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MONEY LAUNDERING IN NEW ZEALAND AND THE LEGISLATIVE RESPONSE:

PROCEEDS OF CRIME, MUTUAL ASSISTANCE, MONEY LAUNDERING OFFENCES, AND FINANCIAL TRANSACTIONS REPORTING

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"There is the need of almost every member of society to be taught what the requirements of the law - the common path for pursuing the common good - actually are; and taught not by sermons, or pages of fine print, but by the public and (relatively) vivid drama of the apprehension, trial, and punishment of those who depart from that stipulated common way. And there is the need to give the law-abiding the encouragement of knowing that they are not being abandoned to the mercies of criminals, that the lawless are not being left to the peaceful enjoyment of ill-gotten gains, and that to comply with the law is not to be a mere sucker: for without this support and assurance the indispensable co-operation of the law-abiding is not likely to be continued."

John Finnis," Natural Law and Natural Rights"
p.263

ABSTRACT

This paper examines the phenomenon of money laundering, it's typology's and the techniques used, and the reasons for it's use by criminals. It considers the international nature of the problem itself, before turning to a consideration of whether there is any evidence of the existence of money laundering in New Zealand.

It is accepted that there is evidence of money laundering activity in New Zealand, both as a result of domestic criminal activity, and also as part of the international laundering processes employed by foreigners in New Zealand. The paper concludes that while there is evidence of money laundering in New Zealand, the major motivating factor behind implementing legislation aimed at combating it, is in response to the international initiatives that have developed, and New Zealand's assumption of obligations thereunder. This paper then considers the extent of those international initiatives.

The anti-money laundering regime of legislation that New Zealand has enacted over the past five years is then examined, with particular critical examination being given to the very recently enacted Financial Transactions Reporting Act 1996.

The text of this paper (excluding contents page, footnotes, bibliography and appendices) comprises approximately 14,862 words.

A. INTRODUCTION

1. What is Money Laundering?

One thing may be said with certainty - there is no universal or comprehensive definition of money laundering.

The common description for money laundering is "turning black money into white". It involves the conversion of illicit cash to a less suspicious form, conceals its origin and creates the appearance of a legitimate source.[1] Although the methodologies differ, the essence of 'money laundering' is that it is a process employed by criminals to hide the true source of the monetary proceeds of their crimes by creating apparently legitimate justifications for controlling or possessing such money for personal or business purposes.[2]

Dependent on the view of the observer, definitions will differ. For example, legal definitions for the purposes of prosecution will be narrower than a definition for intelligence purposes.

Whatever the particular interest of the observer may be, it is generally accepted that money laundering entails two distinct processes. The first involves an attempt to conceal the existence of illicit proceeds from relevant authorities (including law enforcement and taxation authorities). The second aspect is "cleaning" or "sanitising" the money, whereby the true nature, source or use of the illicit proceeds is disguised in such a way as to give the impression that there are genuine reasons why the money launderer possesses the laundered funds.[3]

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[1] see 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art 3, s1(b) ("The Vienna Convention")

[2] see G.J. Kriz "International co-operation to combat money laundering. The nature and role of Mutual Legal Assistance Treaties" 1992 18(2) Commonwealth Law Bulletin 723, 724

[3] see "Money Laundering in New Zealand". Report to Justice & Law Reform Committee, New Zealand Police, July 1995, Appendix I, "Typology of Money Laundering", 1

The essence of laundering money is to create a justification for controlling or possessing funds and assets. For example a drug dealer will need to be able to explain to police why he or she is able to afford expensive real estate and drive a luxurious car. Corrupt diplomats will have to explain to their governments why their lifestyles are not commensurate to their income. The tax evader will have to account for purchase of a luxury yacht and investment in shares.

Money laundering tends to run parallel to serious and organised criminal activity. Experience worldwide has shown that organised crime in particular operates as "big business", generating large quantities of cash as profits from criminal activity. Money laundering, by virtue of its ability to disguise and legitimise illicit proceeds, enables criminals to retain profits from their criminal activities, providing them with both the motivation and resources to continue and expand their offending.[4]

The origin of the term "money laundering" emanates from the 1920s and 1930s era in the United States. It was initially a reference used by US law enforcement agencies to refer to Mafia ownership of laundromats. In this era, the Mafia bought legitimate businesses with illicit profits from bootlegging, gambling and prostitution. Mafia investments in laundromats were popular because many were already owned by small time Italian families. Dirty money was mixed with cash takings from laundry businesses and it was claimed that illicit cash was legitimate money. The Mafia bosses used the laundromat as a financial and tax alibi for illicit income.[5]

Whereas a laundromat changes dirty clothes into clean clothes, a money laundry turns dirty money into clean money.

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[4] Above n3, at 1.

[5] See D.A. Chaikin "Investigating Criminal and Corporate Money Trails" in B. Fisse, D. Fraser and G. Coss (eds), The Money Trail: Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting (The Law Book Company Limited, Sydney, 1992) 257, 258 ("The Money Trail").

2. Money Laundering - Background

Money laundering is a vital aspect of any criminal activity that generates revenue. In order to be able to consume, save or invest "dirty money" in the legitimate economy, or be able to reinvest criminal proceeds in illegal enterprises, the underground entrepreneur must have a means of concealing the existence, illegal source or illegal application of income, and then disguising that income to make it appear legitimate.[6]

Money laundering is important to criminals, as it enables them to convert large amounts of cash into other forms, which are less likely to attract the attention of law enforcement agencies or tax authorities. This offers the criminal two important protections - first, the protection from having the illegal activity which generated the illicit funds detected, and second, the protection of the proceeds themselves. Money laundering provides the means by which the proceeds of crime are not only safeguarded, but also utilised and enjoyed. The often referred to quote, attributed to Bruce "Snapper" Cornwall, an Australian drug trafficker writing to an associate while awaiting extradition from the U.K. to Australia to face drug trafficking charges, epitomises the attitude of the criminal mind:

"I don't give a f*** what they do to me, as long as we keep safe all that we have worked for."[7]

Cornwall later pleaded guilty and was sentenced to 23 years imprisonment, with a minimum of 14.

Furthermore, the laundered proceeds can be invested in establishing structures for ensuring future criminal proceeds may also be legitimised - for example by setting up apparently legitimate companies or businesses.

Similarly, the money laundering process is important to law enforcement agencies because:

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[6] C. J. Kent "The Canadian and International War against Money Laundering", (1992) 35 CLQ 21,

[7] I Temby QC (1989) "The Proceeds of Crime Act: One Year's Experience", (1989) 13 Crim LJ 24, 30

a) The activity of money laundering may provide a point of vulnerability in a process of criminal activity: this point is the stage of the money laundering process when it enters the legitimate economy, eg the deposit of funds into a bank account in a false name, or the sending of funds offshore to a company or bank haven. At this stage a "paper" trail will begin to be created for these funds. It is a vulnerable point because this initial action may appear suspicious to law enforcement agencies.

b) A money laundering offence provision enables charges to be laid against people who have facilitated the laundering, even if they were not involved in the criminal activity that originally produced the illicit proceeds. In conjunction with confiscation legislation,[8] a direct attack is thus launched on the profit motive behind crime. Confiscation and forfeiture provisions deprive the criminal groups of the financial means to commit further offences. Thus, these two law enforcement tacts prevent the continuation of criminal activities - the criminal group has no players, and no money.

c) A focus on money laundering offences may assist in getting closer to the ultimate organisers of criminal groups, who are unlikely to be involved on a day to day basis with their illegal commodities, but who are likely to be controlling their profits. Whilst drug lords or other organised criminals can disassociate themselves from the criminal activity that they direct, such disassociation from the proceeds of these crimes is impossible if they personally desire to use the proceeds for investment, savings or consumption in the legitimate economy or for reinvestment in their illegal enterprises. It is the money trail which will often represent the only link between the leaders of the criminal enterprise and the crime itself. For this reason, the money laundering process has often been described as the Achilles heel of the financiers of crime.

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[8] For example The Proceeds of Crime Act 1991

d) Money laundering is not confined to dealing with the proceeds of drug trafficking, and can be used to deal with proceeds of any other criminal activity which generates profits.

e) Focusing on money laundering activity may assist in the tracing of criminally derived assets for confiscation.

3. Techniques

The laundering process has been analysed as breaking down into three basic steps known as placement, layering and integration.[9]

"Placement" is the stage where the proceeds of criminal activity first enters the financial system, or stream of legitimate commerce. It includes the physical disposal of cash by depositing it into a bank account or accounts, or the physical smuggling of funds to states regarded as bank secrecy havens.[10]

"Layering" is the stage wherein attempts are made to distance the money from its illegal source. It typically involves a process of transferring the funds among various accounts through often complex transactions designed to disguise the trail of proceeds, or as often referred to, the "money trail".[11] A further objective is to deliberately create a money trail which is difficult to follow, or has breaks in it at certain stages, in an attempt to thwart investigators. The nexus between placement and layering is clear, as any placement procedure which involves the alteration of the physical location or nature of the "hot money" is also a form of layering. Common layering strategies include converting cash into tangible assets, such as cars, jewellery or real estate, or into monetary instruments such as money orders, cashiers' cheques or securities and multiple electronic transfers of funds to so-called "bank secrecy havens".[12]

"Integration" describes the actual shifting of funds to legitimate organisations or individuals with no apparent links to the criminals or to the activities from which the funds were obtained. After integration, the illicit proceeds in their now laundered form should appear to be derived from legal sources. This may be done through false recording of loans, income of shell corporations, real estate transactions or fraudulent import-export invoicing. The money is then able to be openly used in normal business

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[9] Above n2 at 724
[10] Above n2 at 724; above, n6 at 22
[11] Above n2 at 724; T. S. Greenburg, "Anti Money Laundering Activities in the US" (1993) 19(4) CLB 1866
[12] Above n6 at 22

transactions or for personal use, for example, investment in property, stocks, shares or commodities etc.

The three basic steps may occur as separate and distinct phases. They may occur simultaneously or, more commonly, they may overlap. How the basic steps are used depends on the available laundering mechanisms and the requirements of the criminal organisation. The table below provides some typical examples.[13]

Placement Stage	**Layering Stage**	**Integration Stage**
• Cash paid into bank (sometimes with staff complicity or mixed with proceeds of legitimate business).	• Wire transfers abroad (often using shell companies or funds disguised as proceeds of legitimate business).	• False loan repayments or forged invoices used as cover for laundered money.
• Cash exported	• Cash deposited in overseas banking system.	• Complex web of transfers (both domestic and international) makes tracing original source of funds virtually impossible.
• Cash used to buy high value goods, property or business assets.	• Resale of goods or assets.	• Income from property or legitimate business assets appears "clean".

[13] See "Money Laundering, Guidance Notes for Mainstream Banking, Lending and Deposit Taking Activities", 1993, Joint Money Laundering Steering Group, London, U.K.

4. The International Nature of the Problem

Increasing international attention to money laundering in the 1980s resulted in part from the rapid increase in narcotics trafficking during this period and the growth in proceeds of crime which accompanied it. Not only does money laundering occur internationally (ie worldwide), it is also very often a "trans-national" activity. The activities of money launderers will frequently cross national boundaries. A good example of the transnational nature of money laundering was revealed with the public announcement in September 1992 of the culmination of "Operation Green Ice".[14] This was an undercover sting operation which sought to disrupt a major cocaine distribution and money laundering system involving groups in both Colombia and Sicily. The result was the arrest of more than 200 people in 6 countries and the seizure of nearly (US)$42 million in alleged illegal drug profits worldwide.

The criminals involved in money laundering, be they drug traffickers or groups engaged in organised crime generally, were recognised to be growing increasingly sophisticated. The process of money laundering has been greatly assisted by modern communications technology. Implementation of this technology has not only increased the efficiency and responsiveness of the world's financial systems, but it has also facilitated the speed and complexity of money laundering transactions.

The same factors leading to a vast increase in world trade, making global travel easier, and facilitating the faster transfer of information and funds, have also served to facilitate criminal enterprises of all kinds. Criminal groups are able to be established on a truly international basis, without difficulty. As one commentator has said, "... it would be no exaggeration to say that, spared the bureaucracy of its legitimate counterpart, there now exists today a United Nations of Crime."[15]

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[14] J. Adams "International Developments and Recent Trends in Money Laundering", (1993) unpublished paper presented at Australian National Crime Authority, Money Laundering Course for Investigators. 1

[15] M. Raphael "Money Laundering and the Legal Profession" (1995), 145 (6172) N.L.J. 1377.

B. EVIDENCE OF MONEY LAUNDERING IN NEW ZEALAND

The extent to which money laundering exists in New Zealand is extremely difficult to gauge. This is partly due to the very nature of the process itself, and also partly due to the fact that until September 1995, money laundering was not an offence in New Zealand and therefore there were no prosecution statistics available.

However, there is evidence of money laundering in New Zealand, and some individual cases are highlighted below.[16]

1. Examples of Foreign Money entering New Zealand

(a.) The Police reported receiving information from a foreign country which revealed the formation in New Zealand of several companies purporting to be merchant banks. The principals of these companies had no banking or finance industry experience, one being a discharged bankrupt. The companies opened bank accounts and an office which consisted of an empty room with a telephone, answerphone and fax machine. These companies are not known to have conducted any legitimate business.

(b.) In May 1995 the Police received information which identified a group of foreign nationals bringing large sums of money into New Zealand by telegraphic transfer and depositing them into an account at a bank (bank one). The funds were then transferred to an account at another bank (bank two). They were then transferred by telegraphic transfer to a branch of bank one in an offshore banking centre. In this case New Zealand appeared to be used as part of a "loop" arrangement to move money into a jurisdiction with strict bank secrecy laws.

At this stage, there was no requirement imposed upon the banking industry to report cash transactions above a certain threshold, (ie a mandatory quantum initiated

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[16] Above n3 at 3-5

reporting regime, as exists in Australia and the United States), nor was there any obligation to report suspicious transactions to the Police.

(c.) Hun-Shik Gim

Gim is a Korean national who was arrested in Korea in November 1993 for trafficking heroin with a street value in excess of $400 million. Gim and a group of Americans were involved in smuggling heroin from Thailand to the USA in printing machines. When Gim's American associates were arrested they were in possession of 200 kg of heroin worth $200 million.

Enquiries revealed that Gim had extensive business interests in New Zealand. These included ownership of an inner Auckland motel, a large deer farm in the Kaipara district and an interest in an immigration consultancy business. Information from overseas and local enquiries indicated that Gim had brought between $1.5 and $2 million into New Zealand. He also laundered money in Australia, Singapore and other South East Asian countries.

2. Examples of Money Laundering activity in New Zealand

Had a money laundering offence been available prior to 1995, charges may have been laid against the following persons. The instances described below are not an exhaustive list of cases detected in New Zealand, but are indicative that money laundering, or suspected money laundering, occurs on a regular basis in New Zealand.[17]

(a.) Charles Warwick Reid

Reid is a New Zealander who was employed by the Hong Kong Government's Attorney General's Department as a prosecutor from 1975 to 1989. He rose to senior rank in the Department. Reid was convicted of having assets disproportionate to his income as a result of corruptly receiving bribes for abandoning certain prosecutions against serious criminals in Hong Kong. The amount received was NZ$4.5 million.

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17 Above n3 at 5-10

The first payments Reid received consisted of US$137,000.00 which was sewed into the lining of a jacket and brought into New Zealand. He then used other people to travel about New Zealand converting the US money into New Zealand currency, and depositing it to the account of a front company he had set up.
Reid also set up companies and accounts in Singapore and Taiwan which he used to hold money and to channel some of it to his company in New Zealand.

(b.) Ralf Simon
Simon is a German national who was sentenced to 5½ years jail in Germany in September 1994, on charges of investment fraud involving over $200,000.00. He is still under investigation and is the subject of civil claims in Germany involving over $40 million.

Simon came to New Zealand in 1991 following his being implicated in an investment fraud which netted approximately DM2.5 million in Germany. He passed himself off as a merchant banker and attempted to purchase Pakatoa Island in the Hauraki Gulf on behalf of a syndicate of German "investors". The deal did not go ahead. Simon did, however, purchase a property in St Heliers in Auckland for $4.5 million using funds fraudulently obtained in Germany.

Another German national eventually obtained an order from the New Zealand HighCourt to take possession of the property which has subsequently been sold.

(c.) Alan James Brough
Brough lived on the East Coast of the North Island and was convicted of drug dealing offences in February 1994. At the time of his arrest in February 1993 he was found in possession of a large quantity of cannabis material and $17,130.00 in cash. In 1988 he had purchased a farm property on the Coromandel Peninsula consisting of 200 acres of freehold and 400 acres of leasehold land, with a combined value of $255,000.00.

Brough owned a section in Helensville and assisted a co-offender to purchase a section in Thames with $12,000.00 in cash. He operated six bank accounts in various names, had two credit card accounts and an account with a finance company.

In January 1993 Brough purchased a Harley Davidson motorcycle from a dealer in Hamilton. He paid $28,000.00 in cash for this motorcycle. The cash was in $20 and $50 notes.

Of the money which was able to be traced through the various accounts $101,918.78 was held to be the proceeds of drug dealing.[18]

(d.) David John McCormick

McCormick was a farmer in South Canterbury. In May 1994 he was convicted of cultivating and possessing cannabis for supply over an eight year period. He was imprisoned for 4 years.

At the time of his arrest he was found in possession of cannabis material with an estimated value of $495,000.00 and $31,000.00 in cash. McCormick operated several bank and building society accounts in both his and members of his family's names but much of the money derived from his criminal activity was paid in cash to purchase land, vehicles, furniture, jewellery and antiques. Between 1990 and 1992 he paid $12,306.00 in cash for private school fees. He also gave several members of his family large amounts of cash which were then given back to him disguised as loans. He made further cash payments to these relatives as repayments on the loans.

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[18] *R v Brough* [1995] 1NZLR 419, 423; wherein the Court of Appeal in dismissing Brough's appeal against sentence and orders under the Proceeds of Crimes Act 1991, considered the policy of that Act:

"The policy of the Act, therefore, is twofold. First, a person who has engaged in criminal activity should be required to disgorge what in common parlance may be referred to as his or her ill-gotten gains. Requiring these to be paid cannot in any way be regarded as a penalty. Rather, it is simply a recognition that the law should not permit a person to retain the profits of criminal activity. Secondly, it empowers the Court to forfeit property used to facilitate the commission of the offences. That too is not for reasons of penalty or punishment , but rather the recognition of the principle that persons who use property to commit crimes should be liable to have that property forfeited."

Identified illegal income from 1990 to 1994 was $309,176.00 and estimated illegal income from 1986 to 1990 was in excess of $300,000.00.

Further, Police operations in New Zealand in recent years have established that a common practice amongst criminals is the purchase of Harley Davidson motorcycles with cash earned from criminal activities. Harley Davidsons are very popular with criminals, and their price provides an opportunity to consume significant amounts of cash. Once purchased, the motorcycles can be utilised in further transactions as they have a stable market value, a ready market for resale, and are easily transferable.

An enquiry into the activities of one motorcycle dealership revealed many instances of this practice. All the individuals involved in these transactions are criminals with various convictions for drug offences and violence.

1. January 1991	Harley Davidson purchased through intermediary for $22,000.00 cash.
2. February 1991	Harley Davidson purchased for $16,000.00. Cash deposit of $10,000.00 paid and balance paid in cash within six weeks of purchase date.
3. March 1993	The same purchaser as (2) sold another Harley Davidson to the firm for $15,500. A month later he bought the same motorcycle back for $16,500 paid in cash.
4. June 1993	The same purchaser as (2) and (3) purchased a car from the same firm for $8,000. He received $1,600 as a trade in on another vehicle and paid the balance in cash by the end of the same month.
5. October 1993 -	The same purchaser as (2), (3) and (4) purchased a

January 1994	further three Harley Davidsons from the firm for $25,000, $18,000 and $12,500 respectively. All payments were made in cash.
	Between 1991 and 1994 this individual spent $94,000 at the firm. All payments were made in cash.
6.	In the space of one year one individual, an unemployed beneficiary, purchased two Harley Davidsons and a car together valued in excess of $45,000. One of the motorcycles was purchased from the firm for $25,500.00.
7. December 1993	A Harley Davidson purchased for $14,900. $9,000 of the purchase price was paid in cash.
8. July 1994	The motorcycle purchased in (7) was traded for $7,000 and another purchased for $27,000, the balance being paid for in cash.
9. July 1994	A Harley Davidson purchased for $27,000. A trade in for $16,500 was made, and the balance paid in cash.

These transactions were typical of a large number conducted by the firm. Enquiries indicated that a very high proportion of the firm's business was conducted in cash. The manner in which this business operated must raise the suspicion that it was controlled by those with an interest in laundering the proceeds of their illegal activities, or that they were at least a party to the laundering process of others.

C. THE NEW ZEALAND SITUATION IN THE INTERNATIONAL CONTEXT

1. The need to implement Money Laundering legislation in New Zealand

Just how much money is actually laundered in New Zealand is virtually impossible to measure. Reference is often made to overseas studies, attempting to gauge the extent of worldwide money laundering activities. Inevitably, the figures mentioned are enormous, and then the focus is quickly shifted to the desirability of implementing legislation, to ensure New Zealand is not seen as an international "weak link", able to be exploited by international money launderers.

In a report prepared for the Minister of Justice in 1992 the Department of Inland Revenue was quoted as saying:

> "Money laundering is an activity that filters through all levels of New Zealand society. It enables criminals and tax evaders to profit from their activities at the expense of the majority of the society.
> Overseas studies indicate that the level of evaded legally earned income ("tax gap") is approximately equal to between 8 and 14% of GDP. No comprehensive study of the New Zealand "tax gap" has been undertaken by the department. Police and other law enforcement agencies studies indicate that the size of illegal activities in New Zealand is $1.3 billion. Both types of income are evaded through the use of money laundering techniques."[19]

[19] See above, n3 at 2.

2. Assumption of International Obligations

While there is evidence of money laundering in New Zealand, the apparent major motivating factor for the implementation of anti-money laundering legislation in recent years has come from New Zealand's acceptance of international obligations. The Ministry of Justice's briefing paper to the Justice and Law Reform Select Committee on the Financial Transactions Reporting Bill,[20] explained that:

> "The bill is a companion measure to the money laundering offence contained in the Crimes Amendment Bill which the Committee has recently reported back to the House. Its purpose is to provide effective measures to detect and combat money laundering through financial institutions and to assist with the enforcement of the Proceeds of Crime Act 1991. The bill also satisfies New Zealand's international obligations as members of the Financial Action Task Force on Money Laundering."

Further reference was also made to New Zealand's assumption of international obligations, in the Justice Department's Discussion Paper, issued in the policy formation stage to a wide variety of financial institutions, professional and assorted statutory bodies in 1993.[21]

> "In recognition of the international nature of the problem, New Zealand has assumed international obligations to take steps aimed at combating money laundering."

The Discussion Paper also highlighted the fact that money laundering had been attracting international attention since the late 1980s as a result of international efforts to fight drug trafficking. It noted that the focus of international attempts to address issues relating to money laundering, was to; (a) encourage the implementation of proceeds of crime legislation; (b) make money laundering a specific offence; and, (c) the development of mutual assistance programmes.

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[20] Department of Justice "Financial Transactions Reporting Bill", briefing paper to the Chairperson, Justice & Law Reform Select Committee, 19 June 1995, 1

[21] Department of Justice, "Money Laundering through Financial Institutions and Other Bodies Dealing with Cash" (1993) 1, (the "Discussion Paper") at 2.

Furthermore, the Discussion Paper notes, the international focus has also been upon financial institutions, in recognition of the reliance placed upon them, by money launderers. As a result it was recognised there existed a need to introduce measures to ensure the scope for abusing the financial system was minimised, and at the same time providing effective measures to detect money laundering.

3. The International Initiatives

As New Zealand has maintained it must introduce money laundering legislation as a result of international obligations, it is worthwhile examining the extent of those international initiatives.

What has developed at the international level, has been described as a "twin track" response to money laundering. On the one hand, it calls for the "*strengthening of the criminal law*"; on the other, it is now generally accepted that the financial systems can and must play an effective "*preventative*" role. [22]

Falling into the first category, "strengthening the criminal law" are:

The 1988 U.N. Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; ("the Vienna Convention")

The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime; (the 1990 Council of Europe Convention)

Two further major instruments constitute "preventative" measures:

[22] W. C. Gilmore "Money Laundering, The International Aspect" Paper delivered to the joint FATF/Commonwealth Secretariat, Asia Money Laundering Symposium, Singapore, April 1993.

- The Basle Statement of Principles (1988) on the Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering; (the Basle Statement of Principles);

- The Council of European Communities Directive on Prevention of the Use of the Financial System for the Purpose of Money Laundering, February 1991 ("The Council Directive").

Set out below is a brief consideration of each instrument, following the order as above.

(a) The Vienna Convention

On 20 December 1988, 67 nations at a United Nations convention in Vienna reached agreement on the need for international co-operation against illicit traffic in narcotics. The "Vienna Convention" came into force on 11 November 1990, and by late 1992, over 70 nations were party to the treaty. It was the first, and still remains the most important statement by the world community as a whole, of its determination to act collectively in this area.[23] It has had a major influence on subsequent initiatives. Its focus was on the narcotics problem and it includes provisions relating to the confiscation and forfeiture of assets, and bank secrecy. In the context of money laundering, some of the more significant Articles of the Convention are:

Article 3: (Offences and Sanctions)
Mandatory obligations on parties to the Convention to ensure money laundering is criminalised.

Article 5: (Confiscation)
Requires parties to the Convention to put measures into place to enable competent authorities to identify, trace, freeze or seize proceeds derived from

[23] Above, n 14 at 1377

drug trafficking and money laundering offences. Courts or competent authorities are empowered to order that bank, financial or commercial records be made available to investigating authorities. This article removes bank secrecy as a reason for refusing to co-operate in money laundering investigations.

Article 6: (Extradition)

Deems drug trafficking offences and money laundering offences to be included in an extradition treaty existing between parties. Parties which do not make extradition conditional on the existence of a treaty must recognise amongst themselves drug related or money laundering offences as extraditable between themselves.

Article 7: (Mutual Legal Assistance)

Focuses on key elements of mutual legal assistance. The most important aspect of this Article is the obligation on parties to provide assistance in the investigation, prosecution and judicial proceedings in relation to drug related or money laundering offences.

It has been described as 'one of the most detailed and far reaching instruments on international criminal law and, if widely adopted and effectively implemented, will be a major force in harmonising national laws and enforcement actions around the world.' [24]

New Zealand is a signatory to the Vienna Convention and is required to enact criminal offences relating to drug money laundering, in order to ratify the convention.

(b). The 1990 Council of Europe Convention

This instrument builds on the Vienna Convention, recognising that not all efforts to combat money laundering could rest exclusively on the Vienna Convention. It is broader in scope, and is meant to increase international co-operation in

[24] Above, n14 at 6.

investigations and the freezing and confiscation of the proceeds of illegal activities. This level of international co-operation was reflected in the request made to Australia, Canada and the United States, who had assisted in drafting the convention, to sign it, even though they were not members of the Council of Europe. It was signed by the 12 countries of the Council of Europe in November 1990.

It contains a wider definition of money laundering, relating not only to the proceeds of drug trafficking, but of any criminal offence.

Again, the Convention obliges signatories to criminalise money laundering.

(c). The Basle Statement of Principles

In 1988 the problem as first perceived was how to keep the cash proceeds of drug trafficking from entering the legitimate banking system. With this in mind, the central bankers meeting[25] in Basle issued a Statement of Principle in December 1988. The essential principles are:

- customer identification;
- conformity to laws and high ethical standards;
- co-operation with law enforcement authorities; and
- training of bank staff in matters covered by the Statement.

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[25] The Committee of Banking Regulations and Supervisory Practices is a group made up of representatives of central banks of the Group of Ten Countries. The Committee was established in 1974 to strengthen supervision of international banking activity amongst banks in the major industrialised countries. It includes representatives from Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, Netherlands, Sweden, Switzerland, United Kingdom and United States.

The Basle Statement of Principles has been said to be quite influential at a practical level, and endorsed by many financial centres.

(d). The 1991 Council Directive

The 1991 Council Directive, adopted in June 1991, was designed to complement the November 1990 Council of Europe Convention referred to at (b) above. The philosophy of prevention is also essential to plans of the European Communities in the area of money laundering.

The Directive has as its purpose the prevention of the use of the financial system for the purpose of money laundering. The Preamble to the Directive argues for the introduction of measures to combat money laundering in Europe. Some of the important points made in the Preamble are:

- combating money laundering is one of the most effective means of opposing organised criminal activity, and drug trafficking;
- the financial system can play a highly effective role in combating money laundering;
- the definition of money laundering should be extended to include not only proceeds from drug trafficking, but also those from other criminal activities such as organised crime and terrorism.

The key points of how the Directive will apply include:[26]

- client identification on opening accounts and offering safe custody facilities, and also of occasional customers where the amount exceeds ECU 15,000. Reasonable measures are to be taken to identify beneficial clients;

[26] R Parlour "Money Laundering in the New Europe" (1993) 10 JIBL 435, at p 436

- examination of suspicious transactions;

- full indemnities are to be given for good faith reporting of suspicions;

- identification records are to be kept for five years after the client relationship has ended, and transaction records for five years after the transaction's execution;

- co-operation with the authorities; and

- adequate internal procedures and training programmes have to be adopted.

The Directive requires implementation in Member States. It adopts a suspicion-based reporting system, as developed in the United Kingdom rather than the American and Australian systems of reporting all transactions over a certain size, whether suspicious or not. (Subsequently however, the United States has also introduced suspicion-based reporting, and Australian legislation also provides for suspicion-based reporting).

The Directive is not legally binding in New Zealand, but it has clearly formed a basis upon which the Financial Transactions Reporting Act 1996 was modelled.

(e). The Financial Action Task Force on Money Laundering

In addition to the 4 major instruments described above, there has been established the "Financial Action Task Force on Money Laundering" (FATF) with the aim of combating money laundering on an international level. FATF was set up in July 1989 by a decision of the G7 Heads of State and Government, participating in the Paris Economic Summit. It reflected world leaders' concerns at the dimensions the drug problem had attained, and the speed with which drug trafficking and related money laundering were growing. While primarily concerned with drugs money laundering, FATF does address the laundering of the proceeds of all serious crime.

The FATF expanded quickly from the G7 nations to a group of 15 countries in its first year of operation. It has since expanded to 26 countries.[27] The FATF has a number of relatively unusual features. It is not part of any other international organisation such as the UN or OECD. It is a free standing specialist body which concentrates on the international fight against money laundering. It brings together experts from the world's leading financial countries in different areas of expertise - particularly financial, law enforcement and legal agencies. It ensures anti money laundering measures are developed and implemented in the financial system, in investigative agencies and in the criminal justice system. It also facilitates effective co-operation between these three areas both domestically and internationally.

The FATF is the only multi national body in the world dedicated exclusively to combating international money laundering. It was convened as a mechanism for studying existing measures for combating drug money laundering and formulating recommendations for improvements in international co-operation in this area.

In April 1990 the FATF issued a report with a comprehensive programme of 40 recommendations that each participating country should take to fight money laundering.[28] Some of the more important recommendations are set out below.

Before turning to a brief examination of them, it is important to note the continuing involvement of the FATF, subsequent to its preparation of the 40 recommendations. Since then, the FATF has monitored the implementation by its members of the anti money laundering measures, at the same time keeping abreast of changes in laundering techniques. It has also engaged in a process of self

[27] FATF members: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States as well as the Commission of the European Communities and the Gulf Co-operation Council.

[28] Above, n11 T. S. Greenburg, at 1870

assessment of its membership, which although now closed, consists essentially of the top 26 financial countries in the world. The self assessment process involved members completing annual returns to the secretariat of their progress in adopting the Task Force's recommendations.

In 1991-1992 the Task Force commenced a process of mutual evaluation of its members. This process involved teams of experts from other member countries visiting individual member jurisdictions and examining and reporting back to the Task Force not only the extent to which individual members are complying with the recommendations, but also the effectiveness of the efforts of individual members in the fight against money laundering.

Some of the more important FATF recommendations are:

- Each country should, without delay, take steps to implement fully the 1988 Vienna Convention and proceed to ratify it;

- Agreement that financial institution secrecy laws should be conceived so as not to inhibit implementation of Task Force recommendations;

- Enforcement programmes should include increased multilateral co-operation and mutual legal assistance in money laundering investigations, prosecution and extradition;

- Countries should implement effective measures to trace, seize and forfeit proceeds of crime;

- Each country should take steps to criminalise drug money laundering as defined in the Vienna Convention. They should also consider extending the application of this offence to:
  (a) any other crimes linked to narcotics; or
  (b) serious crimes generally.

The recommendations relating to the financial system (17 of the 40) cover:

(a) banks and non bank institutions;

(b) customer identification and record keeping rules;

(c) increasing the diligence of financial institutions, particularly in the reporting of large cash and suspicious transactions;

(d) the need for ongoing training and audit activity; and

(e) monitoring cross border flows of cash.

The recommendations of the FATF do not constitute an international convention binding in international law. They appear to have been effective nonetheless, as a considerable number of member countries have made significant efforts to introduce money laundering measures, especially in anticipation of a visit from a team of FATF evaluators.

D. THE NEW ZEALAND LEGISLATIVE RESPONSE

1. Recent Legislation - An Overview.

New Zealand has now implemented legislation in direct recognition of its international obligations, in particular the Vienna Convention. On 3 April 1991, New Zealand also endorsed the FATF recommendations, and thereby qualified for membership. In doing so, New Zealand agreed to be evaluated by the FATF on or before 30 April 1994.

The decision to endorse the FATF recommendations reflected a number of considerations. Foremost was the desire to keep international money launderers and other criminals away from New Zealand. The Government recognised that action by overseas countries could leave New Zealand increasingly exposed to the attention of money launderers. The Government was also said to be concerned to maintain international confidence in New Zealand's financial institutions.[29]

The following legislation has now been enacted in New Zealand, in fulfilment of Vienna Convention and FATF obligations:

- The Proceeds of Crime Act 1991
- The Mutual Assistance in Criminal Matters Act 1992
- The Crimes Amendment Act 1995 - creates offence of Money Laundering
- The Financial Transactions Reporting Act 1996

The main provisions of each statute are considered in the following sections. Particular attention is devoted to the recently enacted Financial Transactions Reporting Act 1996[30]. (the "FTR Act").

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[29] Above, n21 at 2

[30] The Financial Transactions Reporting Act 1996 received royal assent on 1 April 1996, but only came into force by Order in Council on 1 August 1996. However the offence provisions set out in the Act do not come into force until 1 February 1997.

2. The Proceeds of Crime Act 1991 (the "PCA")

The long title to the Proceeds of Crime Act 1991 (the "PCA") states that it was enacted "to provide for confiscation of the proceeds of serious criminal offending"[31].

Some important definitions contained in section 2 of the Act are:

> "Proceeds", in relation to a serious offence, means any property that is derived or realised, directly or indirectly, by any person from the commission of the offence.
>
> "Property" means real or personal property of any description, whether situated in New Zealand or elsewhere and whether tangible or intangible; and includes an interest in any real or personal property.
>
> "Interest" in relation to property, means -
> (a) a legal or equitable estate or interest in the property; or
> (b) a right power or privilege in connection with the property.
>
> "Serious offence" means an offence punishable by imprisonment for a term of 5 years or more.

The PCA's jurisdiction applies to property it identifies as "tainted". This concept, which is essential to the application of the PCA, is also defined in section 2;

> "Tainted property" in relation to a serious offence, means -
>
> (a) property used to commit, or to facilitate the commission of, the offence; or
> (b) proceeds of the offence;-
> and when used without reference to a particular offence means tainted property in relation to any serious offence.

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[31] P.C.A. long title, para (a)

Following a conviction for a serious offence, the Solicitor General may apply either to confiscate property, or to impose a financial penalty. These remedies are contained, respectively, in either a forfeiture order against "tainted property", or a pecuniary penalty order in respect of benefits received by the defendant from the commission of the serious offence. The confiscation proceedings may only be brought following a conviction, and up to 6 months thereafter.

Pending the trial itself, the PCA provides for the property to be preserved, by way of restraining orders. Such an order may even be applied for, prior to a person being charged with a serious offence. An application may be made *ex parte* if it is thought notice to the defendant may result in the destruction or disposal of property.[32] A restraining order is granted upon the basis that there are reasonable grounds to believe that the property is tainted property, or that it represents a benefit derived, directly or indirectly, from the commission of the offence.[33] The Court may direct that the Official Assignee take custody and control of the property, or such part of the property as is specified in the order.[34] Otherwise, the Court may simply order that the property is not to be disposed of or otherwise dealt with, prior to the determination of the confiscation proceedings.

There are two types of confiscation order provided for in the P.C.A., as noted above. The first type, a forfeiture order, has the effect of vesting property against which the order is made, in the Crown absolutely. This order is essentially against "tainted property". The second type, a pecuniary penalty order, focuses on the benefit obtained by the convicted person, and requires the Crown to make an assessment of the benefit derived from the commission of the offence.[35] The Court is able to lift the corporate veil in assessing the value of benefits derived by a person from the

[32] However, an *ex parte* restraining order expires after 7 days unless further application is brought, upon notice to the defendant, for its continuation. Section 41(2), (3).
[33] P.C.A. s.42, s.43
[34] P.C.A. s.42(1)(b)
[35] P.C.A s.25, 27, 28

commission of an offence, but the Court must be satisfied the relevant property is subject to the "effective control" of the defendant.[36]

The New Zealand Court of Appeal has applied the P.C.A. vigorously, as is evidenced by its judgments in *R v Pedersen*.[37] For instance the observations of Casey J, at p 391:

> "... I am satisfied that the Proceeds of Crime Act 1991 was enacted with effective deterrence as to its aim, and the more effective the better. Accounting practices adopted in legitimate transactions have no place in the assessment of the pecuniary penalties, as is made very clear by the exclusion of expenses and outgoings from the calculation."

He continued, at p 392, that:

> " 'Benefits' is a word of wide meaning, easily applicable without strain to the payment received by a drug supplier. Although a penalty assessed at that figure may be regarded as Draconian where the supplier buys from another, such severity accounts with and gives maximum effect to the clear policy of the Act."

In the same case, Cooke P stated, at p 391,

> "Being a measure designed to deter serious crime by demonstrating emphatically that it does not pay, the Proceeds of Crime Act should be judicially administered in that spirit."

Cooke P considered that the Courts have often urged for the introduction of measures, alternative or additional to imprisonment. He felt that as Parliament has made other remedies available by way of the P.C.A., then it:

> "behoves the Courts to use the Act as effectively as reasonably possible."[38]

In this case, the defendant was convicted of selling cannabis to an undercover agent. At his sentencing in the High Court, the defendant was sentenced to 53 weeks

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[36] P.C.A. s.29(1)
[37] [1995] 2 NZLR 386
[38] See above n.37 at p.391

imprisonment, and a pecuniary penalty order was made, with the "benefits" assessed at $240.00. This figure was based on the actual "profit" the defendant had made, after he had paid his supplier. The defendant had paid his supplier $8,600, and resold the cannabis for $8,800 and retained a small amount of cannabis for himself.

On appeal, the Court of Appeal agreed with the Solicitor General's argument that the proper method of determining "benefit" under s.27 of the PCA. did not pay regard to the fact that the defendant has to pay someone else. In the words of Cooke P again, at p.391.

> "The benefit from a sale is what the seller gets in return."

And earlier at p.390,

> "... we see no reason as a matter of statutory interpretation, why the cost of supplies can be offset against the benefit that an offender receives from an illegal sale. To allow such a deduction would water down the strength of the legislation. It could also involve inquiries into criminal deals, on evidence likely often to be unreliable."

However, in spite of this enthusiastic approach taken by the Court of Appeal in applying the PCA vigorously to deprive offenders of the spoils of their offending, there are still problems manifest in its application. The case of R v McCormick[39] is illustrative of one difficulty encountered. As noted earlier,[40] McCormick had paid cash for land, vehicles, furniture, jewellery, antiques and school fees, as a result of his operating a substantial cannabis growing and supply operation on his Canterbury farm, for a period in excess of 8 years. However, in granting a forfeiture order, the High Court trial judge restricted himself to a consideration of the offending period between the date of commencement of the Act (July 1992) and the date the informations were laid. The result was that the forfeiture was substantially less than it could have been. As Holland J remarked:[41]

> "Had I been entitled to take into account in relation to the forfeiture the offending from 1986 to 1994 I may well have considered that the hardship to

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39 21 December 1994, CA 180/194. See above, B2, 13

40 Above, p.14.

41 6 May 1994, The Solicitor General of New Zealand v McCormick (HC Christchurch, M 59/94)

third parties and the prisoner was not sufficiently great to prevent me ordering the total forfeiture of the farm without qualification."

McCormick's farm comprised ten separate legal titles, and the whole property was used to some extent, in the cannabis growing operation. Although the whole farm was deemed "tainted property" and liable to forfeiture, the Court of Appeal made its order in respect of only one parcel of land, valued at $78,000.00. In doing so, it recognised the 25% interest of the defendant's brother in the land, as it held there was no evidence that he knew about the offending.

Furthermore, the PCA may not be able to be implemented to disgorge the ill gotten gains of criminal enterprise, where money laundering techniques have been employed to disguise the link between the property derived, and the offender themselves. Unless the Court is satisfied such property is under the effective control of the defendants, it cannot be forfeited under the PCA.

3. The Mutual Assistance in Criminal Matters Act 1992 (the "MACMA")

This Act came into force on 1 April 1993. It implements New Zealand's treaty obligations, particularly Article 5 of the Vienna Convention. This requires each member nation, upon the request of another member nation, to identify, trace, seize, freeze or forfeit property or proceeds located in the requested nation, which were derived from, or used in drug trafficking and drug money laundering in violation of the laws of the requested country. The MACMA enables New Zealand to request international assistance in criminal matters, and to respond to similar requests by foreign countries to assist in the investigation of criminal actions by foreign nationals in New Zealand.

The object of the Act, as stated in section 4, is "to facilitate the provision and obtaining, by New Zealand, of international assistance in criminal matters, including -

(a) the identification and location of persons;
(b) the obtaining of evidence, documents of other articles;
(c) the production of documents or other articles;
(d) the making of arrangements for persons to give evidence or assist investigations;
(e) the service of documents;
(f) the execution of requests for search and seizure;
(g) the forfeiture or confiscation of tainted property;
(h) the recovery of pecuniary penalties in respect of offences;
(i) the restraining of dealings in property, or the freezing of assets, that may be confiscated or forfeited, or that may be needed to satisfy pecuniary penalties imposed, in respect of offences;
(j) the location of property that may be forfeited, or that may be needed to satisfy pecuniary penalties imposed, in respect of offences.

The MACMA also specifies that it does not derogate from any existing, formal or informal types of co-operation, and is not preventative of any other new forms of co-operation being developed.

The MACMA establishes the basis for international co-operation in the fight to combat criminal offending on the international stage. It is an important law enforcement tool, in recognition of the international activities assumed by money launderers.

However, it is only effective in countries who have reciprocal agreements in force - otherwise resort must be had to the more informal methods of international co-operation. A further restricting factor of the MACMA for law enforcement agencies is that all requests for assistance by New Zealand from a foreign country must be made by the New Zealand Attorney General.[42] Established networks for international co-operation between law enforcement agencies have not traditionally been hurdled with this bureaucratic process, which may have significance in the context of a particular investigation or inquiry.

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[42] s.8, MACMA.

4. The Crimes Amendment Act 1995 (the "CAA")

This Act makes it an offence to launder money in New Zealand. A new heading "Money Laundering" is inserted into the Crimes Act 1961, by section 5 of the CAA. Two new offences are also created:

- s.257 A (2) laundering money; and
- s.257 A (3) intending to launder money.

The former offence is punishable by up to 7 years imprisonment, while the latter offence carries a maximum term of 5 years imprisonment.

The subsection (2) offence contains three elements:

(a) engaging in a money laundering transaction;

(b) in respect of property that is proceeds of an offence punishable by 5 years imprisonment or more;

(c) knowledge or belief that all or part of the property is the proceeds of an offence.[43]

The subsection (3) offence is concerned with the possession of property for money laundering purposes. It is an offence to:

(a) obtain or have possession of any property (being property that is the proceeds of a serious offence committed by another person);

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

(c) knowing or believing that all or part of the property is the proceeds of any serious offence.

What constitutes "engaging in a money laundering transaction" is set out in s.257 A(4). It includes a person:

(a) dealing with any property; or

[43] Adams on Criminal Law (Student Edition), Wellington, Brookers, 1996, CA 257A. 04.

(b) assisting any other person, whether directly or indirectly, to deal with any property -

for the purpose of -

(c) concealing that property; or

(d) enabling another person to conceal that property.

The offence provisions apply not only to the person who committed the original offence, which produced the illicit funds, but to any person involved in the laundering process. This may however enable serious charges to be laid against the same person, if it can be established the laundering was carried out by the perpetrator of the serious offence which produced the property to be laundered.

A "serious offence" is defined in s.257 A (1) to mean an offence punishable for a term of five years or more, (consistent with the definition in the Proceeds of Crime Act 1991) and includes any act, wherever committed, which if committed in New Zealand, would constitute an offence punishable by imprisonment for a term of five years or more.

Similarly, the definition of "deal with" contained in s.257 A (1) recognises the often trans-national nature of money laundering. This term is defined, in relation to property, to mean dealing with property in any manner and by any means, and, without limiting the generality of the foregoing, includes:

1. To dispose of the property, whether by way of sale, purchase, gift or otherwise.
2. To transfer possession of the property.
3. To bring the property into New Zealand.
4. To remove the property from New Zealand.

Other important definitions for the purposes of section 257 A, contained in subsection (1) include:

"Conceal" in relation to property, means concealing or disguising the property, and includes:

- converting the property from one form to another;
- concealing or disguising the nature, source, location, disposition, or ownership of the property or of any interest in the property.

"Property" means real or personal property of any description, whether situated in New Zealand or elsewhere, and whether tangible or intangible, and includes an interest in any such real or personal property.

"Interest" in relation to property, means:

- a legal or equitable estate or interest in property; or
- a right, power or privilege in connection with the property.

The offence provisions are not restricted to drug money laundering as defined in the Vienna Convention, but apply to the proceeds of any serious offence. As such, the CAA implements the wider recommendations of the FATF. The offence provisions are aimed at capturing the various ways in which money may be laundered, for instance converting property into different forms or transferring funds to offshore banks or companies.

The test adopted in New Zealand is a subjective one, requiring proof by the prosecution that the defendant "knew" or "believed" that the property involved in the laundering process was the proceeds of a serious offence. While this test is refined by subsection (5)[44], the definition may still create problems for prosecutors, insofar as there is a necessity to establish a "belief" in the mind of the accused, if it is unable to prove "knowledge". This does not appear to be of any great assistance to those involved in prosecuting these offences, as "belief" does not significantly assist in

[44] S.257 (A)(5) states that it shall not be necessary for the prosecution to prove that the accused knew or believed that the property was the proceeds of a particular serious offence or a particular class of serious offence. Neither is it a defence that the accused believed any property to be the proceeds of a particular serious offence, when in fact the property was the proceeds of another serious offence.

enabling the required mens rea to be established, sufficient to obtain a conviction. The interpretation of these offence provisions has yet to be determined in a New Zealand court. To the writers knowledge, there has been no prosecution taken under the new money laundering offences, at the date of writing in September 1996.

The definition of the New Zealand offence provision clearly avoids the criticisms that have been made of the equivalent money laundering offence provisions in Australia. In Australia the money laundering offences are contained in the Proceeds of Crime Act 1987 (Commonwealth).(The "POC Act"). Three offences were created, namely money-laundering under s.81, receiving or possessing money or property reasonably suspected to be the proceeds of crime (as prescribed by s.82) and organised fraud under s.83.

To succeed in a prosecution under section 81,[45] there are four elements which must be proved. They are:

(i) the act of engaging in a transaction, or receiving, possessing, concealing, disposing of or bringing into Australia;

(ii) money or other property;

(iii) that is proceeds of crime;

(iv) the mental element of knowing or ought reasonably to have known, that the source of the property was from some sort of unlawful activity.

Under section 82,[46] liability is established unless the accused can prove on the balance of probabilities that he or she had no reasonable grounds to suspect that the property referred to in the charge was derived or realised, indirectly or directly, from some form of unlawful activity.

The mental element required for liability under s.81 or 82 of the Australian POC Act is not confined to intention, knowledge or recklessness. Under s.81, liability extends to an unreasonable failure to know that money or other property is derived or

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[45] Section 81 provides:

(1) In this section: "transaction includes the receiving or making of a gift."

(2) A person who, after the commencement of this Act, engages in money laundering, is guilty of an offence against this section, punishable, upon conviction, by:

(a) if the offender is a natural person - a fine not exceeding $200,000 or imprisonment for a period not exceeding 20 years, or both; or

(b) if the offender is a body corporate - a fine not exceeding $600,000

(3) A person shall be taken to engage in money laundering if , and only if,

(a) the person engages, directly or indirectly, in a transaction that involves money, or other property that is proceeds of crime; or

(b) the person receives, possesses, conceals, disposes of or brings into Australia any money, or other property, that is proceeds of crime;

and the person knows, or ought reasonably to know, that the money or other property is derived or realised, directly or indirectly, from some form of unlawful activity.

[46] Section 82 provides:

(1) A person who, after the commencement of this Act, receives, possesses, conceals, disposes of or brings into Australia any money, or other property, that may reasonably be suspected of being proceeds of crime is guilty of an offence against this section punishable, upon conviction, by:

(a) if the offender is a natural person - a fine not exceeding $5,000 or imprisonment for a period not exceeding 2 years, or both; or

(b) if the offender is a body corporate - a fine not exceeding $15,000.00.

(2) Where a person is charged with an offence against this section, it is a defence to the charge if the person satisfies the court that he or she had no reasonable grounds for suspecting that the property referred to in the charge was derived or realised, directly or indirectly, from some form of unlawful activity.

realised, directly or indirectly, from some form of unlawful activity.[47] Noting that these objective tests of liability were inconsistent with the emphasis traditionally attached to subjective tests of liability for serious offences, one commentator observed that:

> The rise of money laundering and related offences under [The Proceeds of Crime Act 1987 (Cth)] has been accompanied by the fall of basic principles of criminal liability. This is a regrettable legislative achievement, of totalitarian bent.[48]

The same author further noted:

> Sections 81 and 82 do not adhere to the model provided by the money-laundering offences enacted under the *Money Laundering Control Act* 1986 (U.S.): knowledge is required under the corresponding United States provisions. The test under [the Proceeds of Crime Act 1987 (Cth)] appears to be derived from the "reason to know" provision that appeared in some of the early drafts of the *Money Laundering Control Act* but which was expressly rejected by Congress in favour of a requirement of knowledge.[49]

The adoption in New Zealand of a subjective knowledge test before liability can be established under s.257 A (2), is in accordance with the mental element required for a charge of receiving.[50] The interpretation by New Zealand courts of the "knowledge" requirement of this charge, has been to refuse to equate this concept with negligence or even wilful blindness. In R v Crooks,[51] the Court of Appeal held that a person is said to "know" something when he or she has ascertained, by physical or mental perception, a state of facts or circumstances which creates in his or her mind a certainty that the point of his or her inquiry is free from doubt. Mahon J held that if this were the test of criminal liability for the crime of receiving, then the only sure method of proof would be to establish that the suspected receiver actually saw the

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[47] B Fisse. "The Proceeds of Crime Act: The Rise of Money Laundering Offences and the Fall of Principle" (1989) 13 Crim L J 5, 5.
[48] Above, n.47, at p.23.
[49] Above, n.47, at p.13.
[50] The Crimes Act 1961, S.258. This section makes it an offence for anyone to be in possession of goods that have been stolen or dishonestly obtained, *knowing* at the time they received the goods, that the goods were so stolen or dishonestly obtained.
[51] [1981] 3 NZLR 53 (CA)

goods being stolen. It was for this reason the word "knowing" came to be treated in the common law concept of receiving as including "believing" (p 56).[52]

In R v Crooks, Mahon J held that:[53]

> Belief is the result of a subjective evaluation of evidence or information which has produced acceptance of a proposition, or of the existence of a set of facts. Where belief is founded not upon evidence or information from other persons but is derived from intuitive assessment of a set of circumstances, then it is not in the true sense a belief at all. It is only an opinion or, in the present context, a suspicion, and the fact that a receiver merely suspects goods to be stolen cannot make him or her liable.

Mahon J continued to say "suspicion may ripen into knowledge or belief as a result of further inquiry."[54]

> Where a person does not make an inquiry as to whether his or her suspicion is well founded, this cannot establish criminal liability.[55]

As noted above, the New Zealand test imposed under s.257 A (2) for subjective knowledge, avoids the criticisms which have been levelled at its Australian counterpart, where an objective test of liability has been favoured. This is in spite of the recommendation of the FATF that, "the offence of money laundering should apply at least to [knowledge of the] money laundering activity, including the concept that knowledge may be inferred from objective factual circumstances."[56] The money laundering offence, by use of the words "knowing or believing" appears to be endorsing the common law position which has developed under the offence of receiving.

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[52] Above n.43, CA 258.12, p.468.
[53] Above n.51, 57.
[54] Above n.51, 57.
[55] Above n.43, CA 258.12
[56] FATF Report, 6 February 1990, recommendation 6.

It will be interesting to see if the New Zealand judiciary adopt the money laundering offence provisions with the same fervour they have shown toward implementing the Proceeds of Crime Act legislation, or whether they adpot a more cautious approach based upon the common law development of the offence of "receiving", and refuse to equate "knowledge" or "belief" with recklessness or wilful blindness.

Immunity from liability for disclosure of confidential information concerning money laundering activities to the Police, was provided by s.257 B, CAA 1995. This section, now repealed with the enactment of the Financial Transactions Reporting Act 1996,(the FTR Act) was intended to provide immunity to employees of financial institutions, who may otherwise have been liable for breaching the banker-customer duty of confidentiality.[57] The implementation of the FTR Act, imposing an obligation on financial institutions to report transactions where money laundering is suspected, enables the financial institution to rely on a well established exception to the duty of confidentiality.

[57] The principle of a bank's duty of confidentiality was established by the English case of *Tournier v National Provincial and Union Bank of England* [1924] 1 KD 461 (CA), and has been expressly endorsed by the New Zealand Bankers Association in its *Code of Banking Practice,* (January 1992). Four qualifications to the duty of confidentiality are recognised:
(i) where disclosure is under compulsion of law;
(ii) where there is a duty to the public to disclose;
(iii) where the interests of the bank required disclosure; and
(iv) where the disclosure is made by the express or implied consent of the customer.

5. The Financial Transactions Reporting Act 1996 (the "FTR Act")

(a) Background to the FTR Act

The FTR Act received royal assent on 1 April 1996 and came into force by Order in Council on 1 August 1996. Regulations setting the "prescribed amount" for the purposes of Parts II & V of the FTR Act at $9,999.99 also came into effect on 1 August 1996.[58] Offence provisions contained in the FTR Act, do not come into force until 1 February 1997, with the exception of the offence contained in s.40 which relates to the failure to report imports and exports of cash over the prescribed amount of $ 9,999.99.[59]

The FTR Act aims to facilitate the prevention, detection, investigation, and prosecution of money laundering, and the enforcement of the Proceeds Of Crime Act 1991, by -

(a) imposing certain obligations on financial institutions in relation to the conduct of financial transactions

(b) requiring persons entering or leaving New Zealand to declare cash in excess of a prescribed amount;-

and to provide for incidental matters thereto.[60]

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[58] The Financial Transactions Reporting (Prescribed Amount) Regulations 1996, 1996/185. With respect to Part II of the FTR Act, where the amount of cash exceeds $9,999.99, a financial institution must, in certain circumstances specified in that Part, verify the identity of the person conducting the transaction, and if applicable, the person on whose behalf the transaction is conducted. Part V of the FTR Act imposes obligations on persons arriving in or leaving New Zealand to report cash over the prescribed amount.

[59] Offence provisions are contained in the following sections:

- s. 13 failure to comply with obligations imposed on financial institutions under Part II, to verify identity in specified circumstances
- s. 22 failure of financial institution to report "suspicious" transactions, or to make report containing false or misleading information, or disclosing fact of making a suspicious transaction report to the customer.
- s. 36 failure to retain records in compliance with obligations imposed in Part IV of the FTR Act.

[60] Long title to FTR Act

The FTR Act is described as a companion measure to the money laundering offences created in the Crimes Amendment Act 1995 and seeks to satisfy New Zealand's obligations as a member of the Financial Action Task Force (FATF), regarding the prevention of money laundering .[61]

The FTR Act implements FATF recommendations regarding the detection of money laundering through financial institutions. As noted earlier, [62] 17 of the 40 FATF recommendations related to the financial system. New Zealand agreed to implement the FATF programme on 3 April 1991, and thereby became a member of the task force. The main features of the FATF programme which are implemented in the FTR Act are:

- a broad range of institutions to which anti-money laundering measures apply; (Part I)
- the obligations imposed on financial institutions to;
  (a) verify customer identity : (Part II)
  (b) report suspicious transactions : (Part III)
  (c) retain records: (Part IV)
- the introduction of measures to monitor cash at the border. (Part V)

The introduction of the FTR Act recognises that financial institutions have a unique ability to assist in the recovery of the proceeds of crime. The obligations imposed under Parts II & IV of the FTR Act, (customer identification and record keeping requirements) are designed to assist law enforcement agencies to trace money that is derived from criminal activity. They are also designed to enable the Police to reconstruct a paper trail to identify the criminals involved. However, these requirements alone do not assist enforcement agencies to detect criminal activity.

Similarly, it was recognised that financial institutions have a unique ability to assist in the detection of money laundering activities and recovery of the proceeds of crime. A number of indications from a financial transaction may cause the financial institution

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[61] Financial Transactions Reporting Bill, (1995) No.83-2,(i).
[62] Above Part C, 3(e), p 25.

to suspect money laundering. Unfortunately for the Police and other law enforcement agencies, the rules relating to customer confidentiality precluded financial institutions from reporting their suspicions to the Police.

The FTR Act therefore imposes in Part III, a mandatory requirement on financial institutions to report suspicious transactions (viewed objectively) to the Police, and in return provides immunity from civil or criminal liabilty in respect of reports of suspicious activity made to the Police in good faith.

A further consideration prior to the introduction of the FTR Act, was the need for New Zealand to ensure that its' financial institutions were not open to abuse by those wishing to avoid more onerous reporting requirements in other jurisdictions. Of particular significance in this context is New Zealands proximity to Australia where stringent reporting requirements already exist.[63]

(b) Part I - Preliminary Provisions / Defintions

Submissions made to the Justice and Law Reform Select Committee on the FTR Bill (the "J&LRSC") raised issues of three types:

- whether the range of institutions covered by the FTR Bill was adequate (for example, should it include motor vehicle dealers ?)
- whether the full range of anti-money laundering measures should be applied to all "financial institutions" (for example, employer/ employee superannuation schemes, and real estate agents)
- the adequacy of the definitons themselves (for example, application to financial planners and security firms which fell within the definition in the bill)

Section 3 of the FTR Act defines the term "financial institution." This definition is pivotal as it defines the range of persons or bodies upon whom the full range of anti-money laundering measures are imposed. In line with the FATF recommendations, the

[63] Above n 21, "the Discussion Paper", 4

definition includes traditional financial institutions (those whose core business is financial) together with other groups such as lawyers and accountants, to the extent that they receive funds from clients for deposit or investment. (In the case of lawyers, the extent is widened for the purposes of the FTR Act, to include receiving funds in the course of business, for the purpose of settling real estate transactions. It also includes casinos, real estate agents (to the extent the real estate agent receives funds in the course of that person's business for the purpose of settling real estate transactions), and the Totalisator Agency Board (TAB) because international experience has shown that these types of businesses are particularly vulnerable to use in money laundering operations. Persons whose business involves borrowing, lending or investing money on behalf of others are also included in the definition.

One group specifically excluded from the definition are motor vehicle dealers. The submission of the Motor Vehicle Dealers Institute (the "MVDI") to the J&LRSC, was that motor vehicle dealers should be included in the definition and thereby covered by the FTR Act. This submission was supported by the New Zealand Police, whose own enquiries indicated the use of motor vehicle dealers in money laundering processes employed in New Zealand.[64] However, the MVDI submission was rejected as it was considered the direct purchase of goods using the proceeds of crime is more readily detected than where the proceeds of crime are first laundered through the financial system. The J&LRSC noted that other FATF member jurisdictions[65] had not included motor vehicle dealers in their definitions, and noted that,[66]

> "the intent of the bill is to prevent the use of the <u>financial system</u> for the purpose of money laundering rather than to cover situations where the proceeds of crime are used in the direct purchase of goods."[67]

Similarly, other internationally identified targets of money launderers such as gold and bullion dealers, antique dealers, jewellers and auction houses, have been excluded from the provisions of the FTR Act, for the same reasoning.

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64 Above, pp15-16
65 Including the United Kingdom, Canada, France, Germany and Austria.
66 Above n61, p(ii)
67 emphasis added.

It was noted the policy of the bill not only aimed at preventing criminals using the financial system to launder money, but also provided mechanisms for detection when this use occurred.[68] Where the financial system is used to disguise illicit proceeds, money laundering is extremely difficult to detect.[69] Conversely, where criminal proceeds are applied directly to the purchase of goods, such purchases are difficult to conceal, unless the proceeds have first been laundered using the financial system.

The overall broad coverage of the range of businesses and institutions included or covered by the definition in s.3 of the FTR Act, was considered essential. This was in recognition of the fact that if anti-money laundering measures were not properly imposed to particular financial institutions or groups, they would inevitably become the targets of money launderers. For the same reasoning, officials proposed to monitor the position of dealers in goods, after an initiation period, to assess whether money launderers are deliberately focussing on these groups to avoid the implementation of the FTR Act measures. If so, assessment will be made to determine whether further anti-money laundering measures will be required.[70]

The definition of real estate agent under the section 3 definition of "financial institutions", was limited to the extent of receiving funds in the course of business for the purpose of settling real estate transactions. The J&LRSC accepted the submission of the REI that property management activities of real estate agents provided limited scope for money laundering activities, and were therefore specifically excluded.

Payment to a real estate agent of a deposit constitutes an "occasional transaction". The obligation to verify identity would arise only if there is a payment in cash above the prescribed amount, if there is evidence of structuring to avoid this requirement, or if the payment is a suspicious transaction. It was considered that these circumstances were likely to be rare, and therefore the obligations imposed on real estate agents

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68 Department of Justice, Report to the Chairman, J&LRSC, 28 September 1995, at 3.
69 Above n68, 3.
70 Above n68, 4.

would not be onerous. The J&LRSC saw no reason to treat the payment of deposits into a real estate agents trust account differently from any other occasional transaction covered by the FTR Bill.

The submission of Armourguard to the J&LRSC was that although security firms such as themselves may well fall within the definition of a financial institution, it was not appropriate that they have the FTR Act obligations imposed on them. The J&LRSC accepted that security firms and other cash carriers were different to other types of financial institutions covered by the bill in that they were unlikely to be used in themselves to launder money. The imposition of customer verification and record keeping requirements on security firms was seen to be an unnecessary duplication, as the identity of the customer will have been verified by the financial institution which receives the funds, and a record will be made of the entry of the funds into the financial system.

Security firms were therefore excluded from the financial institution definition. Other definitions of terms used in the FTR Act are included in Part I, at the interpretation section, s. 2(1). These include;

"Facility", "Facility holder", "Occasional transaction", "Transaction".

(c) Part II - Customer verification requirements.

Customer verification is required in three main circumstances:

(a) when a person applies to become a facility holder (section 6)

(b) when a person conducts an occasional transaction,

(i) involving cash in excess of the prescribed sum, or

(ii) there are reasonable grounds to believe that transactions are being structured to avoid the verification requirement, and the aggregate amount would exceed the prescribed amount. (section 7);[71]

[71] Above n 68,7.

(c) when a transaction is suspicious, for instance;

(i) the transaction may be relevant to the invetigation or prosecution of any person for a money laundering offence, or

(ii) the transaction may be relevant to the enforcement of the Proceeds of Crime Act 1991. (Section 11).

The requirement to verify identity of customers, is designed to enable the police to reconstruct a paper trail to identify the criminal. It was considered to be the most difficult part of the FTR Act conceptually, because of the need to frame the requirements in a way which would secure the application of the measures to a diverse range of institutions. The requirements were framed after consultation with the financial sector and have been designed so far as possible to minimise costs and compliance difficulties for financial institutions[73].

Submissions to the J&LRSC, in particular the non bank financial institutions[74] identified the customer verification provisions in Part II as an area of major concern, both because of the costs imposed and practical difficulties with compliance.

In contrast the New Zealand Bankers Association supported the general approach, as it considered the requirements of Part II were broadly similar to customer verification procedures its member banks have had in place since 1991.

The concerns of the non bank financial institutions were considered by the J&LRSC to fall under three broad headings;

i) The benefit and costs of the customer verification procedures

ii) Compliance difficulties

iii) Customer verification procedures

Consideration of these concerns is set out below, following the same order as above.

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[72] Above n 58, prescibed amount set by regulation at $9,999.99

[73] Department of Justice, briefing paper on the FTR Bill, to the Chairperson, J&LRSC, 19 June 1995, 4-5.

[74] In particular ASFONZ, FSF, NZLS, LOA

(i)(a)- The Benefits

Rigorous identification procedures place an obstacle in the way of those wishing to launder dirty money through legitimate financial institutions.As such, they deter money laundering activity and protect the financial institutions themselves against fraud and abuse by customers. There are also significant benefits for law enforcement agencies. Such procedures assist in the investigation of and prosecution of money laundering and it's predictate offences because when coupled with record keeping they allow suspicious transactions to be traced through the financial system to an identified source.[75]

Customer verification procedures were said to have become an international standard and their adoption by domestic financial institutions seen as necessary for them to maintain international credibility. They were considered a necessary deterrent to money laundering and of considerable importance in detecting it when it occurs.[76]

(i)(b)- The Costs

Financial institutions were consulted during policy development with the aim of minimising compliance costs while nevertheless providing an effective customer verification regime. Three features of the FTR Act were said to reflect the need to minimise compliance costs.[77]

- flexibility in the method of verification
- the limited circumstance in which verification of the identity of customers conducting one-off transactions is required (only where such a transaction is in cash of an amount in excess of the prescribed amount)
- the provisions of section 12, which permit a financial institution to rely on previous verification by some other financial institution in defined circumstances.

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[75] Above n 68, 11
[76] Above n 68, 11
[77] Above n 68, 11

(ii) Compliance Difficulties.

Numerous submissions highlighted difficulties in complying with the customer verification procedures of the proposed FTR Bill. These were mainly due to the nature of the financial institutions themselves, and the varying nature of financial services procedures involved.

Submissions which identified ways in which the costs of compliance could be minimised, without compromising the fundamental policies of the FTR Act, were generally accepted and implemented in the FTR Act.

Some of these concerns were:

- The timing of the requirement to identify.

It was accepted that the proposed requirement to verify identity before a facility was established or a transaction was conducted, was likely to be onerous and cause unnecessary delays where there is no face-to-face contact with customers. Thus the FTR Act allows verification of identity in these circumstances, to be made as soon as practicable after the facility is established or the transaction conducted (section 6(2)).

- Occasional transactions in cash made through one financial institution directly to another financial institution.

It was accepted that verification was unnecessary in this instance as the financial institution which receives the cash payment is required to verify the identity of the person who makes the cash payment in specified circumstances. Financial institutions were granted a specific exemption from the requirement to verify customer identity in these circumstances (section 7(2)).

- 'On behalf of' transactions, in particular nominee accounts operated by institutions are included by the broad definition of "financial institution".

The requirement to verify identity was limited to apply only in cash transactions above the "prescribed amount" set by regulation. (presently $9,999.99) .(section 8(1)).

- 'On behalf of' transactions where a trustee may be acting on behalf of numerous beneficiaries.

A new section was inserted into the FTR Act precluding the requirement to verify identity where a transaction is being conducted on a person's behalf, in his or her capacity as a beneficiary of a trust, where a person does not have a vested interest under the trust (section 10).

Specific provision was also made requiring verification of identity where an institution has reasonable grounds for believing that transactions are being structured in such a way as to avoid the verification of identity requirements. This practice is commonly referred to as 'smurfing' in overseas jurisdictions with mandatory cash reporting of transactions over a prescribed amount.

(iii) Customer Verification Procedures.

The customer verifications prescribed in the FTR Act (section 12) are left flexible. The financial institution may require the provision of such documentary or other evidence as is reasonably capable of verifying the identity of the person concerned. Flexibility in the method of verifying identity was considered desirable for a number of reasons:

- the costs and compliance burdens, which prescriptive identification requirements impose on financial institutions, are avoided;
- privacy concerns, especially the concerns expressed by the Privacy Commissioner, for instance the freedom of choice for an individual to conduct transactions anonymously for personal reasons. As was stated by the Privacy Commissioner in his report to the J&LRSC,

" it might perhaps be regretted that the activities of criminals lead,
perhaps inevitably, to restraints on individual choices that affect the rest of us,
no matter how law abiding we are."[78]

The Privacy Commissioner was also concerned to ensure that the obligation on poorer members of society, immigrants, refugees, or transient members or homeless people were not prevented from establishing a bank account through inflexible rules as to the means by which they must prove their identity.[79] The Privacy Commissioner supported the flexibility as to the means of identification.

- The effectiveness of such requirements. Where the method of verification is limited and well known, the identification procedures are more easily circumvented.

(iv) Offences / Defences

Financial institutions are liable to a fine not exceeding $ 20,000 in the case of an individual, and $ 100,000 in the case of a body corporate, for failing to verify identity in the 10 instances contained in the offence provision at section 13 of the FTR Act.

A defence is available where a financial institution is able to prove that it took all reasonable steps to ensure compliance with the verification procedures.(section 14) The J&LRSC noted that all forms of documentary evidence were capable of being dishonestly obtained. The intention of the legislation was that an institution would not be liable in respect of individual failures, as long as it has put in place proper verification systems and procedures.[80]

It was for this reason that the offence provision does not come into effect until February 1997, to allow time to establish those procedures.

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[78] Report by Privacy Commissioner to the Minister of Justice on the Financial Transactions Reporting Bill, 23 May 1995, 3
[79] Above n78, 3
[80] Above n 68, 21

(d) Part III - Suspicious transaction reporting requirements.

(i) Outline of requirements

Part III of the FTR Act provides for mandatory reporting, by financial institutions, of suspicious transactions. Section 15 requires a financial institution to report a transaction to the Police where the financial institution has reasonable grounds to suspect:

> (i) that the transaction is or may be relevant to the investigation or prosecution of any person for a money laundering offence;[81] or
>
> (ii) that the transaction is or may be relevant to the enforcement of the Proceeds of Crime Act 1991.[82]

In either of the above described situations, a financial institution shall as soon as practicable after forming that suspicion report the transaction to the Commissioner of Police.

New Zealand's adoption of a mandatory reporting regime, requiring financial institutions to report suspicious transactions as opposed to merely permitting them to do so, was said to be for two reasons.[83] First, the money laundering offence in the CAA 1995 only applies where a person has knowledge of money laundering. In the absence of a duty to report suspicious transactions, financial institutions would therefore be able to proceed with transactions which appear to be part of a money laundering operation without informing the Police. Second, was the concern noted above, that New Zealand must ensure that its financial systems were not open to abuse by those wishing to avoid the stringent reporting regimes existing in other countries already.[84]

An interesting submission was made by the NZLS, which raised the issue of "transferred suspicion". This situation was said to occur where a law enforcement

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[81] FTR Act s15(1)(b)(i)
[82] FTR Act s15(1)(b)(ii)
[83] Above n 73, 3
[84] See p46 above, n63

agency provides information to a financial institution, in order to prompt them into making a suspicious transaction report. Otherwise, the duty of confidentiality would preclude the disclosure of that information.

The J&LRSC made inquiries in England to assess whether this was a problem, (requiring further definition to exclude the fact that a law enforcement agency mentions a particular account, from making that customers account transactions suspicious) and concluded the problem was more theoretical than real. The banks in England contacted, (where a similar suspicious reporting regime is in place), advised that as a matter of policy the fact a particular account has been mentioned by an enforcement agency, is disregarded when considering whether or not to report suspicios account activity. The J&LRSC considered the issue was one which could be best addressed administratively, in the suspicious transaction guidelines to be developed.[85]

The term "suspicious transaction" is not defined or capable of definition. However some examples of what may constitute a suspicious transaction are :

- operating several accounts with cash deposits, where the total balance is very substantial
- operating an account that appears to have no personal banking or business related activity, but is used to receive or disburse large sums which have no obvious purpose
- back to back deposit / loan transactions with subsidiaries or affiliates of overseas banks in known drug trafficking areas
- unusual settlement of securities in cash form
- buying and selling securities with no discernible purpose or in apparently unusual circumstances
- using letters of credit and other methods of trade finance to move money between countries where this is not consistent with the customer's usual business

[85] Above n 68, 29

- building up large balances which are not consistent with the known turnover of a customer's business, and subsequently transferring this money to an overseas account

As noted earlier, the FTR Act provides specific immunity from civil and criminal liability for reporting details of suspicious transactions, if the disclosure of the information was made in good faith.(section 17 FTR Act). The J& LRSC also recommended the insertion of a further clause (section 18 FTR Act) whichprovides specific immunity from liability for disclosure of information relating to money laundering transactions. This new section was based on the former s.257 B of the Crimes Act 1961, which was repealed with the enactment of the FTR Act. This broader immunity was designed to ensure that there were no disincentives to reporting suspicious transactions.

The identity of persons, who in their capacity as an employee of a financial institution, either handled a transaction which is referred to in a suspicious transaction report, or who has made the report itself, is protected from being disclosed by the Police. This protection, at section 21 of the FTR Act was in recognition of concerns raised in the submissions, that some form of retribution could be taken against the person, who made the report in good faith. This protection of identity of the employee extends to judicial proceedings as well.(section 21(3))

(ii) Offences / Defences

The offences are set out at section 22, and include the following :

- failure to comply with the suspicious tranasaction reporting requirements at s.15. The penalty for this offence is a fine not exceeding,-

  (a) in the case of individual, $ 20,000

  (b) in the case of a body corporate, $100,000
- in making a suspicious transaction report, either makes a false or misleading statement, or omits material details to falsify or mislead the Police (liable to a fine not exceeding $100,000)

- contravenes any of the above provisions, for either an advantage or pecuniary gain, or with the intent to prejudice any investigation into a possible money laundering offence (liable to imprisonment for two years)
- disclosing without authority to a customer, that the Police are, or may be investigating a suspicious transaction (liable to imprisonment for two years). This provision is clearly designed to prevent anyone alerting a criminal to the fact that he or she is under investigation.

A defence of having reasonable systems and training programmes in place is available to financial institutions- section 23 FTR Act.

(iii) Suspicious transaction guidelines

The guidelines to be developed by the Commisioner of Police, in consultation with the Privacy Commissioner and the relevant financial institutions concerned, are not intended to be prescriptive. Their purpose is to merely provide guidance to financial institutions to help them recognise and detect suspicious transactions. As in the case of determining methods of verifying identification, the Privacy Commissioner supported the policy of the FTR Act that the guidelines remained flexible and did not become rules or statutory regulations.

It was recognised that it was not possible to say with any precision what makes a transaction suspicious. There are myriads of ways in which money laundering occurs, and the methods are likely to change over time as the criminals find new ways to avoid detection.[86]

The J&LRSC expressed the view that it was important not to treat the guidelines as rules. To do so could shift the focus away from whether the transaction was truly suspicious, to whether it falls within guidelines. A financial institution is of course required to report a suspicious transaction, whether or not it falls within the guidelines.[87]

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[86] Above n 68, 22

[87] Above n 61, vi (FTR Bill 1995)

A second reason for not treating the guidelines as rules, was that of publicity. It would be obviously undesirable for criminals to have access to the guidelines which will be designed to help them identify and detect suspicious activity. The guidelines should therefore have restricted access, only for use by the financial institution concerned.

(e) Part IV - Retention of records

Section 29 imposes upon financial institutions an obligation to keep transaction and verification records for a period of not less than 5 years.
Section 36 makes it an offence not to comply with these requirements, and imposes penalties of a fine not exceeding $ 20,000 in the case of an individual and $ 100,000 in the case of a body corporate.

To meet privacy concerns about the retention of records, provision is made at section 34 for the destruction of records as soon as practicable after the expiry of the period for the financial institution is required to retain the records.

(f) Part V - Reporting of cash at the border

Section 37 requires every person who arrives in, or leaves New Zealand, with cash on his or her person, or in his or her accompanying baggage, above the prescibed amount of $ 9,999.99, to make a report to a Customs officer before the cash leaves the control of the Customs.

The obligations to report imports and exports of cash, is correlative to the obligations imposed in the FTR Act. International experience has revealed that where there are effective measures for the preventing and detecting of money laundering through financial institutions, criminals may need to resort to physically transporting cash to another jurisdiction for laundering purposes. The destinations are clearly those countries with less stringent reporting regimes, where the detection of laundering will be more difficult.

Therefore the reporting requirement in this part of the FTR Act, serves two purposes-

- preventing the proceeds of criminal offences committed in other countries from being brought into New Zealand for laundering here,
- preventing the proceeds of crime committed in New Zealand from being transported out of the country for laundering elsewhere.

It is an offence not to comply with this requirement, carrying a maximum penalty of a fine of $2,000. Wilful obstruction of a Customs officer wanting to carry out a search of a persons baggage or the person concerned, under powers granted under Part V of the FTR Act to do so, (ss 38,39) is an offence punishable by a maximum fine not exceeding $1,000, or imprisonment of up to 3 months.

In determining to set the prescribed amount at $9,999.99, consideration was given to law enforcement needs, the need to prevent unnecessary inconvenience to international travellers, and the need to set the threshold at a level which would maintain the international credibility of New Zealand's anti-money laundering regime. Officials from the Reserve Bank, Treasury, Police, Customs, Ministry of Agriculture and Fisheries, and the Minister of Foreign Affairs and Trade all agreed that $10,000 was an appropriate threshold sum for three reasons.

1) A threshold of this amount was necessary to minimise the risk of criminals bringing illicit funds to New Zealand to avoid the reporting requirements in Australia (where financial institutions are required to report all cash transactions of AUD $10,000 or more to 'Austrac', a central analytic agency established to receive such reports)

2) In both the USA and Australia the threshold for reporting transactions at the border is $10,000 (in each case in the local currency) and the requirement to report at this level is well known and understood by international travellers.

3) There is limited information about the amount of cash generally carried by persons to and from New Zealand. However, based on information from Australia, NZ Customs predicted that a threshold of $10,000 would affect less than 4,000 travellers per year, out of total annual passenger movements of 6 million people. 60% of

people travelling to New Zealand are from Australia, and a further 15% are from the United States of America. A threshold at this level was therefore said to be likely to cause minimal disruption or inconvenience to international travellers.[88]

E. CONCLUSION

New Zealand has recognised that it is not immune to money laundering activity, identifying examples of it occurring both domestically, as well as being used in the laundering processes of international groups and individuals.

Money laundering has been identified at an international level as being a world wide phenomenon, and one that requires international co-operation in attempts to combat it. It is seen as a process whereby the proceeds of criminal activity are concealed in order to prevent the detection of the offending, and to enable the proceeds themselves to be preserved and used, without alerting the suspicions of law enforcement agencies as to their illegal origins. It also enables the proceeds of the criminal activities to be reinvested to finance continuing illegal enterprises or activities.

As a result, it was considered that anti- money laundering measures were required internationally, in the fight against serious crime. The international initiatives were primarily a response to the rapid growth of international drug trafficking, and the vast profits it was estimated to be generating for criminal groups. The international community has subsequently determined that anti-money laundering measures should apply not just to drug trafficking offences, but to all serious crime.

New Zealand has accepted it has international obligations to introduce anti-money laundering legislation, and taken its' responsibilities seriously. It has now enacted a

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[88] Ministry of Justice, report to the Minister of Justice, 5 June 1996 1,2

package of legislation, in recognition of the severity of the international problem, the growth of money laundering activity domestically and its use by foreigners in New Zealand, and also to ensure the credibility of New Zealand and its' financial institutions were not jeopardised. The identified link between the financial system and money laundering activities has also been accepted, and anti-money laundering measures have been introduced which impose stringent requirements on a broad range of financial institutions. In doing so, New Zealand appears to have balanced the requirements of law enforcement against the costs of imposing those measures on financial institutions. By retaining flexibility in the measures imposed, it has also anticipated being able to adapt, to combat the efforts of criminals to evade the measures themselves.

The importance of fulfilling the international obligations assumed, appears to have been a paramount concern, in particular in the enactment of the Financial Transactions Reporting Act 1996. The recommendation for the commencement date for this legislation was timed to ensure New Zealand could provide a favourable report as to it's likely implementation date, prior to New Zealands scheduled reporting date to the FATF Secretariat meeting in Washington DC, on 25 June 1996. The recommendation for a commencement date of the legislation on 1 August 1996, was made on 5 June 1996.

The legislation now enacted has adopted the recommendations of international treaties, as to what it should contain. The confiscation legislation appears to have been wholeheartedly endorsed by the New Zealand judiciary. It remains to be seen whether the same approach is adopted with regard to the recently enacted money laundering offence provisions.

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List of Submissions to the Justice and Law Reform Select Committee on the Financial Transactions Reporting Bill 1995

Submission No.	Organisation	Abbreviation
1	Motor Vehicle Dealers Institute	MVDI
2	Totalisator Agency Board	TAB
3	Association of Superannuation Funds of New Zealand Inc.	ASFONZ
4	New Zealand Bankers Association	NZBA
5	Financial Services Federation	FSF
6	Investment Funds Association of New Zealand Inc.	
7	New Zealand Law Society	NZLS
8	Life Offices Association of New Zealand Inc.	LOA
9	Legislation Advisory Committee	LAC
10	Real Estate Institute of New Zealand	REI
11	American Express International Limited	Amex
12	Report of the Privacy Commissioner	
13	Armourguard Security Services Ltd	Armourguard
14	Report of the Serious Fraud Office	
15	Report of the Regulations Review Committee	