisional measures	<b>PC</b>	<ul style="list-style-type: none"> <li>• The effectiveness of the POCA is limited by the definitions of “proceeds” and “realizable property” and inconsistencies in the provisions.</li> <li>• Agencies do not have a well developed awareness of the POCA.</li> <li>• There has been no practical application of the POCA in domestic matters.</li> </ul>
<b>Preventive measures</b>		
4. Secrecy laws consistent with the Recommendations	<b>C</b>	<ul style="list-style-type: none"> <li>• This recommendation is fully observed.</li> </ul>
5. Customer due diligence	<b>PC</b>	<ul style="list-style-type: none"> <li>• No requirement to verify the identity of persons acting on behalf of a customer that is a legal person or legal arrangement.</li> <li>• No requirement to identify and verify principal owners and beneficiaries</li> <li>• No definition of principal owners and beneficiaries in FTRA.</li> <li>• No explicit requirement for a RI to make a determination as to whether a customer is acting on behalf of another person.</li> <li>• No explicit requirement for a RI to determine who are the natural persons that ultimately own or control the customer when it is a legal person or legal arrangement.</li> <li>• No requirement to obtain information on the purpose and intended nature of the relationship.</li> <li>• No requirement for data, documents or information</li> </ul>

<sup>20</sup> These factors are only required to be set out when the rating is less than Compliant.

Forty Recommendations	Rating	Summary of factors underlying rating <sup>20</sup>
		<p>collected under the CDD process to be reviewed.</p> <ul style="list-style-type: none"> <li>No requirement for enhanced CDD to be undertaken for higher risk customers, business relationship or transactions.</li> <li>No requirement for reporting institutions to apply CDD requirements to existing customers.</li> </ul>
6. Politically exposed persons	<b>LC</b>	<ul style="list-style-type: none"> <li>No requirement for senior management approval to be obtained where a customer has been accepted and the customer or beneficial owner is subsequently found to be, or subsequently becomes a PEP.</li> </ul>
7. Correspondent banking	<b>PC</b>	<ul style="list-style-type: none"> <li>No requirement for RIs to determine whether the correspondent bank has been subject to a money laundering or terrorist financing investigation or regulatory action.</li> <li>No requirement for reporting institutions to ascertain that the AML/CFT controls of the respondent institution are adequate and effective.</li> </ul>
8. New technologies & non face-to-face business	<b>PC</b>	<ul style="list-style-type: none"> <li>No requirement for reporting institutions to take measures to prevent the misuse of technological developments in money laundering or terrorist financing schemes.</li> <li>No requirement for reporting institutions to have policies and procedures in place which address the specific risks associated with non-face to face business relationships or transactions.</li> </ul>
9. Third parties and introducers	<b>LC</b>	<ul style="list-style-type: none"> <li>The FTRA does not provide a list of countries or territories which the FSC consider adequately meet the FATF Recommendations.</li> <li>The FTRA does not place ultimate responsibility for customer identification and verification with the reporting institution.</li> </ul>
10. Record-keeping	<b>LC</b>	<ul style="list-style-type: none"> <li>The requirement in the FTRA is for institutions to retain correspondence relating to transactions and not to business correspondence.</li> </ul>
11. Unusual transactions	<b>LC</b>	<ul style="list-style-type: none"> <li>No requirement to retain records of findings of complex, unusual large transactions.</li> </ul>
12. DNFBP–R.5, 6, 8–11	<b>PC</b>	<ul style="list-style-type: none"> <li>There is no explicit legal requirements to collect information on beneficiaries of trusts</li> <li>No ongoing due diligence on the settlor, beneficiaries and transactions for trust arrangements in cases where the trustee has no control over the administration of the trust.</li> <li>The FTRA is silent on CDD for existing customer and neither implementing regulations nor guidance</li> </ul>

Forty Recommendations	Rating	Summary of factors underlying rating <sup>20</sup>
		<p>have been issued.</p> <ul style="list-style-type: none"> <li>• Effectiveness is not fully ascertained since compliance audit has recently begun and time is given by the CIFIU for the reporting institutions to comply with the FTRA's CDD requirements.</li> <li>• Lack of effective implementation of the FTRA among lawyers, real estate agents and dealers as the CIFIU has yet to address the issues highlighted by these entities.</li> </ul>
13. Suspicious transaction reporting	<b>LC</b>	<ul style="list-style-type: none"> <li>• Cascading effect from Recommendation 1 where not all predicate offences are covered.</li> <li>• Low reporting levels from some sectors.</li> </ul>
14. Protection & no tipping-off	<b>C</b>	<ul style="list-style-type: none"> <li>• This Recommendation is fully observed.</li> </ul>
15. Internal controls, compliance & audit	<b>LC</b>	<ul style="list-style-type: none"> <li>• The insurance sector has not been provided with guidelines and nor has training specific to this industry been provided.</li> </ul>
16. DNFBP–R.13–15 & 21	<b>PC</b>	<ul style="list-style-type: none"> <li>• Special attention and counter measures for countries with deficiencies in their AML/CFT system have not been implemented.</li> <li>• System of monitoring unusual transactions is generally based on cash threshold rather than analysis of transactions against client profile.</li> <li>• Other than trustee companies, independent audit to test compliance has not been implemented effectively.</li> </ul>
17. Sanctions	<b>PC</b>	<ul style="list-style-type: none"> <li>• CIFIU should have the power to issue administrative sanctions for non-compliance with the FTRA.</li> <li>• CIFIU or FSC should have the power to impose disciplinary and financial sanctions and have the power to withdraw, restrict or suspend the institution's licence for depending on the severity of the breach</li> </ul>
18. Shell banks	<b>PC</b>	<ul style="list-style-type: none"> <li>• Banks are not prohibited from undertaking correspondent banking relationships with shell banks.</li> <li>• Banks are not required to satisfy themselves that respondent financial institutions in a foreign country do not permit their accounts to be used by shell banks.</li> <li>• A shell bank does appear to have been operating from the Cook Islands albeit the authorities have taken action against it.</li> </ul>
19. Other forms of reporting	<b>C</b>	<ul style="list-style-type: none"> <li>• This Recommendation is fully observed.</li> </ul>

<b>Forty Recommendations</b>	<b>Rating</b>	<b>Summary of factors underlying rating<sup>20</sup></b>
20. Other DNFBP & secure transaction techniques	<b>LC</b>	<ul style="list-style-type: none"> <li>While dealers have made efforts to comply with the FTRA, the CIFIU has yet to legislate and prescribe the threshold for dealers in motor vehicle as required under section 2(t) of the FTRA.</li> </ul>
21. Special attention for higher risk countries	<b>PC</b>	<ul style="list-style-type: none"> <li>Insufficient information provided to reporting institutions on countries of concern to the CIFIU and FSC.</li> <li>No provision for the application of counter-measures.</li> </ul>
22. Foreign branches & subsidiaries	<b>N/A</b>	<ul style="list-style-type: none"> <li>This recommendation is considered to be non-applicable as no reporting institutions have foreign branches or subsidiaries.</li> </ul>
23. Regulation, supervision and monitoring	<b>LC</b>	<ul style="list-style-type: none"> <li>Insurance sector: Noting that the sector is very small and presents few risks at present, No on-site examinations have been undertaken in respect of the insurance sector.</li> <li>Non-bank money changers and the money value transfer operator are not registered or licensed and not subject to a regulatory regime other than for AML/CFT under the FTRA.</li> </ul>
24. DNFBP—regulation, supervision and monitoring	<b>PC</b>	<ul style="list-style-type: none"> <li>While the current supervisory approach to give time for reporting institutions to comply is fully acceptable, it remains to be seen if this approach is effective in ensuring full compliance.</li> <li>Lack of an effective enforcement framework to ensure compliance.</li> <li>Lack of technical training for the staff in understanding the product and services offered by the DNFbps.</li> </ul>
25. Guidelines & Feedback	<b>LC</b>	<ul style="list-style-type: none"> <li>Guidelines providing information on methods and trends not issued to insurance sector.</li> <li>Yet to establish specific guidance to address business practices for lawyers and trustee companies.</li> <li>Lack of guidance to deal with countries that have deficient AML/CFT system.</li> <li>Lack of feedback with regards to STR mechanism and its outcome.</li> </ul>
<b>Institutional and other measures</b>		
26. The FIU	<b>LC</b>	<ul style="list-style-type: none"> <li>Limitations in the ability to undertake in depth analysis as a result of issues with the database.</li> <li>No annual reports circulated</li> </ul>

Forty Recommendations	Rating	Summary of factors underlying rating <sup>20</sup>
27. Law enforcement authorities	<b>PC</b>	<ul style="list-style-type: none"> <li>• There have been no prosecutions for ML despite there being some opportunities to investigate such activities.</li> <li>• Notwithstanding the lack of opportunity, there is a lack of knowledge and understanding of the application of the POCA 2003 by both the CIP and CLO and as a result no actions have been identified and pursued.</li> <li>• The CIP needs to further develop skills in the area of financial investigation and to build a sustainable long term capability in this area.</li> <li>• A closer relationship between the CIP and the CIFIU needs to be developed so a more timely and effective response to reported suspicious financial activity occurs.</li> </ul>
28. Powers of competent authorities	<b>LC</b>	<ul style="list-style-type: none"> <li>• Narrow search powers exist in respect of application of the POCA post conviction.</li> </ul>
29. Supervisors	<b>PC</b>	<ul style="list-style-type: none"> <li>• Powers of enforcement and sanction are not adequate.</li> </ul>
30. Resources, integrity, and training	<b>PC</b>	<ul style="list-style-type: none"> <li>• There is a need for greater commitment of resources, training and awareness-raising to be provided to relevant agencies to address the lack of money laundering investigations and action under the POCA.</li> <li>• Police identify the need of a Forensic Accountant function.</li> <li>• Customs require an IT platform and additional equipment resources.</li> <li>• CIP, CIC and CLO all identify training deficiencies.</li> </ul>
31. National co-operation	<b>LC</b>	<ul style="list-style-type: none"> <li>• Operational co-ordination could be more effective to avoid the duplication of function and maximise use of existing resources and expertise.</li> </ul>
32. Statistics	<b>LC</b>	<ul style="list-style-type: none"> <li>• Inability to generate year by year statistics for CTRs, EFTRs</li> <li>• Lack of statistics regarding informal international co-operation</li> <li>• Some uncertainty as to completeness/accuracy of statistics for formal international cooperation.</li> </ul>
33. Legal persons–beneficial owners	<b>PC</b>	<ul style="list-style-type: none"> <li>• Measures are not adequate to ensure that there is sufficient, accurate and timely information held on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities.</li> </ul>

Forty Recommendations	Rating	Summary of factors underlying rating <sup>20</sup>
		<ul style="list-style-type: none"> <li>• Information on the domestic companies register pertains only to legal ownership/control (as opposed to beneficial ownership), is not verified and is not necessarily reliable.</li> <li>• The generally manual system of recording and updating information for domestic companies at the MOJ is an impediment to ensuring timely access to records.</li> <li>• It cannot be ascertained that records kept at the MOJ, in particular on directors and shareholders, are up to date as the onus is on companies to submit updates and MOJ has not implemented a system that is able to monitor non-submission.</li> <li>• There is no requirement in the Companies Act to disclose nominee shareholders.</li> <li>• There is no express prohibition in the Companies Act for bearer shares.</li> </ul>
34. Legal arrangements – beneficial owners	<b>PC</b>	<ul style="list-style-type: none"> <li>• There are no requirements to ascertain the beneficial owners of domestic or international trusts.</li> <li>• Financial institutions, other than trust companies, are not required to ascertain the beneficial ownership of trusts when offering financial services to trusts.</li> <li>• The regime of international trusts establishes a number of ML/TF risks which are not mitigated by other legal measures in Cook Islands’ law.</li> <li>• The system of central registration of international trusts is not accompanied by other measures to mitigate money laundering and terrorist financing risks and in fact establishes some serious risks that the system could be exploited for these crimes.</li> <li>• The regime of international trusts raises concerns in relation to international cooperation and the enforcement of foreign confiscation orders/judgments.</li> </ul>
<b>International Cooperation</b>		
35. Conventions	<b>LC</b>	<ul style="list-style-type: none"> <li>• Relevant articles largely implemented, but with some technical deficiencies.</li> <li>• A lack of practical application of offences and confiscation provisions.</li> <li>• A strengthening and promotion of integrity within government departments also required.</li> <li>• A broad range of sanctions is required by regulators.</li> </ul>
36. Mutual legal assistance (MLA)	<b>LC</b>	<ul style="list-style-type: none"> <li>• Some deficiencies in offence provisions and the</li> </ul>

<b>Forty Recommendations</b>	<b>Rating</b>	<b>Summary of factors underlying rating<sup>20</sup></b>
		<p>consequent application of the POCA may limit effectiveness.</p> <ul style="list-style-type: none"> <li>• Some clarification of processes and roles is required.</li> </ul>
37. Dual criminality	<b>LC</b>	<ul style="list-style-type: none"> <li>• The MACMA requires dual criminality, however a relaxed test applies to extradition.</li> </ul>
38. MLA on confiscation and freezing	<b>LC</b>	<ul style="list-style-type: none"> <li>• Some deficiencies in the POCA may limit effectiveness.</li> </ul>
39. Extradition	<b>LC</b>	<ul style="list-style-type: none"> <li>• As not all designated categories of offence are covered by the current ML offence provision (s280A Crimes Act 1969 as amended), assistance will be reduced to a small extent.</li> </ul>
40. Other forms of co-operation	<b>LC</b>	<ul style="list-style-type: none"> <li>• Given the lack of statistical data, the evaluation team was not able to determine that the mechanisms for international cooperation are fully effective.</li> </ul>
<b>Nine Special Recommendations</b>		
SR.I Implement UN instruments	<b>LC</b>	<ul style="list-style-type: none"> <li>• Relevant articles largely implemented, but with some technical deficiencies.</li> <li>• A lack of practical application of offences and confiscation provisions.</li> <li>• Lack of process in circulation of UNSCR consolidated list.</li> </ul>
SR.II Criminalize terrorist financing	<b>LC</b>	<ul style="list-style-type: none"> <li>• A penalty is required to be specified for corporations convicted of Terrorism financing and other TSA offences.</li> <li>• The additional limb of the definition of “terrorist act” may limit the effectiveness of the offences generally.</li> </ul>
SR.III Freeze and confiscate terrorist assets	<b>LC</b>	<ul style="list-style-type: none"> <li>• The TSA regime enables the freezing and confiscation of “terrorist property” but does not extend to property jointly owned or indirectly controlled by relevant entities nor for access to frozen property for basic expenses.</li> <li>• Clearer, more formal processes are required to ensure information (including the consolidated list of terrorist entities) is communicated to reporting institutions.</li> </ul>
SR.IV Suspicious transaction reporting	<b>C</b>	<ul style="list-style-type: none"> <li>• This Recommendation is fully observed.</li> </ul>
SR.V International cooperation	<b>LC</b>	<ul style="list-style-type: none"> <li>• A broad range of assistance is available, subject to dual criminality and any deficiencies in offence provisions</li> <li>• Simplified procedures available in respect of terrorist financing offences depending on requesting</li> </ul>

Forty Recommendations	Rating	Summary of factors underlying rating <sup>20</sup>
		country.
SR.VI AML/CFT requirements for money/value transfer services	PC	<ul style="list-style-type: none"> <li>• Yet to establish a legal, regulatory and supervisory framework</li> <li>• Absence of a range of proportionate sanctions proportionate to severity of non-compliance.</li> <li>•</li> </ul>
SR.VII Wire transfer rules	PC	<ul style="list-style-type: none"> <li>• There is no detailed instruction issued by the competent authorities to the banks on the requirements of SRVII.</li> <li>• There is no detailed instruction in the FTRA as to what constitutes full originator information.</li> <li>• There is no requirement in law, regulation or other enforceable means for beneficiary financial institutions to adopt effective risk-based procedures for identifying and handling wire transfers without complete originator information.</li> <li>• There is no appropriate sanction mechanism related to the implementation of SRVII.</li> </ul>
SR.VIII Nonprofit organizations	PC	<ul style="list-style-type: none"> <li>• A review of the NPO sector has been conducted but significant information gaps remain on the size and activities of the sector.</li> <li>• There is limited supervision or monitoring of NPOs.</li> <li>• Weak implementation of the existing requirements for incorporated societies to report constitutional, programmatic or financial information.</li> <li>• Registration requirements do not include obligations to record the details of persons who own, control or direct NPOs.</li> <li>• Sanctions available to competent authorities for breaches of controls over NPOs are ineffective.</li> </ul>
SR.IX Cash Border Declaration & Disclosure	PC	<ul style="list-style-type: none"> <li>• There is an absence of current policy for the implementation of cross border reporting legislation</li> <li>• BCRs although electronically stored are not able to be effectively analysed within the database.</li> <li>• Lack of effective implementation – negligible level of reporting. No detection of false/failed declarations, no sanctions imposed</li> <li>• Precious metals and stones not captured in the reporting requirements</li> </ul>

**Table 2. Recommended Action Plan to Improve the AML/CFT System**

AML/CFT SYSTEM	RECOMMENDED ACTION (LISTED IN ORDER OF PRIORITY)
<b>1. General</b>	
<b>2. Legal System and Related Institutional Measures</b>	
2.1 Criminalisation of ML (R.1 & 2)	<ul style="list-style-type: none"> <li>• Competent authorities should ensure that each designated category is fully addressed, in particular that an offence of trafficking in firearms exists as a serious offence and to consider relevant forms of environmental crime beyond illegal fishing</li> <li>• Competent authorities should also consider increasing the relevant penalty for ML for natural persons to ensure that it is proportional and dissuasive.</li> <li>• Competent authorities should consider defining the term “proceeds” for the purposes of the offence in sub-section 280A(5) of the Crimes Act, noting however that the definition of “proceeds” in the Proceeds of Crime Act 2003 is narrower than may have been intended and should not be adopted in its present form.</li> <li>• Competent authorities consider precisely what is intended to be proven in terms of the actus reus of the offences before considering amending the offence provisions to ensure that all necessary elements are clear.</li> <li>• Competent authorities should consider the manner in which the concept “wilful blindness” would be applied and whether other alternative mental elements, such as “recklessness”, appear elsewhere in Cook Islands law.</li> <li>• Authorities may also wish to consider (for the sake of clarity), insertion in the Crimes Act of a definition for the word “illicit” which appears in subparagraph 280A(2)(b)(i) and insertion of the word “predicate” before the word “offence” in subparagraph 280A(2)(b)(ii).</li> <li>• Competent authorities should consider devising a process to ensure that consideration is given to the appropriateness of pursuing an investigation for ML charges at the same time as the investigation for the predicate offence is conducted. As the CIP have a broad discretion in laying charges and conducting prosecutions of a less complex nature, the CIP and CLO should consider consultation at an early stage to ensure ML offences are given adequate consideration in appropriate cases, awareness is heightened and a consistent approach to charging and sentencing submissions is developed.</li> <li>• Competent authorities may wish to consider whether the judiciary may be available for longer periods when required.</li> </ul>
2.2 Criminalisation of TF (SR.II)	<ul style="list-style-type: none"> <li>• Sub-section 4(2)(c) of the TSA imposes a requirement in the definition of “terrorist act” which is not otherwise required by the convention, namely, that the act or omission “must be made for the purpose of advancing a political, ideological or religious cause”. As such, it affects proof of the TF offences which involve the collection or provision of property intending, knowing or having reasonable grounds to believe that the property will be used in full or in part to carry out a “terrorist act”, [section 11(1) TSA]. Other TSA offences which apply the term “terrorist act” are similarly affected. Competent authorities should consider whether this additional limb of the definition of “terrorist act” should be deleted.</li> <li>• Competent authorities should consider specifying a monetary penalty (together with the ability to cancel relevant licences) for corporations for offences under the TSA which are sufficiently high to be regarded as proportionate and dissuasive.</li> </ul>

AML/CFT SYSTEM	RECOMMENDED ACTION (LISTED IN ORDER OF PRIORITY)
2.3 Confiscation, freezing and seizing of proceeds of crime (R.3)	<ul style="list-style-type: none"> <li>• It is recommended that competent authorities should consider: <ul style="list-style-type: none"> <li>○ Reviewing the restraining order and any related provisions to ensure that the property which may be subject to restraint extends to property of the defendant, property of third parties subject to the effective control of the defendant, tainted property and property gifted by the defendant.</li> <li>○ Ensuring that the terminology and operation of the restraining order and related provisions are consistent.</li> <li>○ Replacing the requirement that the application be supported by an affidavit of the SG deposing to his suspicions with a requirement that the affidavit be made by a police officer or an “authorized officer”.</li> <li>○ Regardless of whether a test of suspicion or belief is adopted, there should be consistency in the provisions governing the application and restraining order.</li> <li>○ Revising the definition of “proceeds” to ensure that it applies to property derived, directly or indirectly from the commission of a serious offence. This definition is also applied in the Mutual Assistance in Criminal Matters Act 2003 and accordingly affects the operation of that Act.</li> <li>○ Extending the monitoring order provisions to enable such an order to be made in respect of accounts of persons other than the suspect. Under the present provision, an order could not be obtained in circumstances where a corporate account or account of other third party was used. In addition, the Act requires the application to be made by the SG.</li> <li>○ Enabling the application to be made on behalf of the investigating police as it is purely an investigative tool and whether such a power might be more appropriately exercised by police at a very senior level (although it is noted that CIP do have a broad prosecution function also).</li> <li>○ Whether this provision was intended to expressly override taxation secrecy provisions as such information is of invaluable assistance in the conduct of proceeds of crime proceedings where reverse onus provisions apply or where the examination power is actively used.</li> </ul> </li> <li>• It is recommended that the CIP and CLO develop a strategy to ensure that appropriate matters are identified and investigated and action taken in a consistent manner.</li> <li>• It is recommended that in conjunction with CLO and CIP, a protocol be developed to ensure that action be considered and taken in appropriate cases and that the role of the CIIC be considered. Competent authorities may also wish to consider whether CIP should be obliged to consider whether POCA action (or a ML investigation) arises when assessing cases.</li> <li>• It is noted that mandatory forfeiture and assessment of pecuniary penalty orders are now available in respect of offences which may involve only a fine in excess of \$5,000 arising out of the definition of “serious offence”. Competent authorities may wish to consider the appropriateness of that outcome and whether it might ultimately affect the manner in which a Court interpreted its remaining discretion. Whilst mandatory forfeiture in the case of serious offences is an important consideration, competent authorities may wish to consider whether it should apply to the definition of “serious offence” adopted in the POCA.</li> </ul>

AML/CFT SYSTEM	RECOMMENDED ACTION (LISTED IN ORDER OF PRIORITY)
	<ul style="list-style-type: none"> <li>• It is understood that the Cook Islands is considering adopting a civil forfeiture model. Competent authorities may wish to consider identifying the precise shortcomings in the current regime and their application to potential cases in the Cook Islands before finally determining the nature of the model which would best suit the Cook Islands. It is difficult to evaluate the effectiveness of the conviction-based model when it is untested or to fully assess the commitment required of a civil model.</li> </ul>
2.4 Freezing of funds used for TF (SR.III)	<ul style="list-style-type: none"> <li>• Competent authorities should ensure that the definition of “terrorist property” extends to jointly owned property and to property which is “directly or indirectly” controlled.</li> <li>• As the ability to obtain a control order in respect of the property of certain entities may be wholly dependent upon first obtaining a declaration that the entity is a specified entity under section 6 of the TSA, competent authorities may wish to ensure that notice of the declaration be able to be delayed until after the control order is also obtained (although this would appear to be within the court’s discretion at present).</li> <li>• Competent authorities should consider enacting regulations to the UNSCR Act to ensure the prompt circulation of the UNSC consolidated list of terrorist entities to RIs.</li> <li>• Competent authorities should consider making provision for appropriate procedures for authorizing access (for basic requirements) to funds or other assets frozen as a result of UNSCR 1267/1999 and may wish to consider corresponding provisions for control orders arising out of declarations under section 6 of the TSA.</li> <li>• Competent authorities may also wish to consider whether applications under sections 6 and 17 of the TSA should be reliant upon the beliefs held by the SG rather than an investigator.</li> </ul>
2.5 The Financial Intelligence Unit and its functions (R.26)	<ul style="list-style-type: none"> <li>• Continued outreach is required to all reporting sectors to ensure that the CIFIU maintains a high profile and RIs understand and comply with their responsibilities under the FTRA.</li> <li>• As a matter of priority, support should be given to resolve the current issues with the CIFIU database. As an interim measure, the CIFIU should consider whether to record basic data such as name and bank account details in a simple format (such as Excel or Access) to allow some search capacity (it may even be beneficial to back capture data) until such time as the database issues can be resolved.</li> <li>• Consideration should be given to formalising a process for the exchange of information between the CIFIU and the taxation authority pursuant to the mechanism provided for in section 96 of the POCA. This would require an application process via the Solicitor General; a process should be implemented to enable effective use of this provision.</li> <li>• Given the number of STRs that have been generated from the offshore trust sector (albeit they largely relate to CDD deficiencies), the CIFIU should consider outreach to authorities in the settlor’s country of origin to build a constructive relationship and reconsider the need for dissemination of relevant information to these authorities.</li> <li>• Engagement from all partner agencies, in particular the CIP and the Audit Office, is critical and needs to be maintained. A jurisdiction the size of the Cook Islands needs to share all available resources, expertise and abilities so that all agencies, including the CIFIU, can effectively undertake their</li> </ul>

AML/CFT SYSTEM	RECOMMENDED ACTION (LISTED IN ORDER OF PRIORITY)
	<p>respective legislative functions. Enhancing relationships may be achievable through secondments between agencies to share skill and resources.</p>
<p>2.6 Law enforcement, prosecution and other competent authorities (R.27 &amp; 28)</p>	<ul style="list-style-type: none"> <li>• The CIP should continue to improve capacity and capability with regards to specialist investigative skill development. In particular, the ongoing professional development of financial investigators should be maintained.</li> <li>• Consideration should be given to the identification of an appropriate investigation, then seeking further specialist assistance from an appropriate jurisdiction to mentor the investigation to provide exposure of these specialist investigative methodologies.</li> <li>• The CIP believes it now has the capacity to undertake ML investigations however the Evaluation Team was made aware of an historic ML allegation that had not been adequately investigated due to combination of priorities, resource availability and a skill deficiency that existed at that time. This matter can and should be reviewed and if appropriate an ML prosecution initiated.</li> <li>• The CIP indicated a willingness to employ a forensic accountant. If funding constraints continue to prevent the obtaining of forensic accountancy capability, consideration should be given to formalising a protocol whereby such services can be obtained from the Audit Office on a case by case basis.</li> <li>• CIFIU functions are clearly outlined in the FTRA and do not include the investigation of ML offences. The situation where CIFIU personnel are given police powers to undertake such investigations may cause an overlap with the role of the CIP which clouds responsibility for ML investigations. Ideally there should be clear separation to ensure transparency and integrity of the CIFIU.</li> <li>• To overcome the need to delegate the CIFIU with police powers it is critical that the CIP and the CIFIU work closely and support of each others function. It is recommended that further development of this relationship is required to ensure a more cohesive and effective response to suspicious financial activities occurs.</li> <li>• The CIP and the CICS (and Immigration) work closely together. The continuing development of this relationship and the sharing of resources are to be encouraged. The sharing of resources such as the UNODC computer based training programme, which contains a number of highly relevant modules related to the CICS function at the airport, is an example of how a collaborative approach could enhance effectiveness.</li> <li>• It is accepted that there has only been limited opportunity to apply the POCA, however the CIP and CLO need to be vigilant to opportunities to apply this law. Qualifying income generating crimes such as drug dealing and the misappropriation of government funds need to be considered during the investigation and prosecution process. It is recommended that a POCA training awareness programme be implemented for both the CIP and CLO to address the current lack of awareness of the POCA.</li> </ul>
<p>2.7 Cross-border Declaration &amp; Disclosure (SR.IX)</p>	<ul style="list-style-type: none"> <li>• The CICS recognises the need to further develop policy and procedures and to acquire specialist equipment to enhance the delivery of service. Such proactive development is supported and encouraged by the Evaluation Team.</li> <li>• CICS staff identified that training deficiencies existed and a training needs</li> </ul>

AML/CFT SYSTEM	RECOMMENDED ACTION (LISTED IN ORDER OF PRIORITY)
	<p>assessment has been undertaken to identify and focus on key training needs to enhance the effectiveness of CICS functions. A further priority (which is recognized by the authorities) is the development of an IT platform to enhance efficiencies and provide the ability to monitor and analyze border activity. Implementing training identified as a result of the training needs assessment and developing an IT platform at the border are both supported by the Evaluation Team.</p> <ul style="list-style-type: none"> <li>• It is recommended that equipment be obtained to assist with the inspection of luggage and cargo at the Rarotonga International Airport, in particular an x-ray machine and training to enhance the ability to detect cross border movements of currency and NBIs.</li> <li>• It is recommended that the border declaration documents be amended to accurately reflect the authorities on which the declarations are sought.</li> <li>• At the time of the on-site visit, some Customs staff were unclear as to what an NBI was and also sought training to enhance the ability to detect the movement of currency was required. It is recommended that as part of the capacity building programme this training deficiency be given priority.</li> <li>• Section 97 Proceeds of Crime Act 2003 should be amended (or a provision should be introduced as part of the Currency Declaration Bill (2009)) to include an authority for immediate seizure of undeclared currency or NBI if a prosecution is to be initiated.</li> <li>• The Currency Declaration Bill (2009) will include a requirement to declare precious metals and stones and will provide a legal authority for customs staff to question and enquire into the source and destination of currency as it crosses the border. This legislation will further improve the framework of the jurisdiction and is supported by the Evaluation Team.</li> <li>• The introduction of specific search powers is required to allow the search of cargo and mail for the purpose of interdiction of cash or NBI. The Currency Declaration Bill (2009) has a broad search power but, for the purpose of clarity, it is recommended that such provisions include the ability to search any 'receptacle' crossing the border which would clarify the search authority in respect of unaccompanied cargo or mail.</li> </ul>
<b>3. Preventive Measures – Financial Institutions</b>	
3.1 Risk of ML or TF	<ul style="list-style-type: none"> <li>• There are no recommendations for this section.</li> </ul>
3.2 Customer due diligence, including enhanced or reduced measures (R.5 to 8)	<ul style="list-style-type: none"> <li>• The FTRA should require RIs to verify the identity of persons acting on behalf of a customer that is a legal person or legal arrangement.</li> <li>• The FSC and the CIFIU should consider the complexity of the products and services offered by international banks and how such products can provide an opportunity for ML and TF. The on-site examinations by both teams should reflect these opportunities and more focus should be placed on identifying the high risk areas of this sector. (It should be noted that similar observations are made in section 4 of this report in relation to the TCSP sector).</li> <li>• The FTRA should be amended to provide a definition of principal owners and beneficiaries for the purposes of CDD requirements and should explicitly require RIs to identify and verify principal owners and beneficiaries</li> <li>• The FTRA should explicitly require RIs to make a determination as to whether the customer is acting on behalf of another person.</li> <li>• Although section 4(2)(b) of the FTRA requires that if the customer is a</li> </ul>

AML/CFT SYSTEM	RECOMMENDED ACTION (LISTED IN ORDER OF PRIORITY)
	<p>legal entity RIs must obtain information on the control structure, there is no explicit requirement for RIs to determine who are the natural persons that ultimately own or control the customer.</p> <ul style="list-style-type: none"> <li>• The FSC and the CIFIU must bring the offshore life insurance companies and the visiting agents swiftly into the AML/CFT framework in order to reduce the risk in this area. Transitional provisions are still operating to preserve the position of companies and intermediaries operating in the Cook Islands prior to 1 January 2009. The Insurance Act 2008 came into force on 1 January 2009 and provides for the FSC to undertake fit and proper checks of the relevant persons. These checks should be completed swiftly, on-site visits to the life insurance companies should be undertaken as soon as possible and training and specific guidance to the insurance industry should also be provided.</li> <li>• The FTRA should require RIs to obtain information on the purpose and intended nature of the business relationship rather than relying on the requirements of Prudential Statement 08-2006 which are not enforceable.</li> <li>• The FTRA should require RIs to ensure that documents, data or information collected under the CDD process is kept up-to-date and relevant by undertaking reviews of existing records, particularly for higher risk categories of customers or business relationships.</li> <li>• The FTRA should explicitly require RIs to perform enhanced due diligence for higher risk categories of customer, business relationship or transaction. Additionally, the FTRA should provide for the types of enhanced due diligence which RIs should undertake.</li> <li>• The Evaluation Team considers that it may be prudent for the proposed adoption of a risk-based approach to be delayed until such time as all the RIs have been brought effectively into the current framework and when the supervisory authorities are confident that they fully understand the business of all RIs and the products which they provide. Due to the predominance of trust relationships within the financial sector, the Evaluation Team is not convinced that providing for reduced or simplified CDD to be undertaken would be appropriate for most of the RIs currently participating in business in the Cook Islands.</li> <li>• Whilst it is implied in section 5 of the FTRA that verification of identity should be completed before a business relationship is established, consideration should be given to setting out explicit requirements as to when and in what circumstances (if any) RIs can delay the completion of the verification process.</li> <li>• Consideration should be given to instigating a procedure to ensure that the process of review of relationships established prior to the FTRA coming into force in 2004 continues until the identity of all customers of active accounts has been verified appropriately.</li> <li>• With regard to criterion 6.2.1 of the Methodology, the FTRA should be amended to require RIs to obtain senior management approval where a customer has been accepted and the customer or beneficial owner is subsequently found to be, or subsequently becomes a PEP.</li> <li>• Section 4(6) of the FTRA should be amended to require RIs, when they are gathering information on correspondent banking relationships, to ascertain whether the bank has been subject to a ML or TF investigation or regulatory action.</li> <li>• In order to comply with FATF Recommendation 8, the FTRA should be</li> </ul>

AML/CFT SYSTEM	RECOMMENDED ACTION (LISTED IN ORDER OF PRIORITY)
	<p>amended to require RIs to take measures to prevent the misuse of technological developments in ML or TF schemes.</p> <ul style="list-style-type: none"> <li>• The FTRA should be amended to require RIs to have policies and procedures in place which address the specific risks associated with non-face to face business relationships or transactions. The issue of non-face to face business is identified in Prudential Statement No. 08-2006 but this needs to be incorporated into the FTRA.</li> </ul>
3.3 Third parties and introduced business (R.9)	<ul style="list-style-type: none"> <li>• Consideration should be given to the provision of a list of countries or territories which the FSC and CIFIU consider adequately meet the FATF Recommendations.</li> <li>• Section 7 of the FTRA should be amended to make it clear to RIs that the ultimate responsibility for customer identification and verification will remain, as always, with the RIs relying on the intermediary or third party.</li> </ul>
3.4 Financial institution secrecy or confidentiality (R.4)	<ul style="list-style-type: none"> <li>• There are no recommendations for this section.</li> </ul>
3.5 Record keeping and wire transfer rules (R.10 & SR.VII)	<ul style="list-style-type: none"> <li>• The competent authorities should issue detailed regulations, consistent with international standards, to ensure that wire transfers are accompanied by accurate and meaningful originator information through the payment chain.</li> <li>• The competent authorities should require the beneficiary financial institutions to adopt risk-based procedures for identifying and handling wire transfers that are not accompanied by complete originator information. These procedures must cover, whether a wire transfer or related transactions without complete originator information are suspicious enough to be reported to the CIFIU, and whether the beneficiary financial institutions should consider restricting or terminating relationship with financial institutions that do not comply with SR VII.</li> <li>• The sanctions available to the CIFIU for non-compliance with the requirements of the FTRA which would include the limited requirements for RIs in respect of wire transfers are not considered by the Evaluation Team to be effective, proportionate and dissuasive. Such sanctions should be introduced as soon as possible.</li> </ul>
3.6 Monitoring of transactions and relationships (R.11 & 21)	<ul style="list-style-type: none"> <li>• Consideration should be given to amending section 8 of the FTRA to require RIs to retain findings of complex, unusual large transactions, or patterns of transactions, that have no apparent or visible economic purpose for a period of at least five years and make them available for competent authorities and auditors.</li> <li>• The CIFIU should consider providing RIs with more information on countries' implementation of the FATF Recommendations, such as summaries of weaknesses in AML/CFT programmes as highlighted in Mutual Evaluation Reports.</li> <li>• Consideration should be given to providing the CIFIU with a power to issue notices which would require RIs to give special attention and conduct enhanced CDD where relationships are or have been established with persons from countries with which the CIFIU has concerns. These notices should be mandatory in nature.</li> <li>• Consideration should also be given to implementing legislation which would provide for the authorities in the Cook Islands to apply counter-measures against jurisdictions which do not sufficiently meet the FATF</li> </ul>

AML/CFT SYSTEM	RECOMMENDED ACTION (LISTED IN ORDER OF PRIORITY)
	Recommendations.
3.7 Suspicious transaction reports and other reporting (R.13-14, 19, 25 & SR.IV)	<ul style="list-style-type: none"> <li>• Consideration could be given to reviewing the definition of “transaction” provided for in section 2 of the FTRA. It was brought to the attention of the assessors by one of the RIs that they felt that the definition of transaction was narrow and it could be widened to make it explicit that it was not necessary for a transaction to be suspicious it could just be the circumstances surrounding a client. Alternatively, consideration could be given to providing a more definitive description of “suspicious transaction report” to make it clear that suspicions of any nature and not just those in respect of a transaction are required to be reported.</li> <li>• Consideration should be given to removing the reporting exemption for both cash transactions and electronic funds transfers which applies to a person or entity in the Cook Islands even if they are outside the Cook Islands.</li> <li>• Consideration should be given to issuing the FTRA guidelines to the insurance sector and for both the CIFIU and the FSC to enter into dialogue with the insurance industry in order to establish a relationship on the same level as they currently enjoy with the banking sector.</li> </ul>
3.8 Internal controls, compliance, audit and foreign branches (R.15 & 22)	<ul style="list-style-type: none"> <li>• The CIFIU should ensure that the FTRA Guidelines are issued to the insurance sector and arrange for training to be given to them in order to identify the particular vulnerabilities of this sector.</li> <li>• Consideration needs to be given as to the approach of the FSC should an application be made by the insurance sector in respect of the creation of a subsidiary or branch outside of the Cook Islands. In this respect it may be prudent to consider the inclusion of a provision in legislation which would deal with such a situation should it occur in the future.</li> </ul>
3.9 Shell banks (R.18)	<ul style="list-style-type: none"> <li>• Provisions should be put in place to ensure that banks: <ul style="list-style-type: none"> <li>○ are prohibited from undertaking correspondent banking relationship with shell banks; and</li> <li>○ are required to satisfy themselves that respondent financial institutions in a foreign country do not permit their accounts to be used by shell banks.</li> </ul> </li> </ul>
3.10 The supervisory and oversight system: competent authorities and SROs. Role, functions, duties and powers (including sanctions) (R.23, 29, 17 & 25)	<ul style="list-style-type: none"> <li>• Consideration should be given to providing the CIFIU with the ability to issue a range of proportionate administrative sanctions relevant to the level of breach of the FTRA.</li> <li>• Consideration should be given to providing the CIFIU and/or the FSC with the power to impose disciplinary and financial sanctions and the power to withdraw, restrict or suspend the institution’s licence where applicable.</li> <li>• The FSC and the CIFIU should undertake on-site examinations of the insurance industry as soon as possible in order to ensure that the requirements of the FTRA are being met.</li> <li>• Consideration should be given to the FSC reviewing the licences issued to the insurance sector in order to ensure that no criminals or their associates are holding or are the beneficial owner of a significant controlling interest or holding a management function in an insurance institution and to undertake a fit and proper test to licensed insurers as provided for in the Insurance Act 2008.</li> <li>• Consideration should be given to issuing the FTRA guidelines to the</li> </ul>

AML/CFT SYSTEM	RECOMMENDED ACTION (LISTED IN ORDER OF PRIORITY)
	<p>insurance sector so as to assist them with complying with the requirements of the FTRA.</p> <ul style="list-style-type: none"> <li>• The CIFIU should consider making more use of its website in order to disseminate information to the RIs. The provision of information on current “scams” or schemes which intend to defraud customers of substantial sums of money would be useful and would enable the RIs to be aware of the potential for their customers to be the subject of such schemes.</li> <li>• Consideration should be given to reviewing the structure of the supervisory authorities in order to ensure that the available resources are being utilized in the most effective and productive manner. The supervisory authorities should consider whether joint on-sites leads to duplication of effort in some areas of the examination or whether there is the possibility for particular areas of business relationships to be overlooked completely.</li> <li>• Whatever approach is taken to AML/CFT supervision (ie a continuation of joint on-site examinations by the FSC and CIFIU, or conduct of the entire AML/CFT examination by either the FSC or CIFIU), the Cook Islands must ensure that the relevant supervisory staff are adequately trained and understand the individual financial sectors and of the products and services offered by those sectors. If the CIFIU does assume responsibility for assessing compliance with both Parts 2 and 3 of the FTRA, it should ensure that additional sector-specific training is provided to its staff (possibly through secondments to the FSC or to larger financial institutions), as well as considering the benefits of seconding staff from the FSC to the CIFIU.</li> <li>• The Evaluation Team noted that RIs in the offshore sector in the Cook Islands offer a range of complex structures which are attractive to high net worth individuals. Authorities should ensure that supervisors, both in the CIFIU and the FSC, have the necessary knowledge and training in order to conduct effective examinations of these institutions.</li> </ul>
3.11 Money value transfer services (SR.VI)	<ul style="list-style-type: none"> <li>• It is recommended that the competent authorities establish a range of proportionate sanctions depending on the severity of non-compliance so as to ensure more effective implementation of the FTRA by RIs in the future.</li> <li>• While the risks of underground or hawala appears low, it is recommended that the authorities bring into effect a legal, regulatory and supervisory framework that complies with international standards within a reasonable time frame.</li> </ul>
<b>4. Preventive Measures – Non-Financial Businesses and Professions</b>	
4.1 Customer due diligence and record-keeping (R.12)	<ul style="list-style-type: none"> <li>• The CIFIU should consider as a matter of priority issuing sector specific guidelines for certain categories of DNFBPs to provide more guidance to address specific business operations that may require either simplified or enhanced CDD. Specifically, in view of the various types of trust arrangements operating with different degrees of risk, it is recommended that sector specific guidance to allow for enhanced CDD in line with the uniqueness of the business operations of the TCSP sector be developed by the CIFIU and the FSC in consultation with the trustee association.</li> <li>• It is recommended that CI explicitly provide in the FTRA the requirement to collect information on beneficiaries and to ascertain the ultimate beneficial owners of trusts.</li> <li>• It is recommended that the CIFIU addresses the relevant issues highlighted</li> </ul>

AML/CFT SYSTEM	RECOMMENDED ACTION (LISTED IN ORDER OF PRIORITY)
	<p>by the Law Society and the Trustee Association as a matter of priority to ensure effective implementation of the FTRA.</p> <ul style="list-style-type: none"> <li>• The CIFIU should consider issuing appropriate guidance for certain categories of DNFBPs on CDD for existing customers.</li> <li>• It is recommended that enhanced and ongoing CDD be conducted for more complex trust arrangements, such as “flee trusts” or those that involved using a trust account from which payment of a mortgage of real estate is made where the source of funds cannot be adequately ascertained.</li> <li>• It is recommended that trustee companies be required to take into consideration the implementation of the FATF standards in the country of origin of its co-trustees to determine the extent of CDD. It could also be a factor for the trustee company to consider the risk it is exposed to if the co-trustee is from a jurisdiction that has deficient AML/CFT measures.</li> </ul>
4.2 Suspicious transaction reporting (R.16)	<ul style="list-style-type: none"> <li>• The DNFBPs would benefit from more guidance and feedback from the CIFIU with regard to ML trends and techniques as well as implementing an effective monitoring system to detect unusual transactions.</li> <li>• It is recommended that the CIFIU circulate to DNFBPs regularly any information concerning countries that have deficiencies in their AML/CFT system or which insufficiently apply the FATF standards.</li> <li>• It is recommended that the CIFIU provide more comprehensive guidance on the role and responsibilities of the MLRO and general criteria on employee screening.</li> <li>• It is recommended that the CIFIU ensure that the approval process for MLROs is completed as and when there is any change in the MLRO and that it maintains an up to date list of MLROs.</li> </ul>
4.3 Regulation, supervision and monitoring (R.24-25)	<ul style="list-style-type: none"> <li>• The CIFIU may wish to consider enhancing its coordination with the FSC to avoid any ambiguity with regard to its supervisory role for trustee companies. While the current arrangements are working well, there may arise duplication or possibilities of omission if one depends on the other to perform certain task, in particular with regard to assessing the RI’s transaction monitoring mechanism.</li> <li>• The authorities may consider developing a graduated enforcement regime for the CIFIU to ensure effective compliance, for example, establishing appropriate administrative sanctions depending on the severity of non-compliance.</li> <li>• In view of the complexities of some of the products and services undertaken by DNFBPs, in particular the trustee companies and lawyers, the staff in the compliance section would benefit from more technical training to gain a more in-depth understanding on the features and associated risk arising from such products or services.</li> <li>• The CIFIU may consider organizing more regular feedback to all the MLROs that would include sharing information on STRs (general assessment on the quality as well as statistics), ML trends and other issues that the RI should be looking out for.</li> </ul>
4.4 Other non-financial businesses and professions (R.20)	<ul style="list-style-type: none"> <li>• While dealers have made efforts to comply with the FTRA, it is recommended that the CIFIU legally prescribe the threshold for dealers as required under section 2(t) of the FTRA.</li> </ul>
<b>5. Legal Persons and Arrangements &amp; Non-Profit Organisations</b>	

AML/CFT SYSTEM	RECOMMENDED ACTION (LISTED IN ORDER OF PRIORITY)
5.1 Legal Persons – Access to beneficial ownership and control information (R.33)	<ul style="list-style-type: none"> <li>• It is recommended that: <ul style="list-style-type: none"> <li>○ the MOJ work with other relevant agencies to conduct a review of the domestic company registry system in with a view to obtaining and checking a wider range of information on shareholders and shareholdings and recording that information on a computerised database; and</li> <li>○ the MOJ be required to maintain information as to whether shares of registered entities are held beneficially and if so, to maintain details of the beneficial owner and require company registers to maintain records of the same information.</li> </ul> </li> </ul>
5.2 Legal Arrangements – Access to beneficial ownership and control information (R.34)	<ul style="list-style-type: none"> <li>• The Cook Islands should: <ul style="list-style-type: none"> <li>○ Establish measures requiring trusts (including international trusts) to collect full identification information on the beneficial owners of trusts;</li> <li>○ Implement measures to ensure that adequate, accurate and timely information is available to law enforcement authorities concerning the beneficial ownership and control of trusts;</li> <li>○ Establish mechanisms to mitigate the clear ML/TF risks created by many of the measures in the International Trust Act 1984.</li> </ul> </li> </ul>
5.3 Non-profit organisations (SR.VIII)	<ul style="list-style-type: none"> <li>• The ISA should be amended or regulations be issued under the ISA to provide that organizations applying to be incorporated societies be required to supply information concerning those persons who own, control or direct their activities, including senior officers, board members and trustees, and that this information be kept on the database maintained by the MOJ.</li> <li>• Use of the term ‘friendly society’ in section 2 of the FTRA be reviewed to ensure that it meets its intended purpose of capturing the entire NPO sector in the Cook Islands;</li> <li>• Further outreach should be undertaken to the NPO sector to increase awareness of possible ML/TF risks and the sector’s obligations under the FTRA.</li> </ul>
<b>6. National and International Co-operation</b>	
6.1 National co-operation and co-ordination (R.31)	<ul style="list-style-type: none"> <li>• Consideration should be given to merging CIFIN and CLAG, with the ability of all members to call additional 'specific special operational' meetings as required.</li> <li>• A more collaborative approach to the resolution of ML and predicate offending is required. The CLAG mandate should be used to share resource and skills to permit a whole of government collaborative focus to addressing criminal matters. Mechanisms under CLAG to permit greater sharing of skills and resources between key agencies to support each could enhance the effectiveness of the CLAG approach. In a small jurisdiction where resources are limited, what is required is an 'expert team' not a 'team of experts'. For example, better utilization of the combined skills of Police (investigative), CIFIU (analysis) and Audit (forensic accountancy) to address financial crimes that are large and complex would enhance overall effectiveness and capability.</li> </ul>
6.2 The Conventions and UN Special Resolutions (R.35 & SR.I)	<ul style="list-style-type: none"> <li>• Competent authorities of the Cook Islands should identify the impediments to the practical application of these provisions. They may also wish to consider developing procedures to ensure for example that ML offences or confiscation are always considered and that appropriate cases are</li> </ul>

AML/CFT SYSTEM	RECOMMENDED ACTION (LISTED IN ORDER OF PRIORITY)
	<p>identified.</p> <ul style="list-style-type: none"> <li>• A number of technical issues with the operation of the ML, TF, POCA and MACMA regimes have been identified elsewhere in this report and should be addressed to ensure effective implementation.</li> <li>• Competent authorities should also consider taking steps to strengthen and promote integrity within government departments. A generic mandatory code of conduct with appropriate sanctions would assist in minimizing risks in this area.</li> <li>• In addition, regulators must be provided with a broad range of sanctions so that they may readily take steps to ensure compliance.</li> </ul>
6.3 Mutual Legal Assistance (R.36-38 & SR.V)	<ul style="list-style-type: none"> <li>• It is recommended that the Cook Islands consider the various technical issues highlighted above in section 6.3.2 of this report and determine whether amendments to the MACMA and POCA are required to address them.</li> </ul>
6.4 Extradition (R.39, 37 & SR.V)	<ul style="list-style-type: none"> <li>• There are no recommendations for this section.</li> </ul>
6.5 Other Forms of Co-operation (R.40 & SR.V)	<ul style="list-style-type: none"> <li>• It is recommended that all relevant enforcement and regulatory authorities collect sufficient statistics and other evidence to demonstrate that the Cook Islands' mechanisms for international cooperation are fully effective.</li> </ul>
<b>7. Other Issues</b>	
7.1 Resources and statistics (R.30 & 32)	<ul style="list-style-type: none"> <li>• There are no recommendations for this section.</li> </ul>
7.2 Other relevant AML/CFT measures or issues	<ul style="list-style-type: none"> <li>• There are no recommendations for this section.</li> </ul>
7.3 General framework – structural issues	<ul style="list-style-type: none"> <li>• There are no recommendations for this section.</li> </ul>

**Annex 1. Authorities' Response to the Assessment**

**Annex 2. Details of All Bodies Met During the On-Site Visit**

1. Accounting firms
2. Audit Office
3. Business Trade and Investment Board
4. Cook Islands Banks Association
5. Cook Islands Financial Intelligence Unit
6. Cook Islands Investment Corporation
7. Cook Islands Police
8. Coordinating Committee on Combating Money Laundering and Terrorist Financing
9. Deputy Prime Minister
10. Financial Supervisory Commission (FSC)
11. FSC Board
12. Insurance company
13. Law Society and various legal firms
14. Ministry of Finance and Economic Management (including Customs and Revenue)
15. Ministry of Foreign Affairs/Immigration
16. Ministry of Justice
17. Money changers and remittance company
18. Motor company
19. Pearl Authority
20. Pearl dealers
21. Real estate agent
22. Solicitor General/Crown Law Office
23. Superannuation Office
24. Trustee Association and various trust and company service providers
25. Various domestic and international banks

### **Annex 3. List of All Laws, Regulations, and Other Material Received**

#### **Acts**

Banking Act 2003  
Companies Act 1955  
Crimes Act 1969  
Criminal Procedures Act 1980-81  
Customs Act 1913  
Development Investment Act 1995-96  
Extradition Act 2003  
Financial Supervisory Commission Act 2003  
Financial Transactions Reporting Act 2004  
Incorporated Societies Act 1994  
Insurance Act 2008  
International Companies Act 1981-82  
International Companies Amendment Act 2004  
International Trusts Act 1984  
Mutual Assistance in Criminal Matters Act 2003  
Mutual Assistance in Criminal Matters Amendment Act 2004  
Offshore Insurance Act 1981  
Proceeds of Crime Act 2003  
Proceeds of Crime Amendment Act 2004  
Terrorism Suppression Act 2004  
Terrorism Suppression Amendment Act 2007  
Trustee Companies Act 1981-82

#### **Regulations**

Financial Transactions Reporting (Customer identification) Regulations 2004  
International Companies (Evidence of Identity) Regulations 2004  
Proceeds of Crime (Border Currency Report Form) Regulations 2004  
Trustee Companies (Due Diligence) Regulations 1996

#### **Guidelines and other documents**

Financial Transaction Reporting Act 2004 (FTRA) Guidelines (Nos. 1 – 6)  
Financial Supervisory Commission (FSC) Annual Report  
FSC Practice Note – Bank Licensees  
FSC Prudential Statement

## **Copies of Key Laws, Regulations, and Other Measures**

### 2004 Financial Transactions Reporting No. 16

#### **ANALYSIS**

##### **PART 1**

###### **PRELIMINARY**

1. Short Title and commencement
2. Definitions
3. Application

##### **PART 2**

###### **OBLIGATIONS TO KEEP RECORDS AND VERIFY IDENTITY**

4. Reporting institution must identify and verify customer
5. Necessity of identification to conduct business
6. Reporting institution must maintain records
7. Reporting institution must maintain account in true name
8. Reporting institution must monitor transactions
9. Banks and money transmission service providers must include originator information

##### **PART 3**

###### **OBLIGATIONS TO REPORT**

10. Reporting institution must report financial transactions
11. Reporting institution must report suspicious transactions
12. Suspicious transaction report by supervisory authority or auditor
13. False or misleading statements
14. Disclosure of suspicious transaction reports and other information
15. Protection of identity of persons and information
16. Protection of persons reporting in good faith
17. Privileged communication
18. Other preventative measures by reporting institution
19. Defences

##### **PART 4**

###### **FINANCIAL INTELLIGENCE UNIT**

20. FIU established
21. Minister to appoint Head
22. Functions, powers and duties of Head
23. Head may delegate
24. Head to hold no other office
25. Removal or suspension from office
26. Head must report to Minister
27. Functions and powers of FIU
28. Agreements and arrangements by FIU
29. Disclosure to foreign agencies

- 30. Power to examine
- 31. Power to enforce compliance
- 32. Audit
- 33. Non-disclosure
- 34. Immunity

**PART 5**

**OTHER MATTERS**

- 35. Overriding of secrecy
- 36. Act to prevail if conflict with other specified Acts
- 37. Anonymous account or account in fictitious or false name
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- 40. Regulations
- 41. Transitional
- 42. Savings
- 43. Repeal and revocation

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2004, No. 16

An Act to facilitate the prevention, detection, investigation and prosecution of money laundering, financing of terrorism and other serious offences and the enforcement of the Proceeds of Crime Act 2003 by –

- (a) establishing a financial intelligence unit to collect, analyse, and disseminate suspicious transactions reports and other financial information; and
- (b) requiring reporting institutions to undertake due diligence measures and other measures to combat money laundering and financing of terrorism.

**BE IT ENACTED** by the Parliament of the Cook Islands in Session assembled, and by the authority of the same as follows:

## PART 1

### PRELIMINARY

1. Short Title and commencement – (1) This Act may be cited as the Financial Transactions Reporting Act 2004.

(2) This Act shall come into force on the 1<sup>st</sup> June 2004.

2. Definitions - (1) In this Act, unless the context otherwise requires, -

"account" means any facility or arrangement by which a financial institution does any one or more of the following –

- (a) accepts deposits of currency;
- (b) allows withdrawals of currency;
- (c) pays cheques or payment orders drawn on the reporting institution, or collects cheques or payment orders on behalf of a person other than the reporting institution,

and includes any facility or arrangement for a safety deposit box or for any other form of safe deposit;

"business relationship" means a continuing relationship between two or more parties at least one of whom is a reporting institution acting in the course of that reporting institution's business in providing services to that other party;

"cash" means any coin or paper money that is designated as legal tender in the country of issue; and includes bearer bonds, travellers' cheques, postal notes and money orders;

"Court" means the High Court of the Cook Islands and its appellate courts;

"customer" includes -

- (a) a person engaged in a business relationship; or
- (b) the person in whose name a transaction or account is arranged, opened, or undertaken; or
- (c) a signatory to a transaction or account; or
- (d) any person to whom a transaction has been assigned or transferred; or
- (e) any person who is authorised to conduct a transaction; or
- (f) any person on whose behalf the account or transaction is being conducted; or
- (g) any other person that may be prescribed;

"data" means representations, in any form, of information or concepts;

"document" has the same meaning given by section 3 of the Proceeds of Crime Act 2003;

- "financing of terrorism" means an offence against section 11 of the Terrorism Suppression Act 2004;
- "FIU" means the Financial Intelligence Unit established under section 20;
- "Head" means the Head of the FIU appointed under section 21;
- "Minister" means the Minister of Finance, and includes any member of Cabinet or Minister of the Cook Islands Government acting for him or her or in his or her place;
- "money laundering offence" means an offence against section 280A of the Crimes Act 1969;
- "Money Laundering Reporting Officer" means a person who -
- (a) is a member of the management of the reporting institution;
  - and
  - (b) has been approved by the FIU after consultation with any supervisory authority.
- "politically exposed person" means any individual who is or has been entrusted with any prominent public function in a foreign country, such as a Head of State or of government, a senior politician, senior government, judicial or military official, a senior executive of state owned corporations, and any important political party official and includes the family members or close associates of any such person;
- "prescribed" means prescribed by regulations made under this Act;
- "property" has the same meaning given by section 3 of the Proceeds of Crime Act 2003;
- "record" means any material on which data is recorded or marked and that is capable of being read or understood by a person, computer system or other device;
- "reporting institution" means any person or entity who conducts as a business one or more of the following activities for or on behalf of a customer -
- (a) accepting deposits and other repayable funds from the public or banking business as defined in the Banking Act 2003;
  - (b) lending, including consumer credit, mortgage credit, factoring (with or without recourse), and financing of commercial transaction;
  - (c) financial leasing;
  - (d) providing transfer of money or value, including:
    - (i) collecting, holding, exchanging or remitting funds or the value of money, or otherwise negotiating transfers of funds or the value of money, on behalf of other persons;
    - (ii) delivering funds; or
    - (iii) issuing, selling or redeeming travellers' cheques, money orders or similar instruments;
  - (e) issuing and administering means of payment (for example, credit cards, travellers' cheques and bankers' drafts);
  - (f) entering into or issuing guarantees and commitments;
  - (g) trading in money market instruments (for example cheques, bills, certificates of deposit), foreign exchange, financial and commodity futures and options, exchange and interest rate instruments, and transferable securities;
  - (h) participation in securities issues and the provision of financial services related to those issues;
  - (i) money-broking;
  - (j) providing portfolio management and advice;
  - (k) safekeeping and administration of cash, liquid investments and securities;
  - (l) providing safe custody services;
  - (m) underwriting or placement of life insurance and other investment related insurance, including insurance intermediation;

- (n) trustee administrator or investment manager of a superannuation scheme but excluding closed-ended schemes;
- (o) dealing in bullion;
- (p) operating a gambling house, casino or lottery, including an operator who carries on operations through the internet;
- (q) acting as a trust or company service provider, including acting as a trustee company as defined in the Trustee Companies Act 1981, in relation to –
  - (i) the formation or management of legal persons;
  - (ii) acting as (or arranging for another person to act as) a director or secretary of a company, a partner in a partnership or a similar position in relation to some other legal persons or arrangements;
  - (iii) providing a registered office, business address or accommodation, correspondence or administrative address for a company, a partnership or some other legal persons or arrangements;
  - (iv) acting as (or arranging for another person to act as) a trustee of an express trust;
  - (v) acting as (or arranging for another person to act as) a nominee shareholder for another person;
- (r) acting as a lawyer, a notary or some other independent legal profession, or an accountant, when they prepare or carry out transactions for their clients in relation to –
  - (i) buying and selling of real estate;
  - (ii) management of client money, securities or other assets;
  - (iii) management of bank, savings or securities accounts;
  - (iv) organisation of contributions for the creation, operation or management of companies; or
  - (v) creation, operation or management of legal persons or arrangements, and buying and selling of business entities;
- (s) dealing in real estate
- (t) dealing in motor vehicles or high-value items above a prescribed threshold, including antiques, pearls, precious stones and precious metals;
- (u) acting as a friendly society
- (v) otherwise investing, administering or managing funds or money on behalf of another person;
- (w) money and currency changing;
- (x) acting as investment advisers;
- (y) any other legal entity that is registered or incorporated in the Cook Islands pursuant to the International Companies Act 1981-82 and carrying on any type of business referred to in this subsection;
- (z) any other business that may be prescribed by the Minister;

“serious offence” has the same meaning given by section 3 of the Proceeds of Crime Act 2003;

“supervisory authority” means any institution or authority established in the Cook Islands to regulate or supervise a reporting institution;

“suspicious transaction report” means a report required to be made under section 11 or 12;

“transaction” includes, but is not limited to –

- (a) any deposit, withdrawal, exchange, or transfer of funds (in whatever currency denominated), whether:

- (i) in cash; or
- (ii) by cheque, payment order or other instrument; or
- (iii) by electronic or other non-physical means;
- (b) the use of a safety deposit box or any other form of safe deposit;
- (c) any payment made in satisfaction, in whole or in part, of any contractual or other legal obligation;
- (d) any other transactions that may be prescribed;

“verification documentation” includes –

- (a) in the case of an individual:
  - (i) a certified copy of a valid photographic identification document (such as a passport or driving license) issued by a government or government agency;
  - (ii) a statement from a bank where the customer has maintained a relationship for at least 12 months; and
  - (iii) a recent utility bill that shows the person’s permanent residential address;
- (b) in the case of a legal entity:
  - (i) a certified copy of the certificate of incorporation, the register of directors and the register of shareholders, and the memorandum and articles of associations; and
  - (ii) verification documentation for the directors and shareholders;
- (c) in the case of an association;
  - (i) a certified copy of the certificate of registration and its constitution or charter; and
  - (ii) verification documentation for its principal members;
- (d) in the case of a trust:
  - (i) a certified copy of the certificate of registration or instrument evidencing or by which the trust was established;
  - (ii) verification documentation in respect of each settlor and trustee; and
- (e) such documentation as may be required by the FIU.

(2) In this Act a reference to the law of the Cook Islands or any foreign country, includes a reference to a written or unwritten law of, or in force in, any part of the Cook Islands or that foreign country, as the case may be.

3. Application – (1) This Act applies in relation to business relationships, accounts and transactions conducted through a reporting institution on or after the commencement of this Act.

(2) A reporting institution or other person, as the case may be, must comply with the provisions of this Act, despite any other Act or law to the contrary.

## **PART 2**

### **OBLIGATIONS TO KEEP RECORDS AND VERIFY IDENTITY**

4. Reporting institution must identify and verify customer - (1) A reporting institution must identify the customer on the basis of any official or other identifying document and verify the identity of the customer on the basis of reliable and independent source document, data or information or other evidence as is reasonably capable of verifying the identity of the customer when

- (a) the reporting institution:
  - (i) enters into a continuing business relationship;

- (ii) in the absence of such a relationship, conducts any transaction;
- (b) carrying out an electronic funds transfer other than an electronic funds transfer referred to in subsection 9(2) or 9(3);
- (c) there is suspicion of a money laundering offence or a financing of terrorism offence;
- (d) the reporting institution has doubts about the veracity or accuracy of the customer identification information it had previously obtained.

(2) Without limiting the generality of subsection (1) –

- (a) if the customer is a natural person, a reporting institution must adequately identify and verify his/her identity, including obtaining information relating to:
  - (i) the person's name, address and occupation; and
  - (ii) the national identity card or passport or other applicable official identifying document;
- (b) if the customer is a legal entity, a reporting institution must adequately identify and verify its legal existence and structure, including obtaining information relating to:
  - (i) the entity's name, legal form, registration number and registered address;
  - (ii) its principal owners and beneficiaries, and its directors and control structure; and
  - (iii) provisions regulating the power to bind the entity, and to verify that any person purporting to act on behalf of the entity is authorised to do so and identify those persons;
- (c) if the customer is an association, a reporting institution must adequately identify and verify its legal existence and structure, including obtaining information relating to:
  - (i) the association's name, legal form, registration number and registered address;
  - (ii) the principal members of the association; and
  - (iii) provisions regulating the power to bind the association, and to verify that any person purporting to act on behalf of the association is authorised to do so and identify those persons;
- (d) if the customer is a trust, a reporting institution must adequately obtain information relating to:
  - (i) the trust's name and registered office or address for service;
  - (ii) the nature of the trust and its beneficiaries; and
  - (iii) the name, address, occupation, national identity card or passport or other applicable official identifying document of each settlor and trustee;
- (e) if the customer is a politically exposed person, the reporting institution must:
  - (i) adequately identify and verify his/her identity as set out in this section;
  - (ii) have appropriate risk management systems to determine whether the customer is a politically exposed person;
  - (iii) obtain the approval of senior management before establishing a business relationship with the customer;

- (iv) take reasonable measures to establish the source of wealth and source of funds; and
  - (v) conduct regular and ongoing enhanced monitoring of the business relationship.
- (3) The verification documentation or procedures required for the identification or verification of any particular customer or class of customers may be prescribed.
- (4) A reporting institution must -
  - (a) obtain information on the purpose of the transaction; and
  - (b) conduct on-going due diligence on the business relationship with its customer; and
  - (c) conduct on-going scrutiny of any transaction undertaken throughout the course of the business relationship with a customer to ensure that the transaction being conducted is consistent with the reporting institution's knowledge of the customer, the customer's business and risk profile, including where necessary, the source of funds.
- (5) If a person conducts a transaction, other than a one-off transaction, through a reporting institution and the reporting institution has reasonable grounds to believe that the person is undertaking the transaction on behalf of any other person or persons, then, in addition to complying with subsections (1) and (2), the reporting institution must verify the identity of the other person or persons for whom, or for whose ultimate benefit, the transaction is being conducted.
- (6) A reporting institution must –
  - (a) in relation to its cross-border correspondent banking and other similar relationships:
    - (i) adequately identify and verify the person with whom it conducts such business relationship;
    - (ii) gather sufficient information about the nature of the business of the person;
    - (iii) determine from publicly available information the reputation of the person and the quality of supervision to which the person is subject to;
    - (iv) assess the person's anti-money laundering and combating financing of terrorism controls;
    - (v) obtain approval from senior management before establishing a new correspondent relationship; and
    - (vi) document the responsibilities of the reporting institution and the person;
  - (b) where the business relationship is a payable-through account, a reporting institution must ensure that the person with whom it has established the relationship:
    - (i) has verified the identity of and performed on-going due diligence on that person's customers that have direct access to accounts of the reporting institution; and
    - (ii) is able to provide the relevant customer identification data upon request to the reporting institution.
- (7) Where a reporting institution relies on an intermediary or a third party to undertake its obligations under this section or to introduce business to it, it must-

- (a) immediately obtain the necessary information required under this section;
- (b) ensure that copies of identification information and other relevant documentation relating to the requirements under this section will be made available to it from the intermediary or the third party upon request without delay; and
- (c) satisfy itself that the intermediary or third party is regulated and supervised for, and has measures in place to comply with the requirements set out in sections 4, 5 and 6 of this Act.

(8) If a reporting institution contravenes subsection (1), (2), (4), (5), (6) or (7) the reporting institution commits an offence punishable by -

- (a) in the case of an individual, to a fine of up to \$10,000 or to a term of imprisonment of up to 12 months, or both; or
- (b) in the case of a body corporate, to a fine of up to \$50,000.

(9) Subsection (1) or (2) does not apply -

- (a) if the transaction is part of an existing and regular business relationship with a person who has already produced satisfactory evidence of identity, unless the reporting institution has reason to suspect that the transaction is suspicious or unusual; or
- (b) in relation to customer verification only, if the transaction is a one-off transaction not exceeding \$10,000, other than a wire transfer, unless the reporting institution has reason to suspect that the transaction is suspicious or unusual; or
- (c) in any other circumstances that may be prescribed.

(10) For the purposes of this section, "one-off transaction" means any transaction other than a transaction carried out in the course of an established business relationship formed by a person acting in the course of relevant business.

5. Necessity of identification to conduct business - If -

- (a) satisfactory evidence of the identity is not produced to, or obtained by, a reporting institution under section 4; or
- (b) if, in all the circumstances, the reporting institution is of the opinion that a report should be made to the FIU reporting the matter referred to in paragraph (a), the reporting institution must -
- (c) not proceed any further with the business relationship, the opening of the account or transaction, as the case may be; and
- (d) report the matter to the FIU.

6. Reporting institution must maintain records - (1) A reporting institution must establish and maintain -

- (a) records of all transactions carried out by it and correspondence relating to the transactions;
- (b) records of a person's identification and verification obtained in accordance with section 4;
- (c) records of all reports made to the FIU; and
- (d) records of all enquiries made by the reporting institution or to the reporting institution by the FIU and other law enforcement agencies.

(2) Records required under subsection (1) are those records that are reasonably necessary to enable the transaction to be readily reconstructed at any time by the FIU or by a law enforcement agency.

(3) Records referred to in subsection (2) must contain particulars sufficient to identify the name, address and occupation (or, where appropriate, business or principal activity) of each person -

- (a) conducting the transaction; and
- (b) if applicable, on whose behalf the transaction is being conducted.

(4) In addition, the documents used by the reporting institution to identify and verify each person must have sufficient particulars to identify -

- (a) the nature and date of the transaction;
- (b) the type and amount of any currency involved;
- (c) the type and identifying number of any account with the reporting institution involved in the transaction;
- (d) if the transaction involves a negotiable instrument other than currency, the name of the drawer of the instrument, the name of the institution on which it was drawn, the name of the payee (if any), the amount and date of the instrument, the number (if any) of the instrument and details of any endorsements appearing on the instrument; and
- (e) the name and address of the reporting institution, and of the officer, employee or agent of the reporting institution who prepared the record.

(5) The records mentioned in subsection (1)(a) must be kept –

- (a) for a minimum period of 6 years from the date of any transaction or correspondence; and
- (b) in the Cook Islands or, if kept elsewhere, in a manner and form that allows the FIU to reproduce, within three working days, that record in usable form in the Cook Islands.

(6) The records mentioned in subsections (1)(b), (c) and (d) must be kept -

- (a) for a minimum period of 6 years from the date the account is closed or the business relationship ceases, whichever is the later; and
- (b) in the Cook Islands or, if kept elsewhere, in a manner and form that allows the FIU to reproduce, within 3 working days, that record in usable form in the Cook Islands.

(7) Where any record is required to be kept under this Act -

- (a) it must be maintained in a manner and form that will enable the reporting institution to comply immediately with requests for information from the FIU or a law enforcement agency; and
- (b) a copy of such record may be kept –
  - (i) in a machine-readable form, if a paper copy can be readily produced from it; or
  - (ii) in an electronic form, if a paper copy can be readily produced from it and an electronic signature of the person who keeps the record is retained.

(8) If a reporting institution contravenes subsections (1) to (7), the reporting institution commits an offence punishable by, -

- (a) in the case of an individual, to a fine of up to \$5,000;
- (b) in the case of a body corporate, to a fine of up to \$20,000.

7. Reporting institution must maintain account in true name - (1) A reporting institution must maintain any accounts in the true name of the account holder.

(2) A reporting institution must not open, operate or maintain any anonymous account.

(3) A reporting institution must not open, operate or maintain any account which the reporting institution ought reasonably to have known is in a fictitious or false name.

(4) If a reporting institution contravenes subsections (1), (2) or (3), the reporting institution commits an offence punishable by, -

- (a) in the case of an individual, to a fine of up to \$10,000;
- (c) in the case of a body corporate, to a fine of up to \$50,000.

(5) For purposes of this section, -

- (a) an account is in a false name if the person, in opening the account, or becoming a signatory to the account, uses a name other than a name by which the person is commonly known;
- (b) an account is operated in a false name if the person operating the account does any act or thing in relation to the account (whether by way of making a deposit or withdrawal or by way of communication with the reporting institution concerned or otherwise) and, in doing so, uses a name other than a name by which the person is commonly known; and
- (c) an account is in a false name if it was opened in a false name, whether before or after the commencement of this Act.

8. Reporting institution must monitor transactions - (1) A reporting institution must pay special attention to -

- (a) any complex, unusual or large transactions or attempted transactions or any unusual patterns of transactions or attempted transactions that have no apparent or visible economic or lawful purpose; or
- (b) business relationships and transactions with persons in jurisdictions that do not have adequate systems in place to prevent or deter money laundering and financing of terrorism; or
- (c) wire transfers that do not contain complete originator information, other than the transfers referred to under sections 9(2) and (3).

(2) In relation to subsection (1), a reporting institution -

- (a) must examine, as far as possible, the background and purpose of the transactions or business relations and record its findings in writing; and
- (b) must report those findings to the FIU or to a law enforcement agency and assist the FIU or the law enforcement agency in any investigation relating to a serious offence, a money laundering offence or a financing of terrorism offence.

9. Banks and money transmission service providers must include originator information - (1) A reporting institution must include accurate originator information and other related messages on

electronic funds transfers and other forms of funds transfers, and such information must remain with the transfer.

(2) Subsection (1) shall not apply to an electronic funds transfer, other than a money transfer effected from the use of a credit or debit card as means of payments, that results from a transaction carried out using a credit or debit card, provided that the credit or debit card number is included in the information accompanying such a transfer.

(3) Subsection (1) shall not apply to electronic funds transfers and settlements between reporting institutions where the originator and beneficiary of the funds transfer are acting on their own behalf.

(4) Subsection (1) is applicable only to reporting institutions that carry out the business defined under paragraph (a) and/or (d) of the business of reporting institutions under section 2.

(5) Subsection (3) is applicable only to reporting institutions that carry out the business defined under paragraph (a) of the business of reporting institutions under section 2.

### **PART 3**

#### **OBLIGATIONS TO REPORT**

10. Reporting institution must report financial transactions – (1) A reporting institution must, within 3 working days, report to the FIU, within a time and in the form and manner that may be prescribed, -

- (a) any transaction of an amount in cash exceeding \$10,000, or any other amount that may be prescribed, in the course of a single transaction, unless the recipient and the sender is a reporting institution;
- (b) the sending out of the Cook Islands at the request of a customer of any electronic funds transfer exceeding that \$10,000, or any other amount that may be prescribed in the course of a single transaction;
- (c) the receipt from outside the Cook Islands of an electronic funds transfer sent at the request of a customer, of an amount exceeding \$10,000, or other amount as may be prescribed, in the course of a single transaction.

(2) Nothing in subsection (1)(a) overrides requirements relating to suspicious transactions reports.

(3) Subsection (1)(b) –

- (a) is applicable only to reporting institutions that carry out the business defined under paragraph (a) or (d) of the business of reporting institutions under section 2; and
- (b) does not apply when the reporting institution sends an electronic funds transfer to a person or entity in the Cook Islands, even if the final recipient is outside the Cook Islands.

(4) Subsection (1)(c) –

- (a) is applicable only to reporting institutions that carry out the business defined under paragraph (a) or (d) of the business of reporting institutions under section 2; and
- (b) does not apply when the reporting institution receives an electronic funds transfer from a person or entity in the Cook Islands, even if the initial sender is outside the Cook Islands.

- (5) If a reporting institution contravenes subsection (1), the reporting institution commits an offence punishable by -
- (a) in the case of an individual, to a fine of up to \$10,000;
  - (b) in the case of a body corporate, to a fine of up to \$50,000.

(6) A person who conducts 2 or more transactions or electronic funds transfers that are of an amount below the threshold set out in subsection (1) commits an offence if, having regard to the matters in subsection (7), it would be reasonable for the Court to conclude that the person conducted the transactions, or transfers in that manner or form for the sole or dominant purpose of ensuring, or attempting to ensure, that no report in relation to the transactions or transfers is required to be made.

- (7) The matters referred to in subsection (6) are -
- (a) the manner and form in which the transactions or transfers were conducted, including, without limiting the generality of this, all or any of the following:
    - (i) the value of the currency involved in each transaction or transfer;
    - (ii) the aggregated value of the currency involved in the transactions or transfers;
    - (iii) the period of time over which the transactions or transfers occurred;
    - (iv) the interval of time between any of the transactions or transfers;
    - (v) the locations at which the transactions or transfers were initiated or conducted; and
  - (b) any explanation made by the person about the manner or form in which the transfers were conducted.

- (8) Every person who contravenes subsection (6) is liable on conviction -
- (a) in the case of an individual, to a fine of up to \$10,000 or a term of imprisonment of up to 12 months, or both;
  - (b) in the case of a body corporate, to a fine of up to \$50,000.

11. Reporting institution must report suspicious transactions - (1) If a reporting institution suspects or has reasonable grounds to suspect that information that the reporting institution has concerning any transaction or attempted transaction may be -

- (a) relevant to an investigation or prosecution of a person or persons for a serious offence, a money laundering offence or a financing of terrorism offence; or
- (b) of assistance in the enforcement of the Proceeds of Crime Act 2003; or
- (c) related to the commission of a serious offence, a money laundering offence or a financing of terrorism offence,

the reporting institution must, as soon as practicable after forming that suspicion but no later than 2 working days, report the transaction or attempted transaction to the FIU.

(2) If a reporting institution fails without reasonable excuse to comply with subsection (1), the reporting institution commits an offence punishable by, -

- (a) in the case of an individual, to a fine of up to \$20,000 or a term of imprisonment of up to 2 years, or both;
- (b) in the case of a body corporate, to a fine of up to \$100,000.

- (3) A report under subsection (1) must –
- (a) except as provided for in subsection (4), be in writing and may be given by way of personal delivery, fax, or electronic mail or any other manner that may be prescribed; and
  - (b) be in any form and contain any details that may be prescribed; and
  - (c) contain a statement of the grounds on which the reporting institution holds the suspicion; and
  - (d) be signed or otherwise authenticated by the reporting institution.

(4) If the urgency of the situation requires, a report under subsection (1) may be made orally but the reporting institution must, within 3 working days, forward to the FIU a report that complies with subsection (3).

(5) If requested to do so by a law enforcement agency, a reporting institution that has made a report to the FIU must give the law enforcement agency that is carrying out an investigation arising from, or relating to, the information contained in the report any further information that it has about the transaction or attempted transaction or the parties to the transaction.

(6) If a reporting institution fails without reasonable excuse to comply with subsection (5), the reporting institution commits an offence punishable by, -

- (a) in the case of an individual, to a fine of up to \$20,000, or a term of imprisonment of up to 2 years; or
- (b) in the case of a body corporate, to a fine of up to \$100,000.

12. Suspicious transaction report by supervisory authority or auditor – (1) A supervisory authority must report any transaction or attempted transaction to the FIU, within 2 working days, if it has reasonable grounds to suspect that information that it has concerning that transaction or attempted transaction may be -

- (a) relevant to an investigation or prosecution of person or persons for a serious offence, a money laundering offence or a financing of terrorism offence;
- (b) of assistance in the enforcement of the Proceeds of Crimes Act 2003;
- (c) related to the commission of a serious offence, a money laundering offence or a financing of terrorism offence.

(2) An auditor of a reporting institution must report any transaction or attempted transaction to the FIU, within 2 working days, if it has reasonable grounds to suspect that information that it has concerning that transaction or attempted transaction may be -

- (a) relevant to an investigation or prosecution of a person or persons for a serious offence, a money laundering offence or a financing of terrorism offence;
- (b) of assistance in the enforcement of the Proceeds of Crimes Act 2003;
- (c) related to the commission of a serious offence, a money laundering offence or a financing of terrorism offence.

13. False or misleading statements - A person who, in making a report under sections 10, 11 or 12, makes any statement that the person knows is false or misleading in any material particular or omits from any statement any matter or thing without which the person knows that the statement is false or misleading in any material particular commits an offence punishable by -

- (a) in the case of an individual, to a fine of up to \$20,000 or a term of imprisonment of up to 2 years; or

(b) in the case of a body corporate, to a fine of up to \$100,000.

14. Disclosure of suspicious transaction reports and other information - (1) A reporting institution, its officers, employees or agents or any other person must not disclose to any person -

- (a) that a report under section 11(1) or 12 has been or may be made, or further information has been given under section 11(5); or
- (b) that the reporting institution has formed a suspicion in relation to a transaction for purposes of section 11(1); or
- (c) any other information from which the person to whom the information is disclosed could reasonably be expected to infer that a suspicion has been formed or that a report has been, or may be, made.

(2) Subsection (1) does not apply to disclosures made to –

- (a) the FIU; or
- (b) an officer or employee or agent of the reporting institution for any purpose connected with the performance of that person’s duties; or
- (c) a barrister or solicitor for the purpose of obtaining legal advice or representation in relation to the matter; or
- (d) a supervisory authority of the reporting institution for the purposes of carrying out the supervisory authority’s functions.

(3) No person referred to in subsection 2(d) to whom disclosure of any information to which that subsection applies has been made must disclose that information except to another person of the kind referred to in that subsection, for the purpose of -

- (a) the performance of the first-mentioned person’s duties; or
- (b) obtaining legal advice or representation in relation to the matter.

(4) No person referred to in subsection 2(d) to whom disclosure of any information to which that subsection applies has been made must disclose that information except to a person of the kind referred to in that subsection for the purpose of giving legal advice or making representations in relation to the matter.

(5) Subject to this Act, nothing in any of subsections (1) to (3) prevents the disclosure of any information in connection with, or in the course of, proceedings before a court.

(6) If a person contravenes subsection (1), the person commits an offence punishable by, -

- (a) in the case of an individual, to a fine of up to \$20,000 or a term of imprisonment of up to 2 years; or both
- (b) in the case of a body corporate, a fine of up to \$100,000.

(7) If a person contravenes subsection (1) with intent to prejudice an investigation of a serious offence, a money laundering offence or a financing of terrorism offence, or for the purpose of obtaining directly or indirectly an advantage or a pecuniary gain for himself or herself or for any other person, the person commits an offence punishable by, -

- (a) in the case of an individual, to a fine of up to \$50,000 or a term of imprisonment of up to 5 years;
- (b) in the case of a body corporate, to a fine of up to \$150,000.

15. Protection of identity of persons and information - (1) This section applies to reports made under sections 5, 8, 10, 11, and 12 and to any other information given to the FIU.

(2) A person must not disclose any information that will identify, or is likely to identify any of the following except for the purposes specified in subsection (3) -

- (a) any person who has handled a transaction in respect of which a report has been made; or
- (b) any person who has prepared a report; or
- (c) any person who has made a report; or
- (d) any information contained in a report or information provided under section 11(5).

(3) The purposes referred to in subsection (2) are -

- (a) the investigation or prosecution of a person or persons for a serious offence, a money laundering offence or a financing of terrorism offence; or
- (b) the enforcement of the Proceeds of Crime Act 2003;
- (c) the administration of the Mutual Assistance in Criminal Matters Act 2003.

(4) No person is required to disclose any information referred to in subsection 2(d) in any judicial proceedings unless the judge or other presiding officer is satisfied that the disclosure of the information is necessary in the interests of justice.

(5) Nothing in this section prohibits the disclosure of any information for the purposes of the prosecution of any offence against any of the provisions of section 14.

(6) If a person contravenes subsection (2), the person commits an offence punishable by, -

- (a) in the case of an individual, to a fine of up to \$20,000 or a term of imprisonment of up to 2 years; or both
- (b) in the case of a body corporate, a fine of up to \$100,000.

16. Protection of persons reporting in good faith – (1) No civil, criminal or disciplinary proceedings may be taken against -

- (a) a reporting institution, an auditor or supervisory authority of a reporting institution; or
- (b) an officer, employee or agent of a reporting institution, an auditor or supervisory authority of a reporting institution acting in the course of that person's employment or agency;

in relation to any action by the reporting institution, the auditor or the supervisory authority or their officer, employee or agent taken under sections 5, 8(2)(b), 10, 11, or 12 in good faith.

(2) Subsection (1) does not apply in respect of proceedings for an offence against section 14.

(3) If a reporting institution or its officer, employee, agent or the supervisory authority or auditor of the reporting institution makes a report under sections 5, 8(2)(b), 10, 11 or 12, the person is taken, for the purposes of proceedings for a money laundering offence, not to have been in possession of that information at any time.

17. Privileged communication – (1) Nothing in section 11 requires any lawyer to disclose any privileged communication.

(2) For the purposes of this section, a communication is a privileged communication only if -

- (a) it is a confidential communication, whether oral or in writing, passing between:

- (i) a lawyer in his or her professional capacity and another lawyer in such capacity; or
  - (ii) a lawyer in his or her professional capacity and his or her client, whether made directly or indirectly through an agent of either; and
- (b) it is made or brought into existence for the purpose of obtaining or giving legal advice or assistance; and
  - (c) it is not made or brought into existence for the purpose of committing or furthering the commission of an illegal or wrongful act.

(3) If the information consists wholly or partly of, or relates wholly or partly to, receipts, payments, income, expenditure or financial transactions of a specified person (whether a lawyer, his or her client, or any other person), it is not a privileged communication if it is contained in, or comprises the whole or part of, any book, account, statement or other record prepared or kept by the lawyer in connection with a trust account of the lawyer.

(4) For the purposes of this section, references to a lawyer include a firm in which the person is a partner or is held out to be a partner.

18. Other preventative measures by reporting institution – (1) A reporting institution must -

- (a) establish and maintain procedures and systems to -
  - (i) implement the customer identification requirements under section 4;
  - (ii) implement the record keeping and retention requirements under section 6 and 7;
  - (iii) implement the transaction monitoring requirements under section 8;
  - (iv) implement the reporting requirements under sections 10 and 11;
  - (v) make its officers and employees aware of the laws relating to money laundering and financing of terrorism; and
  - (vi) make its officers and employees aware of the procedures, policies and audit systems adopted by it to deter money laundering and the financing of terrorism;
- (b) train its officers, employees and agents to recognize suspicious transactions;
- (c) screen persons before hiring them as employees; and
- (d) establish an audit function to test its anti-money laundering and combating financing of terrorism procedures and systems.

(2) A reporting institution must appoint a Money Laundering Reporting officer to be responsible for ensuring the reporting institution's compliance with the requirements of this Act.

(3) Subsections (1) and (2) do not apply to an individual who, in the course of carrying on his or her business, does not employ or act in association with any other person, except where the relevant information or other matter that gives rise to a knowledge or suspicion that a person is or has been engaged in a serious offence, a money laundering offence or an offence of the financing of terrorism.

19. Defences – (1) It is a defence to a person or reporting institution charged with an offence under any of sections 4, 6, 7, 10, 11, 13, 14 and 15 if the defendant proves -

- (a) that the defendant took all reasonable steps to ensure that the defendant complied with that provision; or

(b) that, in the circumstances of the particular case, the defendant could not reasonably have been expected to comply with the provision.

(2) In determining, for the purposes of subsection (1)(a), whether or not a reporting institution took all reasonable steps to comply with a provision, the court must have regard to -

- (a) the nature of the reporting institution and the activities in which it engages; and
- (b) the existence and adequacy of any procedures established by the reporting institution to ensure compliance with the provision, including (without limitation) –
  - (i) staff training; and
  - (ii) audits to test the effectiveness of any such procedures.

#### **PART 4**

#### **FINANCIAL INTELLIGENCE UNIT**

20. FIU established – The FIU established by the Financial Transactions Reporting Act 2003 shall continue to be established as if established by this Act.

21. Minister to appoint Head – The Minister must appoint a Head of the FIU on any terms and conditions the Minister may determine in consultation with Cabinet.

22. Functions, powers and duties of Head – (1) The Head may exercise all the functions, powers and duties of the FIU under this Act.

(2) The Head may from time to time, appoint such other officers and employees of the FIU as are necessary for the efficient exercise of the duties, functions and powers of the FIU.

(3) The Head may authorise any person, subject to any terms and conditions that the Head may specify, to carry out any power, duty or function conferred on the Head under this Act.

23. Head may delegate – (1) The Head may, from time to time, in writing, either generally or particularly, delegate to any employee or agent of the FIU as he or she thinks fit, all or any of the powers exercisable by him or her under this or any other enactment, but not including the power of delegation conferred by this section.

(2) Subject to any general or special directions given or conditions attached by the Head, the employee or agent to whom powers are delegated, may exercise those powers in the same manner and with the same effect as if they had been conferred on him or her directly by this section and not by delegation.

(3) Until a delegation is revoked in writing, it continues in force according to its tenor and in the event of the Head ceasing to hold office, the delegation continues to have effect as if made by the person for the time being holding office as Head.

(4) Every delegation made under this section is revocable at will and no delegation prevents the exercise of any power by the Head.

24. Head to hold no other office – The Head must not be -

- (a) a member of Parliament; or
- (b) a member of a local authority; or
- (c) a director, officer or employee of, or hold any shares in any reporting institution (or be the spouse or immediate family of any such person),

and must not, without the approval of the Minister, hold any other office or take on any other occupation.

25. Removal or suspension from office – The Head may at any time be removed or suspended from office by the Minister for disability affecting the performance of duty, neglect of duty, incompetence or misconduct proved to the satisfaction of the Minister.

26. Head must report to Minister – (1) The Head –

- (a) must report to the Minister on the exercise of the Head's powers and the performance of his or her duties and functions under this Act; and
- (b) advise the Minister on any matter relating to money laundering and financing of terrorism.

(2) The Head may not disclose any information, except in accordance with this Act, that would directly or indirectly identify an individual who provided a report or information to the FIU, or a person or an entity about whom a report or information was provided under this Act.

27. Functions and powers of FIU – The FIU has the following functions and powers -

- (a) it must receive reports made under sections 5, 8, 10, 11 and 12 and information provided to the IU by any agency of another country, information provided to the FIU by a law enforcement agency or a Government institution or agency, and any other information voluntarily provided to the FIU about suspicions of a serious offence, a money laundering offence or a financing of terrorism offence;
- (b) it may collect information that the FIU considers relevant to serious offences, money laundering or terrorist financing activities and that is publicly available, including commercially available databases, or information that is collected or maintained, including information that is stored in databases maintained by the Government;
- (c) if the FIU has reasonable grounds to believe a serious offence, a money laundering offence or a financing of terrorism offence has been, is being or may be committed, the FIU must refer the matter to the Police for investigation.
- (d) it may request information from any law enforcement agency and supervisory authority for the purposes of this Act.
- (e) it may analyse and assess all reports and information;
- (f) it may send any report, any information derived from that report or any other information it receives to the appropriate law enforcement authorities if, having considered the report or information, the FIU also has reasonable grounds to suspect that the transaction is suspicious;
- (g) it must destroy a suspicious transaction report received on the expiry of 6 years after the date of receipt of the report if there has been no further activity or information relating to the report or the person named in the report or 6 years from the date of the last activity relating to the person or to the report;
- (h) it may ask for further information relating to any suspicious transaction report received by it from a reporting institution;
- (i) it may instruct any reporting institution to take any steps that may be appropriate in relation to any information or report received by the FIU to enforce compliance with this Act.

- (j) it may compile statistics and records, disseminate financial information and intelligence to domestic authorities within the Cook Islands or elsewhere for investigation or action if there are grounds to suspect money laundering or terrorist financing;
- (k) it must issue guidelines to reporting institutions;
- (l) it may provide training programmes for reporting institutions in relation to customer identification, record keeping and reporting obligations and the identification of suspicious transactions;
- (m) it may provide feedback to reporting institutions and other relevant agencies regarding outcomes relating to the reports or information given under this Act;
- (n) it may conduct research into trends and developments in the area of money laundering and terrorist financing and improved ways of detecting, preventing and deterring money laundering and terrorist financing;
- (o) it may educate the public and create awareness of matters relating to money laundering and terrorist financing;
- (p) it must undertake compliance audits for entities not regulated by a supervisory authority; and
- (q) it may transmit any information from, or derived from, a compliance audit or supervisory review or suspicious transaction report to the appropriate domestic or foreign law enforcement authority, if the FIU has reasonable grounds to believe that the information is suspicious or is relevant to an investigation for non-compliance with this Act, a serious offence or a money laundering offence.

28. Agreements and arrangements by FIU – (1) The FIU may, with the approval of Cabinet, enter into negotiations, orally or in writing, relating to an agreement or arrangement, in writing, with an institution or agency of a foreign state or an international organisation established by the governments of foreign states that has powers and duties similar to those of the FIU, regarding the exchange of information between the FIU and the institution or agency.

(2) Final agreements or arrangements entered into under subsection (1) must be approved by Cabinet.

(3) The information exchanged under subsection (1) must be information that the FIU, institution or agency has reasonable grounds to believe would be relevant to investigating or prosecuting a serious offence, a money laundering offence or a financing of terrorism offence or an offence that is substantially similar to either offence.

(4) Agreements or arrangements entered into under subsection (1) must -

(a) restrict the use of information to purposes relevant to investigating or prosecuting a serious offence, a money laundering offence or a financing of terrorism offence or an offence that is substantially similar to either offence; and

(b) stipulate that the information must be treated in a confidential manner and must not be further disclosed without the express consent of the FIU.

29. Disclosure to foreign agencies – (1) The FIU may disclose its information to an institution or agency of a foreign state or of an international organisation established by the governments of foreign states that has powers and duties similar to those of the

FIU on the terms and conditions set out in the agreement or arrangement between the FIU and that foreign state or international organisation regarding the exchange of information.

(2) Nothing in subsection (1) limits the power of the FIU to disclose its information to an institution or agency of a foreign state or of an international organisation established by the governments of foreign states that has powers and duties similar to those of the FIU for the purposes of an investigation, prosecution or proceedings relating to a serious offence, a money laundering offence or a financing of terrorism offence, provided -

- (a) on such terms and conditions as are set out in the agreement or arrangement between the FIU and that foreign state or international organization regarding the exchange of such information under section 28; or
- (b) where such an agreement or arrangement has not been entered into between the FIU and that foreign state or international organization or body, on such terms and conditions as may be agreed upon by the FIU and the institution or agency at the time of disclosure, where such terms and conditions shall include provisions to –
  - (i) restrict the use of information to purposes relevant to investigating or prosecuting a serious offence, a money laundering offence or a financing of terrorism offence or an offence that is substantially similar to either offence; and
  - (ii) stipulate that the information must be treated in a confidential manner and must not be further disclosed without the express consent of the FIU.

(3) The FIU may transmit any information from, or derived from, a compliance audit or supervisory review to the appropriate domestic or foreign law enforcement authority, if the FIU has reasonable grounds to believe that the information is suspicious or is relevant to an investigation for non-compliance with this Act, a serious offence, a money laundering offence or a financing of terrorism offence.

30. Power to examine – (1) The FIU or any person authorised by the FIU may examine the records and inquire into the business and affairs of any reporting institution for the purpose of ensuring compliance with Parts 2 and 3 and, for that purpose, may, -

- (a) at any reasonable time without warrant, enter any premises in which the FIU or the authorised person believes, on reasonable grounds, that there are records relevant to ensuring compliance with Parts 2 and 3;
- (b) use or cause to be used any computer system or data processing system in the premises to examine any data contained in or available to the system;
- (c) reproduce any record, or cause it to be reproduced from the data, in the form of a printout or other output for examination or copying;
- (d) use or cause to be used any copying equipment in the premises to make copies of any record.

(2) The owner or person in charge of premises referred to in subsection (1) and every person found there must give the FIU or any authorised person all reasonable assistance to enable them to carry out their responsibilities and must furnish them with any information that they may reasonably require with respect to the administration of Parts 2 and 3 or any regulations made under this Act.

(3) Any person who willfully obstructs or hinders or fails to cooperate with the FIU or any authorised person in the lawful exercise of the powers under subsection (1) or any person who does not comply with subsection (2) commits an offence punishable by, -

- (a) in the case of an individual, to a fine of up to \$20,000 or a term of imprisonment of up to 2 years, or both;
- (b) in the case of a body corporate, to a fine of up to \$100,00.

(4) The FIU may send any information from, or derived from, an examination to -

- (a) a supervisory authority;
- (b) the Solicitor-General;
- (c) a law enforcement agency or a foreign supervisory authority;

if the FIU has reasonable grounds to suspect that the information is suspicious or is relevant to an investigation for non-compliance with this Act, a serious offence, a money laundering offence or a financing terrorism offence.

31. Powers to enforce compliance – (1) Every officer and employee of a reporting institution must take all reasonable steps to ensure compliance by that reporting institution with its obligations under this Act.

(2) The FIU may direct or enter into an agreement with any reporting institution that has, without reasonable excuse, failed to comply in whole or in part with any obligations under Part 2 or 3 to implement any action plan to ensure compliance with its obligations under those Parts.

(3) If a reporting institution fails to comply with a directive under subsection (2) or fails to implement an action plan under subsection (2), the FIU may, on application to the Court and after satisfying the Court that a reporting institution has failed without reasonable excuse to comply in whole or in part with any obligations under Part 2 or 3, obtain an injunction against all or any of the officers or employees of that reporting institution on the terms that the Court considers necessary to enforce compliance with those obligations.

(4) In granting an injunction under subsection (3), the Court may order that, if the reporting institution or any officer or employee of that institution fails, without reasonable excuse, to comply with all or any of the provisions of that injunction, the reporting institution, officer or employee must pay a financial penalty in the sum of \$20,000 or any other penalty that the Court may determine.

32. Audit – (1) The FIU is subject to examination and audit by the Director of the Public Expenditure Review Committee and Audit (“Director of PERCA”).

(2) the Director of PERCA and every person acting on behalf of, or under the direction of, the Director of PERCA must not use or disclose any information that they have obtained, or to which they have had access, in the course of their audit, except for the purposes of exercising those powers or performing their duties and functions under the Public Expenditure Review Committee and Audit Act 1995-96.

33. Non-disclosure – (1) This section applies to a person while the person is, or after the person ceases to be, the Head, officer, employee or agent of the FIU.

(2) Except for the purpose of the performance of his or her duties or the exercise of his or her functions under this Act, or when lawfully required to do so by any court, the person referred to in subsection (1) must not disclose any information or matter that has been obtained by him or her in the performance of his or her duties or the exercise of his or her functions under this Act or that he or she has knowledge except for one or more of the following purposes -

- (a) the detection, investigation or prosecution of a serious offence or a money laundering offence;
- (b) the enforcing of the Proceeds of Crime Act 2003.

34. Immunity – No action lies against the Head, any officer, employee or agent of the FIU or any person acting under the direction of the Head for anything done in good faith in the administration or discharge of any powers, duties, or functions under this Act.

## **PART 5** **OTHER MATTERS**

35. Overriding of secrecy – For the avoidance of doubt, a reporting institution must comply with the requirements of this Act despite any obligation as to secrecy or other restriction on the disclosure of information imposed by any written law or otherwise.

36. Act to prevail if conflict with other specified Acts – If there is a conflict between the provisions of this Act and any other Act including the following Acts, this Act prevails -

- (a) International Companies Act 1980-82;
- (b) International Partnership Act 1984;
- (c) International Trusts Act 1984;
- (d) Banking Act 2003;
- (e) Off-Shore Insurance Act 1981-82;
- (f) Trustee Companies Act 1981-82.

37. Anonymous account or account in fictitious or false name – (1) A person who opens, operates or authorises the opening or operation of an anonymous account commits an offence punishable by, -

- (a) in the case of an individual, to a fine of up to \$10,000 or to a term of imprisonment of up to 12 months, or both;
- (b) in the case of a body corporate, to a fine of up to \$50,000.

(2) A person who intentionally opens or operates an account with a reporting institution in a fictitious or false name commits an offence punishable by, -

- (a) in the case of an individual, to a fine of up to \$10,000 or a term of imprisonment of up to 12 months, or both;
- (b) in the case of a body corporate, to a fine of up to \$50,000.

(3) A person who authorises the opening or the operation of an account with a reporting institution in a fictitious or false name in circumstances where that person ought to have reasonably known that the name of the account was fictitious or false, commits an offence punishable by, -

- (a) in the case of an individual, to a fine of up to \$10,000 or a term of imprisonment of up to 12 months, or both;
- (b) in the case of a body corporate, to a fine of up to \$50,000.

(4) If a person is commonly known by 2 or more different names, the person must not use one of those names in opening an account with a reporting institution unless the person has previously disclosed the other name or names to the reporting institution.

(5) If a person using a particular name in his or her dealings with a reporting institution discloses to it a different name or names by which he or she is commonly known, the reporting institution must make a record of the disclosure and must, at the request of the FIU, give the FIU a copy of that record.

(6) For purposes of this section, -

- (a) a person opens an account in a false name if the person, in opening the account, or becoming a signatory to the account, uses a name other than a name by which the person is commonly known;
- (b) a person operates an account in a false name if the person does any act or thing in relation to the account (whether by way of making a deposit or withdrawal or by way of communication with the reporting institution concerned or otherwise) and, in doing so, uses a name other than a name by which the person is commonly known; and
- (c) an account is in a false name if it was opened in a false name, whether before or after the commencement of this Act.

38. Liability of employers or principals – (1) Any act done or omitted by a person as an employee or agent is, for the purposes of this Act, to be treated as done or omitted by that person's employer or principal, whether or not it was done with the knowledge or approval of the employer or principal.

(2) Subsection (1) only applies, in the case of an agent, if the agent acted within the terms of his or her agency or contract.

39. Liability of directors, controllers and officers of bodies corporate – If a body corporate is convicted of an offence under this Act or any regulations made under this Act, every director, controller or officer concerned in the management of the body corporate commits an offence if it is proved that the act or omission that constituted the offence took place with that person's knowledge, authority, permission or consent.

40. Regulations – The Queen's Representative may, from time to time, by Order in Executive Council make regulations -

- (a) prescribing any requirements, policies, or procedures for customer identification, record keeping reporting obligations, systems, training and internal controls;
- (b) prescribing requirements relating to accounts in existence at the commencement of this Act relating to customer identification and verification;
- (c) prescribing the qualifications and criteria for appointment as a Money Laundering Reporting Officer and terms and conditions of appointment;
- (d) prescribing offences for non-compliance with this Act;
- (e) providing for any other matters that are contemplated by or are necessary for giving full effect to this Act and for its administration.

41. Transitional – (1) A reporting institution which, at the commencement of this Act, is subject to the Financial Transactions Reporting Act 2003, must, after the date of commencement of this Act, comply with the provisions relating to customer identification and verification set out in this Act.

(2) Upon the date of coming into force of this Act, all assets and liabilities held by the Financial Intelligence Unit set up by the Financial Transactions Reporting Act 2003 for the purpose of fulfilling certain of its obligations under that Act, shall continue to and vest in and belong to the FIU without further assurance than this section and the FIU shall have all powers necessary to take possession of recover and deal with such assets and discharge such liabilities.

(3) All monies appropriated by Parliament for the year ending 30<sup>th</sup> June during which this Act comes into force for the purpose of the Financial Intelligence Unit referred to in subsection (2) shall, without further authority than this subsection, be appropriated to the FIU.

(4) Every head, officer or employee of the Financial Intelligence Unit appointed by the Minister or by the head of the FIU as the case may be before the coming into force of this Act shall continue to hold office as a head, officer or employee of the FIU for such period and upon such terms and conditions as to remuneration or otherwise as shall be determined by the Minister or the head as the case may be, but in all other respects as if their appointments were made by the Minister or the Head, as the case may be, under section 21 or 22 of this Act.

42. Savings – The Regulations set out in the Schedule to this Act shall continue in force as if made under this Act.

43. Repeal and revocation – (1) The Financial Transactions Reporting Act 2003 is repealed.

(2) The Financial Transactions Reporting (Customer Identification) Regulations 2004 are revoked.

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This Act is administered by the Financial Intelligence Unit

**RAROTONGA, COOK ISLANDS: Printed under the authority of the Cook Islands  
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**Section 42 SCHEDULE**

(Regulations continued in force)

Financial Transactions Reporting (Forms) Regulations 2004

Financial Transactions Reporting (Offering Companies) Regulations 2004

2009

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