ASIA/PACIFIC GROUP ON MONEY LAUNDERING

TONGA ME1

Mutual Evaluation Report

Anti-Money Laundering and Combating the Financing of Terrorism

TONGA

15 July 2010

Tonga is a member of the Asia/Pacific Group on Money Laundering (APG). This evaluation was conducted by the APG and was adopted as a 1st mutual evaluation by its Plenary on 15 July 2010.

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ACRONYMS

AG	Attorney General
AML/CFT	Anti-Money Laundering and Combating the Financing of Terrorism
APG	Asia/Pacific Group on Money Laundering
BCP	Basel Core Principles
BCR	Border Cash Report
CDD	Customer Due Diligence
CID	Criminal Investigation Division (of Tonga Police)
DNFBPs	Designated Non-Financial Businesses and Professions
FATF	Financial Action Task Force
FI	Financial institution
FIU	Financial Intelligence Unit
KYC	Know your customer/client
LEA	Law enforcement agency
MOU	Memorandum of Understanding
ML	Money laundering
MLA	Mutual legal assistance
MLCI	Ministry of Labour, Commerce and Industry
MLPC Act	Money Laundering and Proceeds of Crime Act 2000
NPO	Non-profit organization
NRBT	National Reserve Bank of Tonga
PEP	Politically-exposed person
SRO	Self-regulatory organization
STR	Suspicious Transaction Report
TCU	Transnational Crime Unit (of Tonga Police)
TF	Terrorist financing
TNC Act	Transnational Crimes Act
TRA	Transaction Reporting Authority
UN	United Nations Organization
UNSCR	United Nations Security Council Resolution

PREFACE - INFORMATION AND METHODOLOGY USED FOR THE EVALUATION OF TONGA

1. The evaluation of the anti-money laundering (AML) and combating the financing of terrorism (CFT) regime of Tonga was based on the Forty Recommendations 2003 and the Nine Special Recommendations on Terrorist Financing 2001 of the Financial Action Task Force (FATF), and was prepared using the AML/CFT Methodology 2004 (February 2009 version). The evaluation was based on the laws, regulations and other materials supplied by Tonga, and information obtained by the evaluation team during its on-site visit to Tonga from 2 to 13 November 2009, and subsequently. During the on-site the evaluation team met with officials and representatives of all relevant Tongan government agencies and the private sector. A list of the bodies met is set out in Annex 2 to the mutual evaluation report.

2. The evaluation was conducted by a team of assessors composed of Asia/Pacific Group on Money Laundering (APG) experts in criminal law, law enforcement and financial/regulatory issues. The Evaluation Team consisted of: Ms Elizabeth Liu, Senior Government Counsel, International Law Division, Department of Justice, Hong Kong, China (legal expert); Mr Mark Godfrey, Director, Banking & Finance, Supervision, Australian Transaction, Reports and Analysis Centre and Mr Edward Herman, Senior Supervisor, Cook Islands Financial Intelligence Unit (financial/regulatory experts), Detective Senior Sergeant Ron Macmillan, Proceeds of Crime Unit, New Zealand Police (law enforcement expert); and Mr Eliot Kennedy, Deputy Secretary, APG Secretariat.

3. The experts reviewed the institutional framework, the relevant AML/CFT laws, regulations, guidelines and other requirements, and the regulatory and other systems in place to deter money laundering (ML) and the financing of terrorism (TF) through financial institutions and Designated Non-Financial Businesses and Professions (DNFBPs), as well as examining the capacity, the implementation and the effectiveness of all these systems.

4. This report provides a summary of the AML/CFT measures in place in Tonga as at the date of the on-site visit (November 2009) or immediately thereafter. It describes and analyses those measures, sets out Tonga's levels of compliance with the FATF 40+9 Recommendations (see Table 1), and provides recommendations on how certain aspects of the system could be strengthened (see Table 2).

5. The Evaluation Team would like to express its sincere gratitude to the Tongan authorities for their open and proactive cooperation throughout the entire evaluation process.

EXECUTIVE SUMMARY

Key Findings

1. **Tonga has demonstrated political commitment to anti-money laundering (AML) efforts since the 2000, when it passed the Money Laundering and Proceeds of Crime (MLPC) Act.** The MLPC Act criminalises ML; provides for the forfeiture and confiscation of the proceeds of crime; provides for customer identification, record keeping and suspicious transaction reporting; and establishes a Financial Intelligence Unit (FIU) and a process for receiving and disseminating suspicious transactions reports. Tonga has already identified many of the deficiencies in its AML/CFT system and has drafted but not enacted amendments to the MLPC Act, MLPC Regulations, and a new Transnational Crimes Act which would address many of those deficiencies to a significant extent.

2. **While a formal ML/TF risk assessment has not been conducted, Tonga is not a major money laundering (ML) or terrorist financing (TF) centre**. Tonga does not have a major crime problem although there has been an increase in the number of property related offences. There have been a number of reported and prosecuted cases of both private and public sector fraud, and low-level corruption which have all involved proceeds of crime.

3. **The ML offences are largely in line with international requirements but penalties available for natural persons are not sufficiently proportionate or dissuasive and there is a lack of focus on ML investigations.** Penalties for both natural and legal persons are inadequate and should be substantially increased. Many but not all of the 20 designated categories of predicate offences are currently caught by the MLPC Act. The MLPC Act has never been utilised as a basis of any criminal prosecution or criminal charges. Opportunities for ML and proceeds of crime investigations have been limited however there have been several opportunities that were not pursued.

4. **While the TF threat is low, there are significant shortcoming both in relation to the criminalisation of TF and the freezing of terrorist assets.**

5. **There is a lack of resources and expertise in most of the relevant agencies which may be contributing to a lack of detection of ML and proceeds of crime action.** Investigators may not have the capacity or skills to investigate suspicious transactions. Furthermore, ML activities may be carried out outside of the banking system, for example using alternate remittance systems.

6. **The Transaction Reporting Authority (TRA) is generally vested with the powers of an FIU although there are some serious limitations in its powers.** The TRA's functions under the MLPC Act do not explicitly include analysis of STRs and lack of timely access to financial, administrative and law enforcement information severely limits the TRA's ability to effectively analyse of STRs. Further training and resources are required.

7. **Tonga has introduced a basic level of customer due diligence (CDD) requirements, but resource constraints mean these requirements apply only to the four licensed banks and four authorised restricted foreign exchange dealers supervised by the National Reserve Bank of Tonga (NRBT).** Other financial institutions and cash dealers have not been made aware of the requirements, nor has the compliance of those other FIs or cash dealers been assessed or enforced by any competent authority. The informal remittance sector is potentially very large and may pose a particular risk. Apart from scope issues, the existing CDD requirements do not fully meet the requirements of the FATF Recommendations.

8. **AML/CFT measures have not been extended to the DNFBP sector,** though the current definition of "cash dealer" in the MLPC Act captures some DNFBPs and draft amendments to the MLPC Act would, if enacted, extend these measures to the entire DNFBP sector.

9. **ML is not an extraditable offence under the Extradition Act, and there are doubts as to whether ML is a 'serious offence' as required under the Mutual Assistance in Criminal Matters Act.** These deficiencies will be rectified if and when the penalty for ML is increased, as is the current intention.

10. **Key recommendations made to Tonga include**: increase the penalties for ML; address deficiencies in the criminalisation of TF and freezing of terrorist assets; increase the resources and level of expertise of the key agencies in the AML/CFT system (FIU, police, supervisors); focus more on possible cases of ML/proceeds of crime investigations; extend AML obligations to all financial institutions and cash dealers; strengthen legal and administrative penalties and sanctions available and applied to persons and entities fail to comply with AML/CFT obligations; and strengthen information sharing amongst relevant authorities both domestically and internationally.

Legal Systems and Related Institutional Measures

11. The MLPC Act was enacted in 2000, but has never been used as a basis of any criminal prosecution or criminal charges. Although some of the current provisions of the MLPC Act comply with a number of the requirements of the FATF Recommendations, there are a number of deficiencies and areas of ambiguity, many of which have been recognised by the Tongan authorities and are to be addressed by proposed amendments to the MLPC Act. Many but not all of the 20 designated categories of predicate offences are currently caught by the definition of "serious offence", with shortcomings in relation to the coverage of offences relating to illicit arms trafficking, illicit trafficking in stolen and other goods, fraud, piracy of products, environmental crime, kidnapping, illegal restraint, hostage taking, insider trading and market manipulation. In addition, ML offences are excluded from the definition of "serious offence" in the MLPC Act. Penalties for both natural and legal persons are inadequate and should be substantially increased.

12. While opportunities to pursue ML have been limited, it is not clear that the Tongan authorities have turned their minds to the possibility of pursuing ML charges where opportunities have arisen, or that the relevant agencies would have the technical and other resources to readily pursue such investigations. Tongan authorities have acknowledged that there is a lack of resources and expertise in most of the relevant agencies which may be contributing to a lack of detection of ML and proceeds of crime action. Crown Law and the law enforcement agencies should work closely together to ensure that the law enforcement agencies are well aware of the legal requirements of ML offences to facilitate their investigation.

13. TF is criminalised under the Transnational Crimes Act 2005 (TNC Act). Since its enactment in 2005, no prosecution or investigation has been conducted for TF, nor have any suspicious transaction reports relating to TF been submitted. TF offences are predicate offences for ML since they fall under the definition of "serious offence" under the MLPC Act. There are however serious deficiencies in the TNC Act. There is no provision in the TNC Act on the provision or collection of funds (property) for use by a terrorist organization or by an individual terrorist. The TNC Act requires "the property will be used in connection with an act of terrorism". It connotes the property has to be linked to a specific terrorist act. The Act provides for the offence of providing services to a specified entity but no entity has yet been specified by the Attorney General. These deficiencies should be rectified as soon as possible.

14. Tonga has a conviction-based confiscation regime. While the MLPC Act establishes a basic confiscation regime, there are some serious deficiencies. Because ML is not a serious offence by definition, under the MLPC Act the confiscation of the proceeds of a ML offence cannot be made. Confiscation of property that constitutes instrumentalities intended for use in the commission of ML/TF or other predicate offences and property of corresponding value are not covered. There is also a lack of clarity of definitions of important terms – "tainted property", "proceeds of crime" and "realisable property – that may undermine effectiveness. There has been no confiscation or other provisional measures enforced under the MLPC Act since its enactment in 2000. While opportunities to use the confiscation powers have been limited, this lack of action is also connected to the lack of expertise and resources of the law enforcement agencies to handle ML/TF offences in general. There is sufficient capability within Crown Law to manage and direct necessary enquiries, with the assistance of the Police Commander, to ensure satisfactory outcomes to proceeds of crime proceedings it may instigate. It is recommended that consideration be given to establishing a small Proceeds of Crime Unit within the Tonga Police

15. There is no specific provision for the freezing of funds used for TF under the TNC Act, but the provisional measures and confiscation procedures under the MLPC Act are applicable for the freezing of funds used for TF. However, there are deficiencies in these provisions and particular problems would arise in using the MLPC Act for freezing of terrorist funds. It is therefore recommended that a new set of laws on freezing of terrorist funds should be implemented as the Tongan authorities are planning to do.

16. The National Reserve Bank of Tonga (NRBT) was appointed as the Transaction Reporting Authority (TRA) in July 2001 under section 11(1) of the MLPC Act 2000. The TRA is generally vested with the powers of an FIU although there are some serious limitations in these powers. The TRA's functions under the MLPC Act do not explicitly include analysis of STRs and lack of timely access to financial, administrative and law enforcement information severely limits the TRA's ability to effectively analyse of STRs. There is a lack of guidance to reporting entities others than those eight entities directly supervised by the NRBT; the TRA's AML Guidelines have not in practice been circulated or applied to approximately 259 reporting entities (credit unions and money lenders). Another serious deficiency is the TRA's lack of clear authority to share information with foreign counterparts. Additional resources and additional training of TRA staff are also required.

17. Tonga Police is the sole investigation authority in Tonga. There have been no ML/TF related investigations carried out by police, nor proceeds of crime related inquiries undertaken. There has been no utilisation of special legislative powers provided in the MLPC Act, which are generally adequate. Any ML/TF investigation would be undertaken by the Transnational Crime Unit (TCU) of Tonga Police. The TCU's current staffing is well below an acceptable level, however there is current consideration to increase its resources. It is recommended that the police consider establishing a small (eg two person) Proceeds of Crime Unit within Tonga Police, staffed by an experienced AML specialist and one investigator ,who could be supported by other investigative staff as required. This specialist unit is vital ensure the success of the AML/CFT and proceeds of crime response.

18. Although the Foreign Exchange Control (Restriction on Removal of Cash) Regulations 2009 provide for a declaration reporting system, both on arrival and departure, there are currently no measures in place to monitor inward or outward cash movements. It is planned to introduce the required declaration documents in the near future and draft amendments to the MLPC Act would strengthen the declaration system. Further training of Customs staff in AML/CFT issues is required, as is additional resources and enhanced domestic and international intelligence coordination.

Preventive Measures—Financial Institutions

19. The financial sector in Tonga is small, and remains largely based on cash and banking institutions, though there are also a relatively large number of smaller financial institutions. The NRBT is responsible for licensing and supervising deposit-taking institutions. As well as having the functions of an FIU, the TRA also acts as the AML/CFT supervisor. The NRBT also administers the Foreign Exchange Control Act which includes licensing and supervising foreign exchange dealers, bureaux de change, and money remittance businesses, regulating foreign exchange payments of more than TOP$50,000[1], as well as cross-border cash transactions.

20. The introduction of the MLPC Act and the establishment of the TRA have provided Tonga with a basic level of CDD requirements. While the MLPC Act as worded captures a wide range of financial institutions and cash dealers, in practice, due to resource constraints the TRA has imposed the MLPC Act requirements only on the four licensed banks and four authorised restricted foreign exchange dealers supervised by the NRBT. Other financial institutions and cash dealers have not been made aware of the MLPC Act requirements, nor has the compliance of those other FIs or cash dealers been assessed or enforced by any competent authority.

21. Four AML Guidelines have been issued under the MLPC Act covering CDD, suspicious transaction reporting, establishment of a compliance regime and other measures required by the FATF Recommendations. On paper, these Guidelines apply to all financial institutions and cash dealers. In practice, however, they have only been issued to the eight NRBT-supervised entities. The AML Guidelines are considered to be "other enforceable means" for the eight entities licensed by the NRBT. They are not however enforceable for the great majority of financial institutions and cash dealers that are not licensed by the NRBT.

22. The TRA has only undertaken a limited number of assessments of the compliance of the core financial institutions since the MLPC Act was introduced. Credit unions, money lenders and cash dealers (insurance companies and the retirement scheme) are not monitored by the TRA. They are required to hold a business licence (where they operate a business) from the Ministry of Labour, Commerce and Industry (MLCI) that is renewed annually, but are not subject to AML/CFT supervision by the MLCI.

23. Apart from issues of scope and effectiveness, the CDD requirements set out in the MLPC Act and the relevant AML Guideline do not fully meet the requirements of the FATF Recommendations. Beneficial owners are not required to be identified; there is no requirement to obtain information about the intended purpose and nature of the business relationship; ongoing due diligence on business relationships is not required; enhanced due diligence for higher risk customers is not required; simplified reduced CDD measures may be applied to financial institutions that are subject to very limited oversight; and simplified/ reduced CDD may apply when a suspicious ML/TF or other higher risk scenarios exist. The MLPC Amendment Bill, along with the proposed MLPC Regulations, addresses a majority of the current deficiencies. Tonga should enact the draft amendments and implement the regulations as soon as possible.

24. The MLPC Act does not cover situations where financial institutions or cash dealers rely on another party to undertake CDD processes for them. The relevant AML Guideline, which is enforceable only for the eight NRBT licensed financial institutions, does address some aspects of the

[1] Tongan Pa'anga. As at November 2009, TOP$1.00 = US$0.59

FATF requirements, but contains deficiencies. Proposed MLPC Regulations would substantially address the FATF requirements.

25. Section 23 of the MLPC Act states that the provisions of the Act shall have effect notwithstanding any obligation as to any secrecy or other restriction on disclosure of information imposed by law or otherwise. In short, the secrecy provisions of any other law are overridden by the MLPC Act. However, the competent authorities believe that they are not able to readily access information from relevant domestic and foreign competent authorities due to the lack of clear legislative authority concerning information sharing amongst themselves. Tonga should review the current information sharing legal framework between Tongan competent authorities as soon as possible

26. Section 13 of the MLPC Act sets out requirements for financial institutions and cash dealers to establish and maintain customer records. However, only basic record keeping requirements are in place. The TOP$10,000 threshold above which records are required to be kept means that records of many transactions, including wire transfers, are not required to be kept. In addition, the MLPC Act does not stipulate that the record retention should be regardless of whether the account or business relationship has been terminated and does not require that the records should be sufficient to reconstruct the transaction. Tonga should review the proposed amendments to the MLPC Act for consistency with the FATF Recommendations, in particular SRVII, enact the amendments and implement the draft Regulations as soon as possible.

27. The requirement that financial institutions pay special attention to all complex, unusual large transactions, or unusual patterns of transactions, that have no apparent or visible economic or lawful purpose is not covered by the MLPC Act. AML Guideline 2, which relates to suspicious transactions, requires that institutions be alert to unusual transactions so that they can report STRs but the most of the requirements of Recommendations 11 and 21 are not specifically addressed by the Guideline. In addition, as noted previously, the AML Guidelines are not enforceable for the majority of entities. The Evaluation Team notes and supports Tonga's intention to make the requirements outlined in the AML Guidelines in relation to unusual transactions enforceable through either amendments to the MLPC Act or proposed MLPC Regulations.

28. Tonga has an STR system in place, but there are concerns as to the scope of the reporting requirement and the overall level of reporting. The reporting requirement is section 14 of the MLPC Act is narrower than required under Recommendation 13, as a reporting entity must suspect that information that it has concerning a transaction "may be relevant to the investigation or prosecution of a person for a serious offence". There is also a cascading effect from Recommendation 1, where not all predicate offences are covered. While predicate crime levels in Tonga appear to be relatively low, overall the Evaluation Team felt that STR reporting levels were too low, in particular from the licensed cash dealer/money remitter sector. In addition, the failure to extend in practice the statutory STR reporting requirement to the full range of FIs and cash dealers has a significant adverse impact on the level of reporting.

29. Section 18(3)(a) of the MLPC Act provides that a person commits an offence if they disclose that an STR has been prepared or sent to the TRA. However, it is a defence under section 18(3)(b) of the MLPC Act if the person "did not know or have reasonable grounds to suspect that the disclosure was likely to prejudice any investigation...". This defence is not consistent with the requirements of Recommendation 14 and is of concern.

30. While the MLPC Act and AML Guidelines address many of the FATF requirements regarding internal controls and compliance, implementation has only been assessed for NRBT-

licensed financial institutions and AML Guideline 4, which contains many of the details regarding internal controls, is not enforceable for most entities. It is recommended that obligations to meet the requirements of FATF Recommendation 15 and 22 be set out in law, regulation or other enforceable means, for example through the enactment of the proposed MLPC Regulations.

31. The MLPC Act does not prohibit the establishment of or dealing with shell banks. However, a physical presence in Tonga, established within six months of being granted a licence, is a licence condition for banks and foreign exchange dealers. The Evaluation Team notes and supports Tonga's intention to make the requirements outlined in the AML Guidelines in relation to dealing with shell banks enforceable through proposed Regulations.

32. Other than for NRBT licensed entities, the TRA's powers to force cooperation with monitoring and supervision activities are limited. No sanctions have been applied. The growth and development of the money lender and unofficial remitter sectors is a concern given the resource constraints of the TRA. Tonga should undertake a risk assessment of these growing and unlicensed market segments to determine the appropriate level of regulation and the resources required

33. The NRBT licenses and regulates the formal money transfer sector, and has conducted both offsite and onsite supervision of licensed foreign exchange dealers to ensure compliance with conditions of their licence which includes compliance with AML/CFT requirements. However, Tongan authorities acknowledge that there is a significant informal money transfer sector within Tonga, but there has been no effective engagement with the sector or work undertaken to quantify or measure its impact.

Preventive Measures—Designated Non-Financial Businesses and Professions

34. Tonga has a relatively small DNFBP sector, which is overseen by the Ministry of Labour, Commerce and Industries (MLCI). There are no casinos/internet casinos operating in Tonga and casinos are prohibited under the Criminal Offences Act. AML/CFT measures have not yet in practice been extended to the DNFBP sector, though the current definition of "cash dealer" in the MLPC Act captures some DNFBPs and draft amendments to the MLPC Act would, if enacted, extend these measures to the entire DNFBP sector. Tonga should take steps to regulate/supervise/monitor the full range of DNFBPs for AML/CFT purposes as soon as possible.

Legal Persons and Arrangements & Non-Profit Organizations

35. In preventing the use of legal persons for illicit purposes, Tonga relies primarily on a centralised system of company registration, corporate record keeping and financial reporting requirements, and the investigative powers of competent authorities. Although the Register maintained by the MLCI contains useful information about the legal ownership of domestic legal persons, and the legal control of both domestic and overseas legal persons, the information is not necessarily kept up to date and in any case it contains no information about the beneficial ownership and control of legal persons. Tonga should broaden its requirements to ensure that information on the beneficial ownership and control of legal persons is readily available to the competent authorities in a timely manner.

36. Tongan authorities provided very little information, statutory or otherwise, on the system of trust law in the country. It is the evaluators' understanding, based on open source research, that Tonga has a British common law system of trusts; however, there is insufficient information upon which to evaluate Tonga's system against the criteria for Recommendation 34. Based on this lack of

information the evaluators are of the view that Tonga has failed to satisfy the team that it meets the requirements of this Recommendation.

37. Non-profit organisations (NPOs) may be licensed or registered under the Charitable Trust Act 1993 or the Incorporated Societies Act 1984, however it is not mandatory for trusts or society to be registered or incorporated and most are not. The exact number of NPOs is not known, however it is estimated to be in the thousands; there are 175 registered charitable trusts and 238 incorporated societies. Tonga has not undertaken a review of the adequacy of existing laws and regulations that relate to non-profit organizations that can be abused for the financing of terrorism. No outreach has been undertaken with the NPO sector with a view to protecting it from TF abuse. The authorities have not taken effective steps to promote supervision and monitoring of NPOs. There are no effective mechanisms in place to ensure domestic cooperation, co-ordination or information sharing, and no contact points have been identified for dealing with international requests for information about NPOs. Given the nature of the NPO sector in Tonga, it is likely that the risk of TF (and ML) through the NPO sector is very low and there is no evidence to suggest that any NPO in Tonga has been used as a vehicle for TF or ML, however the current shortcomings should be addressed.

National and International Co-operation

38. The AML/CFT National Committee, which was established in 2003, is the lead body for AML/CFT. The National Committee's main function is to determine broad policy objectives for AML/CFT. It has established an AML/CFT working group which meets as and when required. Generally, there is a good level of cooperation and coordination in Tonga, with appropriate mechanisms having been created at both the policy and operational levels. Commitment from all partners involved in ML, TF and proceeds of crime recovery, and the development of further expertise in these areas, is however required to enable fully effective and timely responses to matters when appropriate. In addition, it is recommended formal MOUs should be established as a matter of urgency, to permit and encourage information sharing among Tonga's law enforcement agencies, pending amendment of legislation to enable better sharing of information.

39. Tonga acceded to the Vienna Convention on 29 April 1996. Most of the articles under the Vienna Convention have been put into legislation, though with certain deficiencies as noted above. Tonga is not a party to the Palermo Convention, but is considering its accession. Tonga acceded to the Terrorist Financing Convention on 9 December 2002. Terrorist financing is criminalized in accordance with the TF Convention, with deficiencies as described above. Little is in place to implement relevant UN Security Council Resolutions.

40. The Mutual Assistance in Criminal Matters Act (MACM Act) sets out the framework for mutual legal assistance. Under section 4 of the MACM Act, the Attorney General may make and act on requests for mutual assistance in any investigation or proceeding relating to a serious offence. An offence is a serious offence if, the conduct has occurred in Tonga, would have constituted an offence for which the maximum penalty is not less than 12 months (ie there is a dual criminality requirement). However, it is arguable whether ML offences are caught since the current penalty for the ML offence is a maximum penalty for money laundering is imprisonment not exceeding 12 months. This uncertainty will be rectified if and when the penalty for ML is increased, as is the current intention. Tonga has not made or received any requests from overseas jurisdictions pursuant to the MACM Act.

41. ML is not an extraditable offence under the Extradition Act. Under the Extradition Act persons can be extradited only for relevant offences. Relevant offences are offences where the penalty is two years' imprisonment or more.

42. Regarding informal international cooperation, other than for the TRA, current arrangements appear to be working relatively well. Given the lack of statistical data, however, the Evaluation Team was not able to determine that the mechanisms for international cooperation are fully effective.

Resources, statistics and other issues

43. Tongan authorities have acknowledged that there is a lack of resources and expertise in most of the relevant agencies which may be contributing to a lack of detection of ML and proceeds of crime action. The resources and technical capacity necessary for the effective implementation of the confiscation system are lacking. Current staffing resources allocated to the TRA are considered inadequate to meet its functions both as an FIU and as AML/CFT supervisor. The TCU lacks the resources to undertake its own investigations, and meet its foreign obligations. Tonga has an extensive coastline, and insufficient resources to ensure prevent illegal passage of persons and property.

44. Statistics provided were generally satisfactory, though there was some uncertainty as to completeness/accuracy of statistics for formal international cooperation and a lack of statistics regarding informal international co-operation

45. Tonga is currently processing a replacement to the TNC Act, and also amendments to the MLPC Act, in order to streamline and enhance Tonga's AML/CFT systems. These new bills should be before the Legislative Assembly by early 2010, and hopefully enacted by May 2010. Their enactment would significantly improve Tonga's levels of technical compliance with the international standards.

1. GENERAL

1.1. General Information on Tonga

The Tongan Archipelago

1. The Kingdom of Tonga is located east of Fiji and south-west of Samoa. It has a land area of 718 square kilometres. Tonga consists of 177 small islands of which 40 are inhabited. The main islands are Tongatapu, Vava'u, Eua, Ha'apai and the Niua's, Niuafo'ou and Niuatoputapu.

2. Tonga's population is approximately 102,000 and more than 25% of the population resides in Nuku'alofa, the capital, which is located on the main island of Tongatapu. The population figures have remained stable due largely to emigration. It is estimated that around 100,000 Tongans reside in New Zealand, the United States, and Australia.

The Tongan Economy

3. Tonga is a small open economy, geographically isolated, with a narrow resource base. The economy is based on agriculture, tourism and fishing. It relies on remittances and external development assistance for much of its development.

4. Total GDP in 2008 was US$258 million. The economy grew by 1.2% in 2008. Agriculture, tourism and fisheries contribute about 23% to GDP in recent years. The financial and business service sectors contribute 10% to GDP.

5. The Government is the main employer and employs about 40% of the total employed labour force (est. 10,000). The 2008 GDP per capita was US$2,510 and the average salary wage earned was US$4,000 per annum.

6. Remittances from Tongans living abroad have subsidized incomes and have become the country's primary source of foreign exchange income at 49% of GDP. Following the recent global economic and financial crisis, remittances in 2009 have fallen by an estimated 7% compared to the same period in 2008. It is expected that remittances would continue to fall if employment continues to deteriorate in the United States, Australia and New Zealand.

Table 1: Total value of remittances[2]

	2006/07	2007/08	2008/09
Private ($m)	186.8	202.8	174.9

7. The financial system in Tonga consists of three private commercial banks, a Government owned development bank, the central bank, insurance companies and insurance intermediaries, money transfer companies, money changers, credit unions, cooperatives and many small credit companies. There are no securities or offshore sectors in Tonga. There are four banks offering commercial services (one Australian bank, two locally incorporated foreign banks and one Government owned bank) all of which are regulated by the National Reserve Bank of Tonga (NRBT) pursuant to the Financial Institutions Act 2004.

[2] All monetary amounts in this report are in Tongan Pa'anga (TOP$), unless otherwise indicated.

8. There are four money transfer companies licensed as foreign exchange dealers who carry on money remittance business. These companies are licensed by the NRBT pursuant to the Foreign Exchange Control Act. Though there is significant anecdotal evidence that there are unlicensed institutions carrying on the business of money transfer and money changing, the NRBT lacks the resources to locate these suspected institutions and to require them to be licensed under the Foreign Exchange Control Act or to require them to cease carrying on such businesses.

9. There are 45 credit unions and about 250 cooperative societies which are regulated for general purposes by the Registrar of Cooperative Societies and Credit Unions pursuant to the Credit Unions Act and the Cooperative Societies Act respectively. The credit unions are mostly in the villages and have been formed to provide small loans for their members. The cooperatives facilitate the setting up of small businesses. Both of these institutions have to file returns and are subject to on-site inspections and audits of their accounts by the Registrar, which is part of the Ministry of Labour, Commerce and Industries. At present, however, there is no supervision of these entities for AML purposes.

10. There are no securities dealers, futures brokers, bullion dealers, gambling houses, casinos, lotteries or unit trusts operating in Tonga.

The Government

11. Tonga has been a constitutional monarchy since 1875 with the granting of the Act of Constitution of Tonga Act. The Kingdom was a British protectorate until 1970 and has, since that time, been an independent hereditary constitutional monarchy within the Commonwealth of Nations.

12. The Government consists of the traditional branches of Government, namely the Executive (consisting of the King, Privy Council, Cabinet and the Ministers), the Legislative Assembly (the law making body), and the Judiciary.

13. His Majesty appoints the Prime Minister, and also the Ministers of the Crown, upon the advice of the Prime Minister. The Privy Council is the highest executive authority which consists of His Majesty the King, the Ministers of the Crown and Governors of Ha'apai and Vava'u island groups. Under the Constitution His Majesty governs the land but his Ministers are responsible.

14. The Prime Minister is in charge of the day to day affairs of Government and chairs the Cabinet. The 14 Cabinet members consist of both elected and appointed members, 10 appointed by the Monarch and four appointed from among the elected members of the Legislative Assembly, including two each from the nobles' and people's representatives.

15. Upon coming to the throne in September 2006, His Majesty publicly announced that all his executive powers will be exercised by the Prime Minister, except his prerogative and judicial powers, and that Ministers of the Crown will be appointed upon recommendation of the Prime Minister. His Majesty has therefore elected to distance himself from the daily business of the Executive branch, and left it for the Prime Minister and the Ministers to administer the Government.

16. His Majesty has also been instrumental in leading the Kingdom through constitutional and electoral reform with granting royal assent to the establishment of the Constitutional and Electoral Commission to recommend appropriate reforms for the Kingdom, which will be implemented in 2010. Under that new Government, His Majesty has agreed for a fully representative Government to run the country, where the Prime Minister and the Ministers will be directly accountable to the electorates.

The Legislative Assembly

17. The Legislative Assembly of Tonga is a unicameral House comprising of 30 members; 12 Cabinet ministers appointed by the King, nine Nobles' Representatives, elected by their peers, and nine People's Representatives, who represent around more than 100,000 commoners divided into electorates by island groups. The elected members of the Legislative Assembly serve for three years.

18. Legislation is mainly proposed by the Executive (Ministers). Non-executive Parliamentarians are also able to present bills.

19. The legal/regulatory structure has various enforceable means such as laws (Acts), Regulations, and Orders which are issued under the authority of the respective Act. Regulations and Orders are published in the Government Gazette and have the force of law.

20. All legislation is written in both Tongan and English, which are the two official languages. In the event of a conflict of meaning or interpretation, the Tongan version prevails.

The judiciary and legal system

21. Tonga has a reasonably efficient court system that ensures that judicial decisions are delivered in a timely way and are enforced fairly. The judicial system is based on the English legal system and English legal principles. The independent judiciary comprises the Court of Appeal, the Supreme Court, the Land Court and the Magistrates' Court. The judges of the Court of Appeal and the Supreme Court are appointed by His Majesty in Privy Council on recommendation of the Judicial Services Commission.

22. The judiciary is headed by the Chief Justice, who is the President of the Court of Appeal, and is resident in Tonga. There are three other Court of Appeal judges, two of whom are from Australia and one from New Zealand, who are not resident in Tonga. There are two other resident judges who sit with the Chief Justice in the Supreme Court and the Land Court. All judges in Tonga are expatriates. The Chief Justice is from New Zealand, and the other two resident Supreme Court judges are from Australia and the United Kingdom, respectively.

23. The Chief Justice and the judges of the Supreme Court and Land Court are appointed on contracts mainly because their remuneration is supplemented by financial assistance from New Zealand, Australia and the Commonwealth Secretariat, respectively.

24. There are seven Magistrates, all of whom are Tongans. The Magistrates are appointed by the Prime Minister with the consent of Cabinet. There have been increased and largely successful attempts to further the training and skills of the all-Tongan magistrates with aid-funded workshops, programmes and overseas training.

25. Jury trials are available in all indictable offences (punishable by three years' imprisonment or more, or a fine of $10,000 or more), and also civil trials. Land matters are dealt with by a Land Court judge who sits with an assessor to advise on Tongan customs and practices, but is not involved in the actual decision making. Both Tongan and English languages are used in court, with the Tongan meaning prevailing in the rare instances where there is conflict.

26. All appeals from the Supreme Court and Land Court go to the Court of Appeal, except for appeals from the Land Court relating to disputes over hereditary titles and estates, which go directly to

the Privy Council. The Court of Appeal judges then sit with the Privy Council to adjudge the appeal. The decision however is made by the Court of Appeal judges and is endorsed by the Privy Council.

27. The supreme law in the Kingdom is the Constitution of Tonga, and the judiciary has the power to declare laws contrary to the Constitution as null and void. The laws of Tonga are currently being revised and a consolidation of the laws is expected to be released after 2010. This is a very significant issue and involves a considerable workload for the Government and legislature.

The Political Situation

28. Tonga has experienced political challenges in recent years. In 2005 public servants went on strike and in 2006 politically motivated strikes destroyed 80% of the central business district in Tonga. These were moves from people protesting government decisions in which they had no input, and wanting more representation in parliament.

29. Since 2005 Government has been committed to political reform for the Legislative Assembly Government, but reforms which will be appropriate and enduring for Tonga. It has thus established the Constitutional and Electoral Commission to propose the appropriate constitutional and electoral reforms. It is anticipated that these reforms will be implemented in late 2010.

Transparency and accountability

30. The Government's Key National Priorities are outlined in the Strategic Development Plan 8. Of particular relevance to AML is the strategic goal on creating a better governance environment. According to the World Bank indicators for 2004 (quoted in the Strategic Development Plan, which was released in early 2006), Tonga's score on 'control of corruption' was below the average for the Pacific, at -0.68 versus an average of -0.50 (the indicators are measured in the range -2.5 to +2.5, with a higher score indicating better governance). A 2004 Transparency International (TI) report (the most recent available) found that corruption had occurred in the Executive, amongst police, in businesses, and in non-government organisations. The report recommended that Tonga strengthen its anti-corruption measures and consider the implementation of a national anti-corruption strategy, with appropriate training and education for civil servants, law and order personnel, NGOs, the business sector and schools. The report noted that people could 'hide behind the culture' because there were no guidelines in place to distinguish between cultural practice and corruption. [3]

31. Tonga was ranked 99 (out of 180) in TI's 2009 Corruptions Perceptions Index, with a score of 3.0. This was a significant improvement on its 2008 ranking of 138 (out of 180) and score of 2.4. TI noted in its analysis of regional trends that "Following the 2006 riots, Tonga has undergone reforms that seek to grant greater political power to popularly elected officials and its anti-corruption drive has earned the support of local civil society organisations. Tonga's CPI score has risen to 3.0 in 2009 from 1.7 in 2007."[4]

32. Tongan authorities indicated that the government sees good governance as important in underpinning achievements in all areas of Tongan economic, social and political developments, and

[3] http://www.transparency.org/policy_research/nis/nis_reports_by_country/asia_pacific

[4] http://www.transparency.org/policy_research/surveys_indices/cpi/2009/regional_highlights

efforts have been made recently to improve the level of good governance through a number of public sector reforms.

33. Financial audits are undertaken by an independent Audit Office. In 2007 the Legislative Assembly passed the Public Audit Act to strengthen the audit process and introduce audit provisions reflecting existing trends and international best practices. The key audit concerns relate to arrears and the collection of debt, the reconciliation of ministry and department accounts with information on donor activities, the incomplete reporting of the Government's assets and liabilities, the use and objectives of financial reports and their qualitative characteristics, and the shortcomings of the computing system in producing timely information. A process audit function is currently being established within the Audit Office.

34. The Commissioner of Public Relations fills the role of ombudsman in Tonga. The Commissioner for Public Relations was established under the Commissioner for Public Relations Act to deal with public complaints on official actions or decisions. The Commissioner has three tasks: to improve the image of the Public Service; to raise the importance of dealing with corruption in Government, human rights violations, and the promotion of good governance; to establish an Ombudsman system that will facilitate the principles of good governance; and to establish an Ombudsman system that will facilitate the principles of accountability and transparency.

35. The establishment of the Office of Commissioner was greeted by effusive parliamentary and public approval, but according to Tongan authorities has so far made only little impact on anti-corruption. The Commissioner for Public Relations operates from a small Nuku'alofa office. He has only a senior investigator, one other investigator, and clerical staff to help him. There is no office on either of the other main island groups. Thus, the office remains small, understaffed, and underexposed in terms of awareness and accessibility. In the first year of operation, the Commissioner dealt with only 16 cases. At present there is no substantive appointment as Commissioner of Public Relations.

36. An Anti-Corruption Commission was established under the Anti-Corruption Commission Act in 2007. The Commission has extensive powers, to investigate suspected corruptions, and prosecute civil servants of wrong doing. It is expected that the Anti-Corruption Commissioner would be appointed by early 2010. A code of conduct is being drafted in addition to anti-corruption legislation. This code of conduct would apply to ministers and also require that senior officials declare their assets. The current plan is to either merge the Office of Public Relations Commissioner into the Office of the Anti-Corruption Commissioner, or to transform the Office of Public Relations Commissioner to an Ombudsman Office. Either option would mean increasing the resources of the Public Relations Commissioner.

37. The Constitution also provides that "it shall not be lawful for anyone holding an office of emolument under the Government to engage in trade or work for anyone else, except with the prior consent of Cabinet". In addition, nobles of the realm are stripped off their titles if charged with corruption. The planned corporatization of public enterprises, and the removal of civil servants as directors and replacement with private sector representatives, would reduce vested interests in government.

Public procurement

38. There are no regulations, and no public procurement officers. Tenders for public works are called for and advertised in newspapers. The choice is made according to best practice. The successful bid is not advertised but may be found from the appropriate authority (usually the Ministry

of Works). Parties who feel they have been unfairly treated can take the matter further by asking the government department of departments that have been involved about the tender process and can find the reasons for the choice. At present there is little purchasing in-country. Departments do their own purchasing or overseas agencies obtain what is needed. Tongan authorities are hopeful that the public sector reforms now in progress will address this matter and lead eventually to the establishment of a Procurement Board.

Land ownership

39. Under the Constitution, all land is the property of the Crown. Every estate and allotment is hereditary according to prescribed rules of succession. Selling land is illegal, however there is a leasehold market. There is also an active market in informal land transactions that function through the transferring or leasing of land in exchange for a 'gift' of the equivalent value.

40. No foreigner can own land, although anyone can lease property for up to 50 years subject to Cabinet approval, or 99 years subject to Privy Council approval. Many foreigners have taken advantage of this opportunity, and foreigners currently lease land to set up small foreign-owned businesses such as guesthouses, restaurants, and small resorts.

1.2. General Situation of Money Laundering and Financing of Terrorism

41. Tongan authorities stated that Tonga is considered to be a safe country and not a major money laundering or terrorist financing centre, and that Tonga does not have a major crime problem although there has been an increase in the number of property related offences. The increase in these property related crimes may be attributed to the level of unemployment, the fall in remittances, the current economic downturn and the increase in the number of deportees from developed countries. Deportees are mainly persons who have committed, and been convicted of serious criminal offences, and have served significant imprisonment terms, and who are then returned to Tonga because they were born in the Kingdom. In 2007, there was a steady rise in the forgery and theft-related crimes.

42. The following table shows prosecutions and convictions for predicate offences over the past three years.

Table 2: Prosecutions and Conviction Rates for Predicate Offences

Predicate Offence	2006	2007	2008
Forgery	0 (pending- 233 from 2005)	10 (235- pending from 2006)	
Counterfeiting of currency	0	0	2
Corruption & Bribery	3	0	0
Drug trafficking	0	0	0
Importation of Drugs in transit	0	0	0
Possession of Illicit Drugs	16	15	9
Growing or being in possession of cannabis	16	10	1
Supply of illicit drugs	4	2	1
Consumption of illicit drugs	2	3	0
Embezzlement/Falsification, False pretences	12	62	5
Trafficking in stolen and other goods	0	0	0
Extortion	0	0	0
Robbery	15	3	3
Theft	165	101	47

43. There were fewer than 15 convictions for the growing and possession of illicit drugs in 2007. According to Tongan authorities, most of these predicate offences are non-profit generating offences.

44. There have been a number of reported and prosecuted cases of both private and public sector fraud, and low-level corruption which have all involved proceeds of crime. Authorities indicated that proceeds of crime investigation were not carried out in relation to these fraud cases because investigators did not consider such action at the time. Moreover, on a general level, proceeds of crime were suspected but never identified fully. It was also felt that proceeds were cash and used for daily needs, rather than used to purchase property such as vehicles or houses.

45. Tonga has been used as a trans-shipment point for drugs and is vulnerable to international drug trafficking operations. In 1996 and in 2001 there were two significant cases of drugs being trans-shipped to New Zealand and the United States. Similarly a money transfer business with an agent in New Zealand has been linked to the remittance of proceeds of crime back to Tonga. Despite these activities, none have been thoroughly investigated for ML activity. No people smuggling or human trafficking activity has been detected and in the last decade, there have been only three illegal foreign fishing access and two cases of smuggling counterfeit goods.

46. There have been no investigations of money laundering or terrorist financing. Tongan authorities state that there are varying reasons for this. First, Tonga has foreign exchange control requirements which require the provision of supporting documents for all outward payments. The Reserve Bank must approve all outward payments over TOP$50,000 and all capital payments regardless of the amount. In addition, Tongan authorities believe that Tonga may not be a target for money launderers because of its small business size and isolation from major economic centres, and foreign investors are noticeably easy to detect and monitor.

47. However the Tongan authorities also indicated that there is a lack of resources and expertise in most of the relevant agencies which may be contributing to a lack of detection of ML and proceeds of crime action. Moreover, investigators may not have the capacity or skills to investigate suspicious transactions. Furthermore, money laundering activities may be carried out outside of the banking system, for example using alternate remittance systems.

48. The Evaluation Team accepts that the opportunities to pursue money laundering and/or proceeds of crime action have been fairly limited in Tonga. For example, drug possession offences do not generally provide proceeds of crime opportunities, if the quantities are small and for drug cultivation offences it could be difficult to take proceeds actions due to the land ownership system. In addition, the costs of taking ML/POC action could be relatively high compared to the amounts involved. Notwithstanding this, the Evaluation Team believes that there have been opportunities, which were either not recognised or pursued, which is the subject of further analysis later in this report.

Other risks and vulnerabilities

49. Tonga has not yet undergone any formal assessment of risks and vulnerabilities to ML/TF. Authorities indicted that there are no current plans to conduct a risk assessment, for which technical assistance would be required.

50. In the absence of a more formal risk assessment, the Tongan authorities have identified some systemic risks and vulnerabilities, as follows:

- The main risk to detecting ML is the lack of technical and experienced staff and staffing restraints at key AML/CFT agencies, including the Transaction Reporting Authority and the Tonga Police's Transnational Crimes Unit. The lack of resources results in a lack of monitoring and depth of investigation of suspicious transactions, and the absence of prosecutions. A related issue is that the investigators may not be aware of new ML typologies;
- Over the last five years, there has been a marked increase in the number of money lenders which also operate as pawn shops in Tonga. The lack of supervision of this sector, and the banks' strict lending criteria, may pose a vulnerability to trafficking in stolen goods and other goods;
- The detection of cross-border transactions by Customs is an area of risk given that there are no formal procedures, x-ray equipment, departure cards, etc in place;
- Tongan culture and tradition hinder the development and implementation of AML/CFT mechanisms. People tend to know one another through the close community ties extended family ties and due to its small population. There is an unwillingness to report people involved in suspicious transactions because of the close ties. On the other hand, these factors may offset the lack of formal identifications at the grass roots level;
- It is difficult to keep reported transactions in confidence due to the small geographical setting. People involved in reporting are more prone to disseminate the information to the persons involved in the suspicious dealings;
- Although there is a small presence of some organised crime, particularly drug dealing, it may be significant enough to develop sufficient criminal revenue that may be laundered;
- Like many small economies, local businesses may be susceptible to dealing with unknown, cash-laden foreign investors, whose background (especially where they are from developing countries) may be difficult to ascertain;
- Most small business, especially ethnic Chinese retailers and wholesalers, prefer to carry out their businesses without going through banks, and thus avoid monitoring and supervision. The only use of banks is for overseas transfers.

51. Taken together, these risk factors and vulnerabilities tend to indicate that, despite relatively low levels of predicate crimes, there is a risk that Tonga may be exploited by domestic or overseas offenders for ML and, possibly, TF purposes.

1.3. Overview of the Financial Sector and DNFBP

The Tongan Financial Sector

52. The financial sector in Tonga is small, and remains largely based on cash and banking institutions, though there are also a relatively large number of smaller financial institutions. There is no securities sector in Tonga.

53. The following are the institutions operating in the financial sector:

Table 3: Financial Institutions in Tonga

Financial Activity	Number of Entities	Supervisor
Commercial Banks	3	NRBT
Credit Unions	65	Credit Union Division of the Ministry of Labour, Commerce and Industries
Foreign Exchange Dealers/Money Transfer	9	NRBT
Money Lenders	194	MLCI
Development Bank (Tonga Development Bank)	1	NRBT
Retirement Scheme (Retirement Fund Board)	1	Self-Regulated
Insurance Companies:		
Life Insurance	5	MLCI
Property, House & Vehicle	8	

54. The types of financial institutions that are licensed in Tonga to carry out the financial activities listed in the Glossary of the FATF 40 Recommendations are as follows:

Table 4: Types of Financial Institutions Carrying out Financial Activities in Tonga

Financial Activity (as defined in Glossary to FATF 40 Recommendations	Categories of Financial Institutions performing such activity in Tonga
1. Acceptance of deposits and other repayable funds from the public	Commercial and Development Banks
2. Lending	Commercial & Development Bank, Money Lenders
3. Financial Leasing	N/A
4. Transfer of money or value	Banks, Foreign Exchange Dealers & Money Transfers
5. Issuing and managing means of payment (e.g. credit and debit cards, cheques, traveller's cheques, money orders and banker's drafts, electronic money)	Commercial Banks & Foreign Exchange Dealers
6. Financial guarantees and commitments	Commercial Banks e.g. Letters of credit and Bank Guarantees
7. Trading in: money market instruments, foreign exchange, exchange, interest rates and index instruments, transferable securities, commodity futures trading	N/A

Financial Activity (as defined in Glossary to FATF 40 Recommendations	Categories of Financial Institutions performing such activity in Tonga
8. Participation in securities issues and the provision of financial services related to such issues	N/A
9. Individual and collective portfolio management	N/A
10. Safekeeping and administration of cash or liquid securities on behalf of other persons	Commercial Banks
11. Otherwise investing, administering or managing finds or money on behalf of other persons	N/A
12. Underwriting and placement of life insurance and other investment related insurance	Life insurance companies
13. Money and currency changing	Commercial Banks & Foreign Exchange Dealers and money changers

55. The largest bank, the Westpac Bank of Tonga is locally incorporated and owned by Westpac Australia, the ANZ bank is a branch and the MBf bank is locally incorporated and is the smallest bank. The Tonga Development Bank is fully owned by the Government of Tonga. These banks are supervised by the National Reserve Bank of Tonga (NRBT).

56. The total assets of the financial sector (commercial banks and Tonga Development Bank) reached TOP$443.7m (US$261.8m) in 2007-08, an increase of TOP$47.1m (US$27.8m) over the year. Total outstanding loans to banks comprised of 52.5% for industries and businesses including agriculture and 45.8% for private individuals. There were 48,920 deposit accounts held with the banks totalling TOP$286m (US$169m).

57. There are four foreign exchange dealers licensed by the NRBT and their assets total TOP$7.4m (US$4.4m).

58. As noted above, remittances from Tongans living abroad have subsidized incomes are the country's primary source of foreign exchange income at 49% of GDP. Remittances in 2009 have fallen by an estimated 7% compared to the same period in 2008, but still amounted to TOP$175m (US$103.25).

59. Regarding the informal financial system, there has been an increase in money lenders over the last five years. These money lenders are small operations which can lend up to a maximum of TOP$1000 at usurious interest rates of more than 30% per annum. They provide instant services and take Tongan mats and other types of collateral as security, which are sold to recover the cost of the loan should the borrower miss the payment date. Some of the large money lenders do not take security and can lend more than TOP$1,000 if the borrower is employed.

60. The insurance sector comprises five life insurance companies all of which are subsidiaries or branches of offshore insurance companies. There are a no Tongan-owned insurance companies

operating in Tonga. Life insurance companies offer term life polices used as part of the security requirements for bank loans taken out by individuals. The policies are generally allowed to lapse once the loan is repaid. The beneficiary of the policy is the relevant lending institution. There are eight general insurance companies offering products such as personal accident, medical evacuation, and funeral policies.

Overview of the DNFBP Sector

61. Tonga has a relatively small DNFBP sector, which is overseen by the Ministry of Labour, Commerce and Industries (MLCI). AML/CFT measures have not yet been extended to the DNFBP sector, though draft amendments to the MLPC Act would, if enacted, extend these measures to the DNFBP sector.

62. There are no casinos including internet casinos, trust and company service providers (registered as such) or dealers in precious metals or precious stones operating in Tonga. Legal firms may however assist with the formation of trust and companies.

63. The following is a list of licensed DNFBPs with the MLCI:

Table 5: Licensed DNFBPs

Business	Type	Total
Real Estate Agent – rent or lease house/land	-	5
Lawyers – Legal firms and practitioners	Private firms- 11 Private practitioners- 23 (Government lawyers - 11)	34
Accountants/Auditors	-	14

a. Real estate agents.

64. There are five real estate agents operating in Tonga. The business licence for real estate agents allows for the renting of houses only and does not allow for the leasing of land. The Tongan Constitution prohibits the sale of land. Land ownership, however, can change for some monetary consideration through a surrender of rights to the land by the holder and his heirs, and then approval by Cabinet, and no other claim by any other person claiming to be an heir, but the person receiving the land must be Tongan. Land can however be leased to any person, whether Tongan or non-Tongan.

b. Dealers in precious metals and precious stones

65. Precious metals are not manufactured in Tonga and there are no dealers in precious metals and precious stones in Tonga. There are a few “jewellery stores” which sell imported low cost jewellery such as gold rings, necklaces and bracelets. Tongan authorities advise that Tongan artefacts such as traditional mats are worth much more than precious stones in Tonga and are more likely to be used as a vehicle for ML/TF than precious stones and metals.

c. Lawyers, notaries, other independent legal professionals and accountants

Law practitioners

66. Law practitioners in Tonga operate and are admitted to practice law under the Law Practitioners Act 1989. There are around 60 enrolled law practitioners in Tonga, with around half who are resident and practicing within the Kingdom. Law Practitioners are required to comply with the Rules of Professional Conduct for Law Practitioners 2002. They are subject to disciplinary proceedings for professional misconduct before the Disciplinary Committee of the Tonga Law Society. Sanctions range from censure up to striking off a law practitioner from the roll of law practitioners. Law practitioners are also required to have a business licence under the Business Licences Act to operate a law practice.

Accountants and auditors

67. There are 14 accountants and auditors operating in Tonga. There are no certifying systems in place for ensuring their ethical and professional behaviour except through the Tonga Society of Accountants. The Society regulates its own compliance with good practice through supervision and sanctions.

68. There is no professional association for auditors and there are no measures to ensure compliance through registration, supervision and sanctions. The auditors are part of the Tonga Society of Accountants.

1.4. Overview of commercial laws and mechanisms governing legal persons and arrangements

Legal persons

69. Bodies corporate in Tonga are incorporated or registered under the following Acts: the Companies Act, the Charitable Trusts Act, and the Incorporated Societies Act.

70. **Companies:** Companies are established under the Companies Act, which is administered by the MLCI. The Companies Act is based on the New Zealand Companies Act. The following details are required for a company registration:

- physical address of the company;
- full name of the applicant;
- the director(s) and residential address;
- the company secretary and residential address;
- the shareholders and the number of shares taken.

71. There are 1296 companies registered in Tonga. As at the time of the on-site visit, viewing of information on the companies' register was subject to a written authority of a company shareholder or director. However, with effect from 1 December 2009, the Government amended the Companies Act to introduce an electronic companies register to allow registration of companies over the internet, electronic notices to companies, and also allow companies to have company secretaries optional.

72. **Incorporated Societies**: A wide range of groups and non-profit organizations such as sports clubs, music, traders, teachers and cultural groups may be registered under the Incorporated Societies Act 1984. Forming an incorporated society group requires: 1) that the application must be signed

thereto by at least 5 subscribers; 2) ensure that proposed constitution is ready; 3) a statutory declaration made by a member of the society that a majority consented to the application; and, 4) witness(es) is attested to the signatures of the subscribers. Name of society must end with the word "Incorporated". There are 238 Incorporated Societies in Tonga.

Legal arrangements (trusts)

73. The Tongan legal system is based on New Zealand law and English common law which recognises a wide range of trusts, including express, discretionary, implied, and many other forms of trusts. If a trust is charitable, its trustees may choose to incorporate as a Board under the Charitable Trusts Act 1993. Charitable trusts are overseen by the Registrar of Charitable Trusts who, under the Charitable Trusts Act, is the Registrar of Incorporated Societies under the Incorporated Societies Act. The Registrar is located in the MLCI.

74. There is no statute to govern the making of contracts, however contracts are entered into based on developed common law.

1.5. Overview of strategy to prevent money laundering and terrorist financing

a. AML/CFT Strategies and Priorities

Overview

75. The primary legal framework for anti-money laundering measures in Tonga is based upon the Money Laundering and Proceeds of Crime Act 2000 (MLPC Act), which criminalizes money laundering; and provides for the forfeiture of the proceeds of crime and the confiscation of the benefits (profits) of crime; provides for customer identification, record keeping and suspicious transaction reporting; and a process for receiving and disseminating suspicious transactions reports.

76. The government supports the building of a strong AML/CFT culture through the administration of the AML National Committee which is chaired by the Attorney General and the Minister of Finance is the Deputy Chair.

77. The Transaction Reporting Authority (TRA) and the NRBT are working together with the banks and financial institutions to build a strong culture of AML/CFT. Under the MLPC Act, the TRA acts both as AML/CFT regulator/supervisor and as the financial intelligence unit (FIU). The TRA issued AML guidelines in 2004 to the banks and licensed foreign exchange dealers. The TRA monitors compliance with the issued guidelines and has undertaken on-site visits of the Banks and two foreign exchange dealers.

78. The Reserve Bank, exercising the authority of the TRA, is vested with most of the powers and functions of an FIU with the exception of a specific power to analyse suspicious transaction reports and the ability to receive information from agencies within Tonga (other than suspicious transaction reports) and from foreign agencies. The TRA currently has no powers to enter into arrangements, such as memoranda of understanding, for the exchange of information with foreign counterparts.

Legislative priorities

79. Tonga is in the process of strengthening its AML legislation to be in line with international best practice. As at the time of the on-site visit (November 2009), amendments to the MLPC Act and the Money Laundering and Proceeds of Crime Regulations 2008 were awaiting passage through the

Legislative Assembly and approval by the Cabinet. Tongan authorities indicated that these amendments, incorporating proposals contained in this draft mutual evaluation report, were likely to be passed in the first half of 2010. These amendments and regulations would align Tonga better with the FATF 40+9 Recommendations. Because they were not in force at the time of the on-site visit or immediately thereafter (ie within 2 months of the on-site), they were not however able to be taken into account in the analysis or ratings contained in this report.

80. According to the Tongan authorities, the laws of Tonga do not currently adequately provide for:

- criminalizing the financing of terrorism;
- reporting requirements on international fund transfers or cash transactions above a specified threshold for purposes of a financial intelligence unit (FIU);
- specific prohibition on anonymous accounts;
- inclusion of originator information on funds transfers;
- inclusion of money changers, lawyers and accountants in the definition of "financial institution";
- the ratification of the Vienna Convention, the Palermo Convention and the UN Convention on the Suppression of the Financing of Terrorism;
- power of the FIU to analyse reports;
- legal protections for the FIU's information;
- imposition of administrative sanctions;
- preventing criminals from controlling or holding significant shareholding or exercising management functions in financial service providers other than banks;
- international cooperation in locating and identifying persons and arranging attendance of person for proceedings other than persons in custody;
- power to extradite for money laundering offences;
- collection of information and monitoring of cross border currency transactions; and
- the licensing and regulation of insurers and insurance intermediaries.

81. These gaps are however being addressed in the draft amendments to the MLPC Act and the MLPC Regulations.

82. Tongan authorities indicated that their main priorities are to:

- enact and implement the amendments to the Money Laundering and Proceeds of Crime Act;
- strengthen the legal and regulatory AML/CFT framework;
- carry out public and private sector public awareness programs;
- establish procedures and mechanisms for collecting statistics; and
- enhance sharing of information amongst government departments as well as with foreign counterparts.

Resource priorities

83. Tongan authorities indicated that, due to the current level of financial activity in Tonga, it is still justified to separate the FIU-type roles between the TRA and the TCU. Given the TRA's limited capacity (in law and in practice) to analyse STRs, after some preliminary analysis, it currently disseminates virtually all STRs to the TCU for further analysis and, if appropriate, investigation.

Locating the TRA in the NRBT gives the TRA access to the financial traffic and also expert (financial) staffing. Once an STR is identified as suspicious and is disseminated, the TCU can then provide the investigative expertise required to complete further analysis and investigation.

84. The TRA has received assistance for the review of the TRA to recommend changes necessary for an effective and fully operational FIU. In particular, assistance has been received on strengthening the suspicious transaction reporting framework, both with licensed financial institutions and the Tonga Police (TCU). Raising public awareness and training of reporting entities are the priorities of the TRA.

85. Tonga is currently working to build the resources and capabilities of the Tonga Police Force, under a five year partnership arrangement with the Australian and New Zealand Governments. This arrangement includes the development of the investigative resources and capabilities of the Transnational Crimes Unit (TCU), which is the unit in the Tonga Police which deals with nuclear weapons smuggling, prevention of terrorism, people smuggling, illegal immigration, drug trafficking, money laundering, cyber crime and human trafficking. It is also a priority for the Tonga Police to develop established procedures between the TCU and the Transaction Reporting Authority of the National Reserve Bank of Tonga when dealing with suspicious transactions.

86. Tonga is also working on developing its Crown Law Department which would conduct money laundering prosecutions, provide legal advice and also drafting of new legislation. The development includes creating an independent prosecution office and also separate legislative drafting and legal advice offices, all under an independent Attorney General. For the first time an independent Attorney General was appointed in May 2009. Crown Law lawyers are now categorised, and moving on to contracts. Initiatives are being put in place to expedite the gaining of experience. A consultant will be looking at further structural reforms including legislative reforms to create an independent Crown Law office, consisting of office of the Solicitor General (legal advice), an office of the Chief Crown Prosecutor (prosecutions) and Chief Parliamentary Counsel (legislative drafting). Crown Law prosecutors have regularly attended money laundering training organised by the Australian Attorney General's Department since 2007.

International treaties

87. Like many other Pacific Island countries, Tonga has only ratified a limited number of international treaties. International treaties ratified by the Kingdom are not automatically incorporated directly into Tongan law. Instead, if any change in domestic law is needed to enable the Kingdom to comply with a treaty obligation, the Government makes that change, following normal parliamentary procedures, before it becomes a party to the treaty. The Kingdom's policy is not to ratify a treaty unless the Government is satisfied that domestic law and practice enable it to comply.

88. Tonga has signed the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention) but not the UN Convention against Transnational Organized Crime (Palermo Convention). It has however signed the 12 United Nations terrorist conventions.

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

Overview

89. The AML National Committee is the lead body for AML/CFT. The National Committee's main function is to determine broad policy objectives for AML/CFT. It was established in 2003, and

comprises of the Attorney General (Chairman); Minister of Finance (Deputy Chairman); Secretary for Foreign Affairs; Solicitor General; Police Commander; Governor of the National Reserve Bank of Tonga; Commissioner of Revenue; Secretary for Labour, Commerce and Industries; and the Secretary for Finance. The Crown Law Department provides the secretariat role.

90. The AML sub-committee was appointed by the National Committee as the AML/CFT working group. It is comprised of representatives similar to the National Committee but at senior officials level, and is chaired by the Solicitor General. The Committee meets several times a year and makes recommendations to the National Committee for decisions or guidance.

91. The following ministries are involved in the decision making related to AML/CFT policy formulation:

- The Ministry of Finance and National Planning is responsible for fiscal policies including budgeting, customs, tax and revenue collections, as well as the economic policies and national planning;
- The Office of the Attorney General and the Crown Law Department is responsible for provision of all legal services to the Government, including legal advice, criminal prosecutions, legal representation and legislative drafting;
- The Tonga Police Force is responsible for the maintenance of law and order. Accordingly they are responsible for investigating money laundering and terrorist financing through its Transnational Crimes Unit (TCU). The TCU has other duties however, reported cases of ML and TF take priority and have no obligations to report to other units within the Police Force.
- The Ministry of Foreign Affairs is responsible for the ratification of the international conventions as well as mutual assistance agreements. It is also responsible for the immigration department.
- The Ministry of Labour, Commerce and Industries is responsible for the laws relating to legal persons and registration of companies, businesses, societies, foreign investors and charitable trusts.

92. The TRA, Customs, and Immigration Services are responsible for the monitoring of cross border transactions.

93. There is no supervisory body for self regulatory organizations or DNFBPs such as lawyers and accountants. Lawyers however are governed by their membership of the Tonga Law Society, established under the Law Practitioners Act 1989. Accountants are governed by their membership in the Tonga Society of Accountants.

94. Non-profit organizations are required to register with the Inland Revenue and Tax department as tax exempt institutions.

National Reserve Bank of Tonga/Transaction Reporting Authority

95. The NRBT is an independent institution under the National Reserve Bank of Tonga Act. It is responsible for monetary policy, licensing and supervising deposit taking institutions, as well as the Registrar of Government Bonds. The Reserve Bank also administers the Foreign Exchange Control Act which includes: licensing and supervising foreign exchange dealers, bureaux de change, and money remittance businesses, regulating foreign exchange payments of more than TOP$50,000, as

well as cash cross border transactions. The Reserve Bank was appointed by Cabinet as the Transaction Reporting Authority under the MLPC Act.

96. The Transaction Reporting Authority (TRA) has the monitoring functions of an FIU. It is responsible for receiving and disseminating suspicious transaction reports, issuing guidelines to Financial Institutions and cash dealers as well as providing training. The TRA also acts as the AML/CFT supervisor. The Governor of the NRBT is the head of the TRA.

The Tonga Police Force

97. The Tonga Police Force is the main law enforcement body of Government. Its operations are governed by the Police Act. The Tonga Police Force is headed by the Minister of Police, and in turn the daily administration is carried out by the Police Commander. The Tonga Police Force consists of around 417 police officers stationed throughout the Kingdom.

98. The responsibility for investigating money laundering in Tonga rests with the Tongan Police Force. The Tongan Police Force however has little experience and resources in financial investigations.

99. Within the Tonga Police Force, the Transnational Crimes Unit (TCU) deals with all criminal offending that have international or transnational origins, such as money laundering and financing of terrorism. The TCU would handle any ML/TF or proceeds of crime case, including those of a purely domestic nature. The TCU deals with the criminal offences covered under the Transnational Crimes Act, such as nuclear weapons smuggling, people trafficking, maritime offences and others. There are at the moment only four police officers in the TCU.

100. There is also the Criminal Investigation Division (CID) which investigates and deals with other general criminal offending under the Criminal Offences Act and other laws with criminal offences. Within the CID there is a Drugs Squad that deals especially with drugs offending under the Illicit Drugs Control Act. There are no other specialist squads in the CID, for example to handle financial/fraud crimes. There are about 40 officers in the CID spread around the Kingdom, and there are 13 in the Nuku'alofa District, which has the highest crime rate.

Tonga Defence Services

101. The Tonga Defence Force consists of around 586 troops consisting of the regular, territorial and reserve forces. Their main role is the defence of the Kingdom under the Tonga Defence Services Act. They also play a domestic law enforcement role in being authorised officers under the Fisheries Management Act to deal with illegal fishing.

Customs Department

102. The Customs Department is part of the Revenue Services Department. Their main role to collect customs duties from imports and exports from the Kingdom. They also have a role under the Customs and Excise Management Act (refer to annex 21) in detecting smuggling of goods and contraband. The Customs face challenges of lack of personnel and also equipment such as scanning machines. They also lack investigation personnel to investigate customs investigations. There is also concern about corruption among Customs officers.

Ministry of Fisheries

103. The Ministry of Fisheries has the role of protecting, conserving and maintain the fisheries of the Kingdom, particularly from over fishing and also illegal fishing. The Ministry is slowly building its law enforcement capacity but still relies heavily on the Navy of the Tonga Defence Services to carry out patrols, and the CID of the Tonga Police Force to carry out investigations. There are just fewer than 30 fisheries officer in the Kingdom who enforce the fisheries legislation.

c. Approach Concerning Risk

104. Tonga has not undertaken a formal ML/TF risk assessment and does not apply a risk-based approach to money laundering or the financing of terrorism. Due to limited resources, Tonga authorities indicated that they are considering adopting a risk-based approach on their application of AML/CFT provisions. Proposed MLPC Regulations are being considered, but have not yet been formally adopted, that would introduce risk-based elements into the AML/CFT framework.

d. Progress since the Last Mutual Evaluation

105. Tonga has not previously been evaluated.

2. LEGAL SYSTEM AND RELATED INSTITUTIONAL MEASURES

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

2.1.1. Description and Analysis

Legal Framework

106. The Money Laundering and Proceeds of Crime Act (MLPC Act) was enacted in 2000. The MLPC Act however has never been utilised as a basis of any criminal prosecution or criminal charges. The main reason provided by Tongan authorities for this is that no ML activity has been identified by the Transaction Reporting Authority (TRA) of the National Reserve Bank of Tonga, or the Transnational Crimes Unit of the Tonga Police Force, which together form Tonga's financial investigation unit. While suspicious transactions have been reported to the TRA, none have been found to involve in any ML activity.

107. As noted in section 1 of this report, as at the time of the on-site visit, amendments to the MLPC Act and the Money Laundering and Proceeds of Crime Regulations 2008 were awaiting passage through the Legislative Assembly and approval by the Cabinet. Tongan authorities indicated that these amendments, incorporating proposals contained in this draft mutual evaluation report, were likely to be passed in the first half of 2010, but because they were not finalized nor in force at the time of the on-site visit or immediately thereafter (ie within 2 months of the on-site), they have not been taken into account in the analysis or ratings contained in this report. Where appropriate, however, brief references to intended amendments are noted for information purposes.

Recommendation 1

Criminalisation of money laundering

108. Money laundering is criminalised by section 17 of the MLPC Act, which states that:

> *A person commits the offence of money laundering if the person —*
>
> *(a) acquires, possesses or uses property knowing or having reason to believe that it is derived directly or indirectly from the commission of a serious offence;*
>
> *(b) renders assistance to another person for —*
>
> *(i) the conversion or transfer of property derived directly or indirectly by the commission of a serious offence, with the aim of concealing or disguising the illicit origin of that property or of aiding any person in the commission of the offence;*
>
> *(ii) concealing or disguising the true nature, origin, location, disposition, movement or ownership of the property derived directly or indirectly by the commission of a serious offence,*
>
> *and shall upon conviction be liable to imprisonment for a period not exceeding 12 months or to a fine not exceeding $10,000 or both, and in the case of a body corporate to a fine not exceeding $50,000.*

109. ML under section 17 is criminalized on the basis of the physical and mental elements required for the offence under the Vienna and Palermo Conventions.

110. Section 17(a) applies to a person who acquires, possesses or uses property knowing or having reason to believe that it is derived directly or indirectly from the commission of a serious offence.

111. Section 17(b) applies to a person who "renders assistance to another person" for the conversion or transfer of property and for concealing and disguising the true nature of the property. It is unclear what is the meaning and purpose of the phrase "renders assistance to another person", but it certainly dilutes the sub-section making it not fully compliant with the physical and material elements of the ML offence under the two Conventions. The Conventions refer to the *actual* conversion or transfer of property and the *actual* concealment and disguise of the property. "Rendering assistance" denotes "aiding and abetting" which should be an ancillary offence for money laundering, rather than being incorporated into the money laundering offence itself.

112. The standard of proof is "knowledge" and "having reason to believe".[5]

Property

113. "Property" and "cash" are defined under section 2(1) of the MLPC Act:

> *"**property**" means cash and all other real or personal property of every description, whether situated in Tonga or elsewhere and whether tangible or intangible, and includes an interest in any such property;*
>
> *"**cash**" means the coin and paper money of Tonga or of a foreign country that is designated as legal tender and any document which is customarily used and accepted as such;*

114. The definition of "property" is similar to that provided in the Vienna and Palermo Conventions, but does not cover "legal documents or instruments evidencing title to, or interest in, such assets".[6]

115. There is no specific requirement under the MLPC Act as to whether when proving that property is the proceeds of crime, it is necessary that a person shall be convicted of a predicate offence. There is also no case law on this. Therefore this area is unclear.[7]

Scope of the predicate offences

116. Under section 17 of the MLPC Act, the predicate offences are "serious offences" under the definition in section 2(1) of the Act.

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[5] It is noted that the MLPC Amendment Bill seeks to change this standard to "having reasonable grounds to believe or suspect" which, if passed as per the draft Bill, will clarify the objective standard.

[6] The MLPC Amendment Bill seeks to amend the definitions "property" and "cash". The definition of "cash" will have a much wider scope. However, the "new" definition of property proposed in the Bill is exactly the same as the current provision. It would appear that it may have been included for the sake of completeness, rather than to amend the current definition.

[7] The MLPC Amendment Bill seeks to add specific provisions on this, under proposed new sections 17(b)(iii) and (v), which make it clear, firstly, that for the purpose of proving the ML offence it is not necessary to prove which serious (predicate) crime has been committed and, secondly, that nothing in the Act prevents a person that committed an offence that generated proceeds of crime from being convicted of ML in respect of those proceeds of crime.

*"**serious offence**" means an offence against a provision of —*

(a) any law of Tonga (other than this Act), for which the maximum penalty is imprisonment or other deprivation of liberty for a period of not less than 12 months or more severe penalty;

(b) a law of a foreign State, in relation to acts or omissions which, had they occurred in Tonga, would have constituted an offence for which the maximum penalty is imprisonment or other deprivation of liberty for a period of not less than 12 months, or more severe penalty, including an offence of a purely fiscal character;

117. Under paragraph (a) of the definition, all offences under any law of Tonga, other than the offences under the MLPC Act, carrying a maximum penalty of not less than 12 months are serious offence. Money laundering, which is an offence under the MLPC Act, is not a serious offence, not only since it is arguable whether it carries a maximum penalty of less than 12 months (the maximum penalty for ML under section 17 is a period not exceeding 12 months), but also, more critically, because it is expressly excluded from the definition of "serious offence" by paragraph (a) of the definition. This has a serious impact on confiscation which will be explained hereinafter.

118. The predicate offences for ML are not limited by offence type and extend, as a result of the definition of "serious offence" set out above, to all offences punishable by imprisonment of not less than 12 months. The relevant offences falling within the FATF-designated categories of offences are set out in the table below:

Table 6: Predicate offences for money laundering

FATF designated categories of offences	Predicate offences under the law of Tonga
Participation in an organized criminal group and racketeering	Participating in an organized criminal group under Transnational Crimes Act (section 23)
Terrorism, including terrorist financing	Terrorist bombing offence under Transnational Crimes Act (section 22); act of terrorism under Criminal Offences Act (section 78A); force and violence on board an aircraft under Aircraft Offences Act (sections 4 and 5); terrorist Financing under Transnational Crimes Act (sections 6 to 8)
Trafficking in human beings and migrant smuggling	Offence of trafficking in persons, children and human smuggling under Transnational Crimes Act (sections 24, 25 and 27)
Sexual exploitation, including sexual exploitation of children	Trading in prostitution, procuring the defilement of females and child pornography under Criminal Offences Act (sections 81, 126, 127 and 115A); prohibition of production of pornographic material under Pornography Control Act (section 4)
Illicit trafficking in narcotic drugs and psychotropic substances	Unlawful import or export of illicit drugs, unlawful possession manufacture cultivation use and supply of illicit drugs, and offence related to controlled chemicals and equipment under Illicit Drugs Control Act (sections 3 to 5)
Illicit arms trafficking	Movement of nuclear material under Transnational Crimes Act (section 14); offence related to firearms explosives on board an aircraft under Aircraft Offences Act NB The coverage of these provisions is limited.
Illicit trafficking in stolen and other goods	Receiving stolen goods under Criminal Offences Act (section 148) NB The coverage of this provision is limited. There is no provision on

FATF designated categories of offences	Predicate offences under the law of Tonga
	other modes of trafficking, or coverage of persons who assist in illegal trafficking but who do not receive the goods.
Corruption and bribery	Bribery of an officer of the Anti-corruption Commissioner under Anti-corruption Act (section 71); corruption offences related to a government servant under Criminal Offences Act (sections 50 to 53); Corruption offence related to customs officers under Customs and Excise Management Act (section 106)
Fraud	Fraud related offences under Criminal Offences Act (sections 158 to 169); fraud offences related to companies under Companies Act (sections 381 to 384, 377) NB The current fraud offences are too restrictive and limited to particular scenarios. There is no offence of fraud in general which, if available, could cover different scenarios of fraud.
Counterfeiting currency	Offences related to counterfeiting currency under Criminal Offences Act (sections 59 to 62)
Counterfeiting and piracy of products	Counterfeit under Customs and Excise Management Act (section 94) NB Copyright Act is not yet in force and there is no time table for it
Environmental Crime	Dumping of wastes or other matter under Marine Pollution Prevention Act (section 52); illegal fishing offences under Fisheries Management Act NB Offences under the Waste Management Act (section 24) and Forest Act (section 10) are not serious offence by definition. Coverage of environmental crimes under the Marine Pollution Prevention Act is also too limited and excludes, for example, illegal logging and illegal fishing offences as predicates.
Murder, grievous bodily harm	Homicide, manslaughter and grievous bodily harm under Criminal Offences Act (sections 91, 93 and 106)
Kidnapping, illegal restraint and hostage-taking	There is no specific offence of kidnapping, but considered as an act of terrorism under Crimes Offences Act (sections 78A and 78B) Abduction of women and girls under Criminal Offences Act (sections 128 and 129); maritime safety offences under Transnational Crimes Act (section 18) NB Coverage of these offences is limited. Unlawful imprisonment under Criminal Offences Act (section 14) is not a serious offence.
Robbery or theft	Theft and robbery under Criminal Offences Act (sections 145 and 154)
Smuggling	Smuggling under Customs and Excise Management Act (section 92)
Extortion	Extortion by government servant and extortion in general under Criminal Offences Act (sections 52 and 156)
Forgery	Forgery under Criminal Offences Act (section 171)
Piracy	Maritime safety offences under Transnational Crimes Act (section 18)
Insider trading and market manipulation	NB Offences under the Protection Against Unfair Competition Act carry no criminal penalty.

119. The predicate offences in Tonga cover offences of many of the designated categories of offences, however some offences are either deficient or missing. The coverage of the provisions for illicit arms trafficking and illicit trafficking in stolen and other goods is very limited. The current offences of fraud under the Criminal Offences Act are too restrictive and limited to particular scenarios only. Piracy of products is not provided for as yet and there is no timetable for bringing the Copyright Act into force. The current laws on environmental crime under the Waste Management Act and Forests Act are not "serious offences" by definition since they do not carry a maximum imprisonment term of more than 12 months and the coverage of the current law on environmental crime (Marine Pollution Prevention Act) is also limited. In relation to kidnapping, there is no specific offence of kidnapping and illegal restraint and hostage-taking, unlawful imprisonment under the Criminal Offences Act carries an imprisonment for a period not exceeding one year, therefore it is not a "serious offence". There are some specific provisions on abduction of women and girls but not in general. There is no provision on hostage taking other than the provision on maritime safety offences under the Transnational Crimes Act. The provisions on unfair competition under the Protection Against Unfair Competition Act do not carry any criminal penalty, therefore they are not "serious offences".

Threshold approach for predicate offences

120. Under the MLPC Act, predicate offences are offences that fall under the definition of "serious offences" under section 2 of the MLPC Act. Under that definition, Tonga applies a threshold approach as to what is deemed a predicate or serious offence. The threshold is a penalty of 12 months' imprisonment or more.

121. Therefore all offences that fall under the "serious offence" definition are predicate offences. As explained above, some offences within the designated categories of offences do not meet the 12 month threshold.

122. Under Tongan law, "serious offences" include both indictable and summary offences. Due to the 12 month threshold, not all criminal offences are included as predicate or serious offences. Section 11 of the Magistrate's Court Act provides the indictable and summary offence threshold as follows:

- "Summary offences" are offences which have a penalty of less than 3 year' imprisonment or a fine of $10,000 pa'anga, and are triable in the Magistrate's Court, unless it is charged together with an indictable offence arising from the same facts.
- "Indictable offences" are offences with penalties of more than 3 years' imprisonment or a fine of $10,000 pa'anga, and are triable in the Supreme Court only.

123. Therefore some predicate offences are indictable offences, and some are summary offences.

Extraterritorially committed predicate offences

124. Paragraph (b) of the definition of "serious offence" under section 2 of the MLPC Act includes an offence against the provision of: *a law of a foreign State, in relation to acts or omissions which, had they occurred in Tonga, would have constituted an offence for which the maximum penalty is imprisonment or other deprivation of liberty for a period of not less than 12 months, or more severe penalty, including an offence of a purely fiscal character.*

Self laundering

125. The fundamental principles of law in Tonga do not preclude the criminalisation of self-laundering. Section 17 of the MLPC Act may apply to self laundering and the test is "knowing or having reason to believe".[8] There is however no case law on this.

Ancillary offences

126. Ancillary offences are provided by provisions of the Criminal Offences Act. These provisions also apply to ML offences. Section 5 provides for the attempt offence, section 8 provides for aiding and abetting, facilitating and counseling, and section 15 provides for conspiracy offences. It is noted that "rendering assistance" in section 17(b) denotes "aiding and abetting".

Additional elements

127. There is no provision in the MLPC Act for the case where an act overseas, which does not constitute an offence overseas, but would be a predicate offence if occurred in Tonga, can lead to an offence of ML.

Recommendation 2

Liability of natural persons

128. Section 17 of the MLPC Act applies to any natural or legal person under the definition of "person" in section 2 of the Act. The same test of "knowing" or "having reason to believe" applies to both natural and legal persons. According to a previous case in Tonga, a television company was convicted of and fined for the offence of criminal defamation in 2001.

Mental element of ML offence

129. There is no specific provision for inference of the state of mind of the offender to be drawn from objective factual circumstances. Tonga relies on the English common law on inference of the state of mind from actions. There is no Tongan case law on this.[9]

Liability of legal persons

130. As noted above, the definition of "person" under the MLPC Act includes legal persons. Therefore legal person can be liable under section 17 of the MLPC Act. There is no Tongan law specifically precluding legal persons from being liable under civil or administrative proceedings for activities that amounts to money laundering, and at the same time being criminally liable for such activities. However, in practice, civil forfeiture is not available under Tongan law and possible administrative proceedings are limited.

[8] As noted above, the proposed MLPC Amendment Bill 2008, if passed, will change the standard to "having reasonable grounds to believe or suspect".

[9] As noted previously, under the new Amendment Bill, there will be a specific provision on this issue.

Sanctions for ML

131. Under section 17 of the MLPC Act the maximum penalty for money laundering is imprisonment for a period not exceeding 12 months or a fine not exceeding $10,000 or both. In the case of a body corporate the penalty is a fine not exceeding $50,000.

132. The current maximum penalty is much too low in order to be dissuasive. It is also not proportionate as compared with other serious economic crimes in Tonga. For example, penalties for other crimes are as follows:

- Forgery: imprisonment for not more than 7 years;
- Fraudulent conversion: imprisonment for not more than 7 years;
- Falsification of accounts: imprisonment for not more than 7 years;
- Embezzlement: imprisonment for not more than 7 years;
- Extortion: imprisonment for not more than 10 years;
- Corruption of Customs officers: imprisonment of not more than 10 years;

133. The penalties for legal persons for other offences are also more dissuasive than those under the MLPC Act. For example:

- Illegal fishing: a penalty not exceeding $1 m;
- An offence under the Communications Act: a fine not exceeding $15,000 and/or an imprisonment not exceeding 6 months and/or forfeiture of anything seized.

134. Tongan authorities are aware of the inadequacy of the current penalty for ML and the maximum penalty is proposed to be increased substantially to 10 years or to a fine not exceeding $500,000 or both, and in the case of a body corporate to a fine not exceeding $1,000,000in the MLPC Amendment Bill.

Statistics and effectiveness

135. As noted previously, there have been no ML investigations or prosecutions to date in Tonga. The Tonga Police Force does maintain comprehensive statistics on criminal investigations, criminal offending and convictions, however it has never carried out any money laundering investigation or prosecutions since the MLPC Act came into force in 2000. The effectiveness of the offence provisions is therefore yet to be tested.

136. Crown Law also maintains comprehensive statistics on criminal prosecutions and convictions, however it too has not conducted any criminal prosecutions of any person for money laundering since the MLPC Act came into force in 2000.

137. Whilst the opportunities to pursue the prosecution of ML have been fairly limited, the MLPC Act has been in place for almost 10 years. It is not clear that the Tongan authorities have turned their minds to the possibility of pursuing ML charges where opportunities have arisen, or that the relevant agencies would have the technical and other resources to readily pursue such investigations. In addition, the Tongan authorities have acknowledged that there is a lack of resources and expertise in most of the relevant agencies which may be contributing to a lack of detection of ML and proceeds of crime action. The lack of effectiveness has been taken into account for ratings purposes.

2.1.2. Recommendations and Comments

138. Although some of the current provisions of the MLPC Act comply with a number of the requirements of the FATF Recommendations, there are a number of deficiencies and areas of ambiguity, many of which have been recognised by the Tongan authorities and are to be addressed by amendments to the MLPC Act.

139. The Evaluation Team recommends that the planned amendments, and some new amendments to the MLPC Act outlined below should be passed as soon as possible to clarify several issues, including:

- deleting the reference to "rendering assistance" in section 17(b) of the MLPC Act;
- broadening the definition of "cash";
- amending the definition of "property" in the MLPC Act to cover "legal documents or instruments evidencing title to, or interest in, such assets".
- adding specific provisions to provide that for the purpose of proving the ML offence it is not necessary to prove which serious (predicate) crime has been committed and, secondly, that nothing in the Act prevents a person that committed an offence that generated proceeds of crime from being convicted of ML in respect of those proceeds of crime; and
- substantially increasing the penalty for ML to a maximum of 10 years imprisonment, and the level of fines that may be imposed on natural and legal persons and deleting the exclusion of ML offences from the definition of "serious offence" in the MLPC Act.

140. As noted above, many but not all of the 20 designated categories of predicate offences are currently caught by the definition of "serious offence", with shortcomings in relation to the coverage of offences relating to illicit arms trafficking, illicit trafficking in stolen and other goods, fraud, piracy of products, environmental crime, kidnapping, illegal restraint, hostage taking, insider trading and market manipulation. It is recommended that these deficiencies be addressed.

141. During the on-site visit, the Tongan law enforcement agencies expressly indicated their lack of expertise and resources to conduct ML investigations. Since no investigation has materialized, the effectiveness of the MLPC Act could not be assessed. It is recommended that the Crown Law and the law enforcement agencies work closely together to ensure that the law enforcement agencies are well aware of the legal requirements of ML offences to facilitate their investigation.

2.1.3. Compliance with Recommendations 1 & 2

	Rating	Summary of factors underlying rating
R.1	**PC**	• The phrase "renders assistance to another person" in Section 17(b) of the MLPC Act makes an offence under section 17(b) in relation to conversion or transfer of property and concealment or disguise of the true nature of property an ancillary rather than an actual offence. • The predicate offences in Tonga do not cover all the designated categories of offences. Offences relating to illicit arms trafficking, illicit trafficking in stolen and other goods, fraud, piracy of products, environmental crime, kidnapping, illegal restraint and hostage-taking, insider trading and market manipulation are not fully covered. • Doubts as to coverage of self-laundering and need for prior conviction for

		the predicate offence. • Scope of "property" is not fully covered, ie, "legal documents or instruments evidencing title to, or interest in, such assets" is missing. • Effectiveness issue: Whilst the opportunities to pursue the prosecution of ML may be limited, no charges have been laid and the offence provisions have not been tested.
R.2	**PC**	• There is no statutory or case law providing for the intentional element of the offence of ML to be inferred from objective factual circumstances. • The maximum penalty of ML is not exceeding 12 months which is much too low to be dissuasive. It is also not proportionate to the other serious offences in Tonga. • Lack of effective, proportionate and dissuasive civil or administrative sanctions.

2.2. Criminalization of Terrorist Financing (SR.II)

2.2.1. Description and Analysis

Legal framework

142. TF is criminalised under Part II of the Transnational Crimes Act 2005 (TNC Act).

143. Since its enactment in 2005, no prosecution or investigation has been conducted or resulted for TF, nor have any suspicious transaction reports relating to TF been submitted.

Criminalization of financing of terrorism

144. Sections 6 to 8 of the TNC Act provide for the offences of TF.

145. Section 6 provides for the offence of TF to carry out a terrorist act, although its heading reads "terrorist property". The word "property" instead of "funds" is used in the TNC Act, but it carries the same meaning as "funds" in the Terrorist Financing Convention.

> ***6*** ***Terrorist property*** **(TNC Act)**
>
> *A person who, by any means provides or collects, property and having reasonable grounds to believe that the property will be used in connection with an act of terrorism, commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 25 years.*

146. The standard required under section 6 is "having reasonable grounds to believe" which is a lower standard than the requirement of "unlawful intention" or "knowledge" under Article 2 of the Terrorist Financing Convention. However the section does not specify that the funds (property) are to be used "directly or indirectly" and "in full or in part", as is required under Article 2 of the TF Convention. There is no case law on this and it is unclear whether these elements can be implied. It should also be noted that section 6 states that "the property will be used in connection with an act of

terrorism" which connotes that the funds (property) have to be linked to a specific terrorist act. There is also no case law on this.

147. An "act of terrorism" in the TNC Act has the same meaning as in section 78A of the Criminal Offences Act which provides for the offence of terrorism. "Act of terrorism" is defined in section 78B of the Criminal Offences Act. The range of specified acts under section 78B is broad enough to cover a range of factual settings that might be expected to be associated with offences created by treaties listed in the Annex to the Terrorist Financing Convention.

78B Act of terrorism defined (Criminal Offences Act)

"Act of terrorism" *means an act which —*

(a) may seriously damage a country or an international organisation;

(b) is intended or can reasonably be regarded as having been intended to —

(i) seriously intimidate a population;

(ii) unduly compel a Government or an international organisation to perform or abstain from performing any act; or

(iii) seriously destabilise or destroy the fundamental, political, constitutional, economic or social structures of a country or an international organisation; and

(c) involves or causes —

(i) an attack upon a person's life which causes death;

(ii) an attack upon the physical integrity of a person;

(iii) the kidnapping of a person;

(iv) extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;

(v) the seizure of an aircraft, a ship or other means of public or goods transport;

(vi) the manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons as well as research into, and development of biological and chemical weapons;

(vii) the release of dangerous substances, or causing of fires, explosions or floods, the effect of which is to endanger human life; or

(viii) interference with or disruption of the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life.

148. Section 7 provides for the offence of providing 'property, financial or other services' to an entity specified under section 5 of the TNC Act.

7 Provision of services to specified entity

Any person, who makes available property, financial or other services for the benefit of, a specified entity, other than for the purposes of humanitarian aid or legal services, commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 25 years.

149. Section 5 provides that the Attorney General may, with the consent of Cabinet, by notice in the Gazette prescribe as a specified entity a person or group specified as such by a resolution of the Security Council of the United Nations. "Entity" is defined in the TNC Act to include *a person, group,*

trust, partnership, fund or an unincorporated association or organisation. However, the AG has not as yet prescribed any entity specified by the resolution of the UN Security Council.

150. Section 8 provides for the offence of dealing with "terrorist property" connected to terrorist acts:

> ***8 Dealing with terrorist property***
>
> *(1) Any person who —*
>
> *(a) deals in any terrorist property;*
>
> *(b) collects or acquires or possesses terrorist property;*
>
> *(c) enters, or facilitates any transaction in respect of terrorist property; or*
>
> *(d) converts, conceals or disguises terrorist property,*
>
> *commits an offence and upon conviction shall be liable to imprisonment for a term not exceeding 25 years.*
>
> *(2) It is a defence to an offence under subsection (1) if that person as soon as he is aware that the property is terrorist property informs the Attorney General in writing and acts in accordance with any directions of the Attorney General for that property.*

151. Pursuant to section 2 of the TNC Act, "terrorist property" shall have the same meaning as in section 78C(2) of the Criminal Offences Act:

> *(2) "Terrorist property" means property which —*
>
> *(a) has been, is being, or is likely to be used for an act of terrorism;*
>
> *(b) is the proceeds of an act of terrorism; or*
>
> *(c) is gathered for the pursuit of, or in conjunction with, an act of terrorism.*

152. Sections 6 and 8 are TF offences relating to terrorist acts. Section 7 relates to the provision of services to a specified entity. There is however no provision in the TNC Act on the provision or collection of *funds* (property) for use by a terrorist organization or by an individual terrorist.

153. Section 6 requires "the property will be used in connection with an act of terrorism". It is unclear whether it means that the property has to be linked to a specific terrorist act.

154. Ancillary offences are provided by provisions of the Criminal Offences Act. These provisions also apply to terrorist financing offences. Sections 4 to 7 provide for the attempt offence, section 8 provides for aiding and abetting, facilitating and counseling, and section 15 provides for conspiracy offences.

Terrorist financing as predicate offence for money laundering

155. The TF offences are predicate offences for ML since they fall under the definition of "serious offence" under the MLPC Act.

Jurisdiction for terrorist financing offence

156. Section 3 of the TNC Act provides for the jurisdiction of the Act:

3 Jurisdiction

(1) Prosecutions may be brought for an offence under this Act if it was committed —

(a) in the Kingdom;

(b) on board a ship or aircraft registered in the Kingdom; or

(c) outside the Kingdom by a person who is now in the Kingdom.

(2) Prosecutions may be brought for an offence against this Act whether committed in or outside the Kingdom —

(a) by a Tongan subject or a citizen of any country who is ordinarily resident in the Kingdom;

(b) in order to compel the Government to do or abstain from doing any act;

(c) against a Tongan subject; or

(d) by a person who is, after the commission of the offence, present in the Kingdom.

157. Section 3(1) provides that a prosecution may be brought regardless of whether the offender is in or outside Tonga. Section 3(2) further reiterates this and further provides for the different circumstances. It seems that there is some drafting mistake for subsection (2)(b) and Tongan authorities indicated that they will look into this section again to see if any amendments are required.

Mental element of TF offence, liability of legal persons and sanctions for TF

158. There is no specific provision on the inference of the mental element from objective factual circumstances. However, the standard is "having reasonable grounds to believe" which implies an objective standard based on factual circumstances. There is no case law on this.

159. The TF provisions under the TNC Act apply to any person. There is no definition of "person" in the TNC Act, but the definition of "persons" under section 2 of the Interpretation Act applies, which *includes any body of persons corporate, or unincorporate*.

160. Legal persons are subject to criminal liability for TF offences. Civil forfeiture is not available under Tongan law.

161. The maximum penalty for the offences under sections 6 to 8 of the TNC Act is dissuasive – not exceeding 25 years' imprisonment.

Statistics and effectiveness

162. The Tonga Police Force maintains statistics on criminal investigations, criminal offending and convictions, however it has never carried out any TF investigation or prosecutions since the TNC Act came into force in 2005.

163. Crown Law also has not conducted any criminal prosecutions of any person for terrorist financing since the TNC Act came into force in 2005.

2.2.2. Recommendations and Comments

164. Sections 6 and 8 under the TNC Act are TF offences relating to terrorist acts. Section 7 relates to the provision of services to a specified entity. There is no provision in the TNC Act on the provision or collection of funds (property) for use by a terrorist organization or by an individual terrorist.

165. Section 6 requires "the property will be used in connection with an act of terrorism". It connotes the property has to be linked to a specific terrorist act.

166. Section 7 provides for the offence of providing services to specified entity but no entity has yet been specified by the Attorney General.

167. It is recommended that these deficiencies be rectified as soon as possible. It is also recommended that the TNC Act be reviewed to generally make it more comprehensive. This will facilitate the law enforcement agencies in their investigation of TF.

168. During the on-site visit, the Tongan law enforcement agencies expressly indicated their lack of expertise and resources to conduct TF (and ML) investigations. In the absence of any TF investigations, it is unclear how effective the TNC Act would be in practice. While the risk of TF and terrorism generally in Tonga is low, it is recommended that the Crown Law and the law enforcement agencies work closely together to ensure that the law enforcement agencies are well aware of the legal requirements of TF offences to facilitate their investigation.

2.2.3. Compliance with Special Recommendation II

	Rating	Summary of factors underlying rating
SR.II	**NC**	• There is no provision in the TNC Act on the provision or collection of funds (property) for use by a terrorist organization or by an individual terrorist. • Section 6 of the TNC Act requires "the property will be used in connection with an act of terrorism". It connotes the property has to be linked to a specific terrorist act. • Section 7 provides for the offence of providing services to specified entity but no entity has yet been specified by the Attorney General.

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

2.3.1. Description and Analysis

Legal framework

169. Tonga has a conviction-based confiscation regime. Part III of the MLPC Act (sections 28 – 80) deals with confiscation and related issues.

Confiscation

170. Part III, Division 1 (Confiscation and Pecuniary Penalty Orders) of the MLPC Act provides for the confiscation of property.

171. Section 28 provides for the confiscation of property that is deemed to be "tainted property", however, any application must be made not later than 6 months after the conviction.

172. "Tainted property" is not defined in the MLPC Act, but according to section 34(2) in determining whether property is "tainted property", the Supreme Court may infer, in the absence of evidence to the contrary:

(a) that the property was used in or in connection with the commission of the offence where it was in the possession of the offender at the time of, or immediately after, the commission of the offence (section 34(2)(a));
(b) that the property was derived, obtained or realised as a result of the commission of the offence if it was acquired by the offender, before, during or within a reasonable time after the period of the commission of the offence (section 34(2)(b)(i)); and
(c) if the income of that person from legal sources cannot reasonably account for the acquisition of the property (section 34(2)(b)(ii)).

173. The current legislation covers proceeds from (section 28(1)(b) and section 34(2)(b)(i)) and instrumentalities used in (section 34(2)(a)) the commission of a serious offence. It does not cover "instrumentalities intended for use" in the commission of a serious offence nor "property of corresponding value".[10]

174. Confiscation under section 28 is conviction-based. There is a limitation period of 6 months after conviction for the Attorney General to make an application to the Supreme Court for confiscation.

175. When considering whether a confiscation order should be made, the Supreme Court shall have regard to a number of factors, including "any hardship that may reasonably be expected to be caused to any person by the operation of the order" (section 34(4)(c)). There is no case law on the Court's interpretation of "hardship", it is preferable to have the standard limited to "undue hardship".

176. The current legislation does not specifically provide for property that is derived directly or indirectly from proceeds of crime; including income, profits or other benefits from the proceeds of crime; nor does it provide for proceeds of crime held by a third party.

177. "Proceeds of crime" is defined in the MLPC Act[11]:

> *"**proceeds of crime**" means any property derived or realised directly or indirectly from a serious offence and includes, on a proportional basis, property into which any property derived or realised directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realised from such property at any time since the offence;*

[10] It is noted that the MLPC Amendment Bill as currently drafted seeks to provide a definition of "tainted property" similar to that provided in section 34(2) (which will be repealed), but like the current legislation, the instrumentalities intended for use and property of corresponding value are not covered.

[11] It is noted that the MLPC Amendment Bill as currently drafted seeks to add a new paragraph (b) to the definition of proceeds of crime to cover property used or intended to be used in the commission of any serious offence. However, the term "proceeds of crime" is not used in section 28 of the MLPC Act, which refers to "tainted property". Therefore the definition of "proceeds of crime", whether before or after amendment, is not applicable.

178. However, the term "proceeds of crime" is not used in either section 28 or section 34 of the MLPC Act, which refers to "tainted property". There is no case law on the application of this definition of "proceeds of crime" in terms of confiscation. It is therefore unclear whether the definition of "proceeds of crime" has any bearing on section 28 or section 34.

179. Confiscation of tainted property in respect of a ML offence is currently not covered, since ML is not a serious offence by definition. Theoretically, a conviction for the predicate offence may be pursued as the alternative in order to confiscate the proceeds, but that would mean that the predicate offence must be proved and convicted, thereby rendering compliance with criterion 1.2.1 meaningless. The MLPC Act should be amended so that ML is no longer excluded from the definition of "serious crime".

Provisional measures

180. Part III Division 4 (Restraining Orders) of the MLPC Act provides for provisional measures in the form of a restraining order to prevent any dealing, transfer or disposal of realizable property.

181. Under section 57, the Attorney General may make an ex-parte application to the Supreme Court for a restraining order against any realizable property held by a defendant or specified realisable property held by a person other than the defendant. "Defendant" is defined under section 2(1) to include "*a person charged with a serious offence, whether or not he has been convicted of the offence, and includes in the case of proceedings for a restraining order under section 58, a person who is about to be charged with a serious offence*". The application may be made after conviction or when the defendant is charged or about to be charged (section 58(1)). It seems that there is something missing in section 58(1). It only sets out the factors that the Supreme Court may consider but it does not say the Supreme Court may make a restraining order after being satisfied with the factors.

182. "Realisable property" is defined under section 2 of the MLPC Act to mean *(a) any property held by a defendant; (b) any property held by a person to whom a defendant has directly or indirectly made a gift caught by this Act*.

183. "Gift" is defined under section 2(1) of the MLPC Act:

> *"**gift**" includes any transfer of property by a person to another person directly or indirectly —*
>
> *(a) after the commission of a serious offence by the first person;*
>
> *(b) for a consideration the value of which is significantly less than the value of the property provided by the first person; and*
>
> *(c) to the extent of the difference between the market value of the property transferred and the consideration provided by the transferee;*

184. Although by definition 'gift' is included as realisable property, under section 58(1)(d) when seeking a restraining order against property of a third party, it is necessary to prove that the property is subject to the effective control of the defendant. This may affect the effectiveness of restraining property held by third parties and who are considered as "donees" of gifts.

185. A restraining order prohibits any person from dealing with or disposing of the property specified therein, subject to any directions of the Court (section 58(2)).

186. On the application of Attorney General, the Supreme Court may direct the Attorney General or such other person to take custody of the property as is specified in the order to manage it with the

directions of the Court, or may require any person to give possession of the property to the Attorney General or such other person (section 58(2)(b)).

187. A restraining order may make provision for meeting out of the property the defendant or his dependants' reasonable living and business expenses (section 58(3)). Before a restraining order is made, the Supreme Court may require the Attorney General to provide an undertaking as to any damages or costs in relation to making the restraining order (section 59). The Tongan Attorney General indicated that this requirement would deter an application for a restraining order, though in some circumstances the Crown might be willing to give such an undertaking. The Supreme Court may also require notice of application for a restraining order to be served on any interested party, unless such a direction may risk the disappearance, dissipation or reduction in value of the property before making a restraining order (section 60).

188. It is an offence if a person knowingly contravenes a restraining order (section 63(1)).

189. Any disposition or dealing made in contravention of the restraining order for insufficient consideration or in favour of a person who had not acted in good faith may be set aside by the Supreme Court (section 63(2)).

190. A restraining order is valid until revoked by the Court, or after 6 months from the date it was made, or when a confiscation or a pecuniary order is made in relation to the property (section 64).

191. A restraining order may be reviewed (section 65), or extended (section 66).

Ex parte application for provisional measures

192. Under section 57, an application for a restraining order may be made ex parte by the Attorney General. However, before making the restraining order, the Supreme Court may require notice of the application to be given to any interested party (section 60), unless such notice may lead to disappearance, dissipation or reduction in value of the property.

Powers to identify and trace property

193. In addition to the general powers for search and seizure conferred upon the police under the Police Act, police officers are provided with the power to search and seize property that may be tainted property and could be the subject of a confiscation order under Part III Division 3 (Control of Property) of the MLPC Act.

194. The powers to search and seize any tainted property under sections 49 to 53 include: power to search a person or enter a premises and seize tainted property from the person or occupier of the land with his consent (section 49); power to search and seize a tainted property with a search warrant obtained from a magistrate (section 51); in urgent cases, a search warrant under section 51 may be obtained by telephone or other means of communication; and power to search and seize a tainted property without a search warrant in emergency situations (section 53).

195. However, a warrant from a magistrate under section 51 can only be obtained if a summons has been issued, or if it has not been issued, that an application for a summons in respect of the relevant offence will be made within 48 hours. "Relevant offence" is not defined under MLPC Act.

196. Under Part III Division 6 (Production Orders and other Information Gathering Powers) of the MLPC Act, police officers are provided with powers to obtain documents for identifying and locating property including: power to obtain production orders by ex parte application for such documents (section 72); power to search for and seize such documents with the consent of the occupier of the land or premises (section 75); power to obtain search warrants for location of such documents (section 76); power to obtain an ex parte monitoring order on a bank account for a period not exceeding 3 months (section 78).

197. "Document" and "data" are defined under the MLPC Act:

> *"**document**" means any record of information, and includes —*
>
> *(a) anything on which there is writing;*
>
> *(b) anything on which there are marks, figures, symbols, or perforations having meaning for persons qualified to interpret them;*
>
> *(c) anything from which sounds, images or writings can be produced, with or without the aid of anything else;*
>
> *(d) a map, plan, drawing, photograph or similar thing;*
>
> *(e) any material on which data are recorded or marked and which is capable of being read or understood by a person or a computer system or other device;*
>
> *"**data**" means representations, in any form, of information;*

198. However, a production order under section 72 may only be obtained where a person has been charged with or convicted of a serious offence, and the production order cannot require the production of bankers' books (section 72(2)). There is no general power to search and seize other than for the purposes of locating property, although the police may rely on the general powers conferred on them under the Police Act or the Magistrates' Court Act.

Protection of bona fide third parties

199. The rights of "third parties" are protected under section 37 of the MLPC Act. The provision allows a third party to apply to the Supreme Court, before a confiscation order is made or within 12 months after the confiscation order is made but with leave of the Court, to make an order declaring the nature, extent and value of the third party's interests.

200. Under section 65 of the MLPC Act, a person who has an interest in property in respect of which a restraining order was made may, at any time, apply to the Supreme Court for an order to revoke or vary the order.

Power to void actions

201. Section 36 of the MLPC Act gives the Court the power to set aside a conveyance or transfer of property. The test however is that such an order cannot be made if there was sufficient consideration to a person acting in good faith and without notice.

202. Under section 63(2) of the MLPC Act, the Attorney General may also apply to the Supreme Court to set aside a disposition or dealing of property subject to a restraining order.

Additional Elements

203. The MLPC Act does not specifically provide for confiscation of property of organizations that are found to be primarily criminal in nature.

204. Confiscation under the MLPC Act is conviction-based. The MLPC Act does not provide for civil forfeiture.

205. Under section 34(2)(b)(ii), "*in determining whether property is tainted property the Supreme Court may infer, in the absence of evidence to the contrary, the Supreme Court is satisfied that the income of that person from sources unrelated to criminal activity of that person cannot reasonably account for the acquisition of that property*". The drafting of this section is clumsy, but it can be read as containing the provision for the offender to prove the lawful origin of property.

Statistics and effectiveness

206. There has been no confiscation or other provisional measures enforced under the MLPC Act since its enactment in 2000. While opportunities to use the confiscation powers have been fairly limited, this lack of action is also connected to the lack of expertise and resources of the law enforcement agencies to handle ML/TF offences in general.

207. The Attorney General is specified in legislation to bring proceeds of crime proceedings in Tonga. As noted previously, the Evaluation Team considers it likely that there have been missed opportunities to take proceeds of crime proceedings since the inception of the legislation. Although there may be insufficient experienced police resources to undertake investigations, there is sufficient capability within Crown Law to manage and direct necessary enquiries, with the assistance of the Police Commander, to ensure satisfactory outcomes to proceeds of crime proceedings it may instigate. This issue is further discussed in section 2.6 of this report, where it is recommended that consideration be given to establishing a small Proceeds of Crime Unit within the Tonga Police.

2.3.2. Recommendations and Comments

208. Confiscation of tainted property in relation to ML offences is currently excluded by definition of "serious offence". Immediate action shall be taken to rectify this.

209. The current legislation does not cover "instrumentalities intended for use" in the commission of a serious offence nor "property of corresponding value". Immediate action shall be taken to rectify this.

210. For the purposes of confiscation under the MLPC Act, there are three different terms used in the Act – "tainted property", "proceeds of crime" and "realizable property". The Tongan authorities should consider streamlining the terms.

211. Under section 28 of the MLPC Act, the AG has to apply for the confiscation order not later than 6 months after the conviction. The Tongan authorities may consider extending the period or removing it altogether.

212. When considering whether a confiscation order should be made, the Supreme Court shall have regard to a number of factors, including "*any hardship that may reasonably be expected to be caused to any person by the operation of the order*" (section 34(4)(c)). There is no case law on the Court's interpretation of "hardship", it is preferable to have the standard limited to "undue hardship".

213. Before a restraining order is made, the Supreme Court may require the Attorney General to provide an undertaking as to any damages or costs in relation to making the restraining order under section 59. The Attorney General admits that this requirement would deter the Crown's willingness to make application for a restraining order; the Tongan authorities may consider removing this requirement.

214. Although by definition 'gift' is included as realisable property, under section 58(1)(d) when seeking a restraining order against property of a third party, it is necessary to prove that the property is subject to the effective control of the defendant. This may affect the effectiveness of restraining property held by third parties and who are considered as donees of gifts. The Tongan authorities may consider removing this requirement.

215. A warrant from a magistrate under section 51 of the MLPC Act can only be obtained if a summons has been issued, or if it has not been issued, that an application for a summons in respect of the relevant offence will be made within 48 hours. The Tongan authorities may consider removing this requirement.

216. A production order under section 72 may only be obtained where a person has been charged with or convicted of a serious offence, and the production order cannot require the production of bankers' books. These limitations have substantially reduced the effectiveness of this section. It is recommended that this section is reviewed.

217. The MLPC Act should be reviewed as a whole to correct some drafting mistakes.

2.3.3. Compliance with Recommendation 3

	Rating	Summary of factors underlying rating
R.3	**PC**	• ML is not a serious offence by definition. Therefore under the MLPC Act the confiscation of the proceeds of a money laundering offence cannot be made. • Confiscation of property that constitutes instrumentalities intended for use in the commission of ML/TF or other predicate offences and property of corresponding value are not covered. • Lack of clarity of definitions of important terms – "tainted property", "proceeds of crime" and "realizable property – may undermine effectiveness. • Agencies do not have a well developed awareness of the confiscation provisions of the MLPC Act. Implementation has been weak. The resources and technical capacity necessary for the effective implementation of the system are lacking. • There has been no practical application of the confiscation provisions in the MLPC Act.

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

2.4.1. Description and Analysis

Legal framework

218. There is no specific provision for the freezing of funds used for TF under the TNC Act, but the provisional measures and confiscation procedures under the MLPC Act are applicable for the freezing of funds used for TF, since offences under sections 6 to 8 of the TNC Act, which provide for the TF offences are "serious offence" by definition under the MLPC Act.

219. In addition to the deficiencies in relation to confiscation, freezing and seizure of proceeds of crime discussed in section 2.3 above, it is noted that under section 60, the Supreme Court may require notice of application for a restraining order to be served on any interested party, unless such a direction may risk the disappearance, dissipation or reduction in value of the property before making a restraining order. Special Recommendation III requires that no prior notice shall be given to the designated persons involved, irrespective of risks mentioned in section 60.

220. Ancillary offences to TF are provided by provisions of the Criminal Offences Act. Defendants of these offences are subject to the provisional measures under the MLPC Act. It is noted that there are deficiencies in the TF offences under the TNC Act (section 2.2 above).

221. As mentioned in section 2.3, there are deficiencies in the meaning of "tainted property" and it is unclear whether the definition of "proceeds of crime" has any bearing on the meaning of "tainted property". Therefore it is unclear whether "tainted property" can be extended to funds or other assets wholly or jointly owned or controlled, directly or indirectly, by the designated persons.

222. The NRBT indicated that it regularly distributes the UN SCR 1267 lists (the consolidated list) to financial institutions. The US Embassy in Suva, Fiji provides the UN lists to the Ministry of Foreign Affairs on individuals and entities associated with TF. This list is disseminated only to those financial institutions supervised and licensed by NRBT. The updates to the list are downloaded from the internet and distributed to financial institutions and cash dealers. The covering letter of the disseminated list instructs financial institutions and cash dealers to report transactions associated with individuals/companies in this list to the TRA. Financial institutions and cash dealers are required to incorporate this in their AML procedures. The list is being distributed under the general regulatory power of the NRBT. In the course of the on-site visit it was evident that financial institutions periodically received lists, but were not clear on the procedures to be followed if a match was identified. No actual guidance was given to financial institutions.

223. To date no financial institution in Tonga has identified accounts being utilised by a designated entity. Tongan authorities indicated that, in the event that terrorist funds were identified by a financial institution, Tongan authorities would alert foreign law enforcement authorities via the Transnational Crimes Unit of the Tongan Police to instigate criminal proceedings, and to monitor any movement of funds. If funds were being imported or exported in cash form, the TRA could also use section 19 of the MLPC Act to detain funds for not more than 3 months while investigations were undertaken to charge the person with money laundering or any other appropriate criminal offence. If charges were laid, the funds could then be set aside as evidence.

224. Tonga can freeze assets upon a request for mutual legal assistance from a foreign country which has reciprocal mutual assistance arrangements with Tonga.

225. Tonga has no mechanism for unfreezing funds or other assets of persons or entities inadvertently affected by a freezing mechanism upon verification that the person or entity is not a designated person.

226. The Tongan authorities are drafting a new TNC Act which would introduce provisions on freezing of terrorist funds.

2.4.2. Recommendations and Comments

227. Although the provisional measures under the MLPC Act may be applicable to TF cases, the MLPC Act is itself deficient. It is therefore recommended that a new set of laws on freezing of terrorist funds should be implemented as the Tongan authorities are planning to do. Therefore Tonga should implement the following:

- Immediately enact laws with provisions allowing for the freezing and confiscation of terrorist assets, including provisional measures, and set up effective procedures to implement these laws as part of the overall requirement to criminalize the financing of terrorism;
- Implement UN Special Revolutions 1267 and 1373 by enacting the appropriate laws.
- Once implemented, Tonga should provide clear guidance to financial institutions and other persons and entities that may hold targeting fund or other assets.

2.4.3. Compliance with Special Recommendation III

	Rating	Summary of factors underlying rating
SR.III	**NC**	• Criminalization of TF is deficient as described in section 2.2. • There are substantial deficiencies in the provisions for confiscation, freezing and seizing of proceeds of crime under the MLPC Act as described in section 2.3. • Tonga does not have laws and procedures in place to freeze without delay terrorist funds or other assets of person designated by the UN Security Council Resolution 1267 Committee.

2.5. The Financial Intelligence Unit and its Functions (R.26)

2.5.1. Description and Analysis

Legal framework

228. The NRBT was appointed by the Attorney General as the Transaction Reporting Authority (TRA) in July 2001 under section 11(1) of the MLPC Act 2000. The TRA is generally vested with the powers of an FIU although, as outlined below, there are some serious limitations in these powers.

229. Statutory powers of the TRA conferred under the MLPC Act are exercised by the TRA Committee of the NRBT, which comprises the Governor, Deputy Governor, Manager and Assistant Manager of the Financial Institutions Department, and the two Transaction Reporting Officers.

230. As noted in section 1 of this report, under the MLPC Act the TRA acts both as Tonga's FIU as well as the regulator/supervisor of reporting institutions for AML/CFT purposes. This section of the

report deals only with the TRA as FIU. Description and analysis of the TRA's supervisory functions is contained in sections 3 and 4 of this report.

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

231. The TRA was established as Tonga's FIU in 2002 and received its first STR in 2003. It has the power under the MLPC Act to receive and disseminate STRs, but its power to analyse STRs is very limited. Planned amendments to the MLPC Act will address a raft of deficiencies in the TRA's powers.

232. Section 11(2) of the MLPC Act outlines the TRA's functions which include:

- receiving reports of suspicious transactions from financial institutions and cash dealers (FIs):
- sending STRs to appropriate law enforcement authorities if suspicious;
- entering premises of any FIs during ordinary business hours to inspect records etc;
- sending to law enforcement authorities (LEAs) information derived from inspections if suspected to be a transaction involving proceeds of crime;
- issuing directions to FIs to assist investigations; compile statistics and records, and disseminate information;
- issuing guidelines to FIs; and
- creating and providing training.

233. The TRA is not authorised to conduct any investigation other than for the purpose of ensuring compliance with the provisions of Part II of the MLPC Act.

234. All FIs and cash dealers, as defined in the MLPC Act, are required to report STRs under section 14 of the MLPC Act. Fifty-seven STRs in total have been submitted to the TRA since its inception, and 51 since 2005. As is discussed in greater detail in section 3.10 of this report, due to resource constraints, the TRA currently only supervises the four banks and four money transfer entities (which are licensed by the NRBT) for AML/CFT compliance and has in practice extended the STR reporting requirement only to these eight supervised entities. STRs have therefore only been submitted by the four banks and four money transfer entities. No other reporting entities have filed STRs.

235. There are approximately 259 FIs (65 Credit Unions and 194 money lenders) which have been issued with a business license and whose business activities are supervised by the Ministry of Labour, Commerce and Industries (MLCI). The AML Guidelines have not been issued to these entities, which accordingly, due to ignorance of the requirements, are not complying with the MLPC Act, including to report STRs. The Tongan authorities indicated to the Evaluation Team that, due to resource constraints within the TRA, there are no immediate plans to inform these FIs and cash dealers of their obligations to comply with the provisions of the MLPC Act.

236. During the assessment, the low percentage of all FIs being monitored – and submitting STRs – was raised as a significant concern. The TRA reported that the majority of FIs operating in Tonga (and which are not yet in practice required to comply with the MLPC Act) are small entities, providing financial services to locals for amounts less than $2,000, and averaging $100 to $200. It was considered by the TRA that the principle FIs, posing the largest ML/TF risks, are being monitored, however no risk assessment had been undertaken to support this contention.

237. STRs are hand delivered to the TRA, generally preceded by phoned advice, within 2 to 3 days of the date of the transaction and are given priority by the TRA over other duties. Reports are generally supported with additional information such as account opening forms and operating authorities, details of identification, and previous transactions which may relate to the transaction reported. All STRs are acknowledged by the TRA on receipt from the FI which is asked to continue to monitor the relevant account(s) and report any further activity.

238. The contents of each STR are checked using a standardised checklist, and the details entered into an Excel spreadsheet. The TRA was previously provided with FIU software by the Australian FIU AUSTRAC ('FIU in a Box'), but this software is not currently fully functional and does not link STRs. Discussions with AUSTRAC to rectify the problems are ongoing. With the small number of STRs, reliance is therefore currently placed on the Excel database and this seems to be effective. The anticipated increased volume of STRs (which will arise when the STR requirement is extended to all reporting entities) will however require the development of the current Excel database, or the purchase of suitable computer software to manage the information and functions required.

239. When STRs are received, a physical check of all names referred to in previous STRs received by the TRA is carried out and where further reports are found, all known details of the aggregated value of the network and any other relevant information, such as other addresses, ID documents, linked accounts, wire transfer or other financial institution information will be added to the Analytical Report prepared by the Transaction Reporting Officer (TRO).

240. The details of the STR are entered into a written report, however the TRA is unable to carry out any effective analysis of STRs, due to its inability to obtain information from law enforcement agencies and other sources under the MLPC Act. There is no legal provision that allows the TRA to have access to relevant government (eg land titles, social security etc), which is a severe limitation on the TRA's effectiveness in relation to analysis of STRs.

241. Effectively, the TRA adds relevant details held within the TRA which has been generated from its on-site inspections and other contact with FIs (eg account information).

242. Where a suspicion is evident, the STR is referred to the Police Transnational Crime Unit (TCU). In total 19 of the 57 STRs received have been disseminated to the TCU. There are special arrangements ensuring immediate dissemination of STRs where urgent matters are identified, ensuring provision to the police the same day. This procedure has already been used on one occasion.

243. All work undertaken within the TRA office by the TROs is overseen by senior NRBT staff, and discussed at regular TRA Management Committee meetings where decisions are made relating to referral if not already attended to, closure, other action including media releases to warn of scams or other risks, or dissemination of identified issues to registered FIs. From discussions held during the on-site visit concerning day-to-day work practices, it was evident to the Evaluation Team the senior NRBT staff maintain close supervision of the TROs, identifying those matters that require urgent referral.

244. A monthly meeting is held between TCU and the TRA to discuss reports made. Feedback is sought from the TCU on the STRs, however due to the nature of police enquiries, it often forms part of an ongoing investigation and is not available, which somewhat limits the effectiveness of these meetings. Quarterly meetings are convened between the TRA and Customs to identify significant issues arising, and increase the awareness of ML/TF related matters.

245. Border cash reports (BCRs) are currently not available to the TRA as arrival cards require revision, and proposed implementation of departure cards used to collect the information has not yet taken place. In addition, due to current legislative information sharing restrictions, Customs would in any case be unable to provide details of such reports to the TRA for analysis purposes. Accordingly, information available for analysis of STRs is very limited, and insufficient to complete an effective report enabling law enforcement agencies (LEAs) to undertake an immediate investigation.

246. It is noted that proposed amendments to the MLPC Act will strengthen the TRA's ability to analyse and assess all reports and information received, provide feedback, conduct research into trends and developments, and improve methods of detecting, preventing and deterring ML/TF. Information sharing will be enhanced both internally and with foreign counterparts. However, these amendments were not in force at the time of the evaluation.

Guidance to reporting entities

247. In 2004 the TRA issued four AML Guidelines to the four banks and four money transfer entities under supervision.[12] As noted above, while the requirement to report STRs under section 14 of the MLPC Act applies to all financial institutions (FIs) and cash dealers, in practice, due to resource constraints, the AML Guidelines have not been circulated to all FIs and cash dealers, ie they have not in fact been issued to those entities not supervised by the NRBT.

248. Guideline 2 is the most relevant document relating to the TRA's role as an FIU. It explains how to report a suspicious transaction. It also provides guidance on how to identify a suspicious transaction, including general and industry-specific indicators that may help when conducting or evaluating transactions. Within the document are definitions of a FI, who must report, and details provided relating to what STRs are and how they can be identified. This is supported by five pages of examples of transactions that may give rise to suspicion. The Guideline outlines the legal obligation to report, what and where to report including a template of the STR form, and immunity provisions in the legislation. The Guideline is well compiled and in line with the current legislation.

249. The eight banks and foreign exchange dealers subject to regulation by the NRBT have been issued with the Guidelines, and those met with during the on-site visit confirmed they were aware of them.

250. Section 11(g) of the MLPC Act places a legislative requirement on the TRA to "provide such training for any financial institution in respect of transaction record-keeping and reporting obligations." Such training has in practice been provided to the eight reporting entities supervised by the NRBT.

Access to information

251. There is no legal provision that allows the TRA to have access to relevant government and law enforcement information, which is a severe limitation on the TRA's effectiveness. In practice, once an STR has been disseminated to the TCU, the TCU has direct access to government databases, for example, the Immigration, Customs, and Lands Department and carries out further analysis of the STR at that stage. While the TRA can obtain financial records and conduct some basic analysis of STRs, the TCU is effectively performing most of the analytical function normally performed by an

[12] These Guidelines are described in greater detail in section 3 of this report.

FIU. The TRA is unable formally to obtain information from the TCU however informal arrangements provide a working system.

252. Recent amendments to the Companies Act to provide online access to companies information from 1 December 2009 will overcome one of the obstacles facing the TRA, but limitations will remain until further legislative amendments are made.

253. The MLPC Act and other relevant legislation also lack general sufficient information sharing powers between Government Departments. The current structures rely on informal information sharing procedures which, in the absence of legislation and MOUs, and are of limited effectiveness.[13]

Obtaining information from reporting entities

254. The TRA has both a specific power and general powers enabling it to obtain additional information from reporting parties.

255. As to the specific power, section 14(3) of the MLPC Act requires a FI or cash dealer that has reported a suspicious transaction to provide further information it has in relation to the transaction, if requested to do so by the TRA. In practice, if additional details are required, these are sought by email or telephone, and generally provided by the FI on the same business day. Good informal relationships exist between the TRA and the eight FIs that it directly supervises, and should they not comply with requests, provisions under the Reserve Bank Act could be invoked.

256. In relation to its general powers to obtain information, under the MLPC Act the TRA has the power to:

- enter the premises of any financial institution or cash dealer during ordinary business hours (without a court order) to inspect any record kept pursuant to section 13(1) of the MLPC Act (which relates mainly to CDD information), and ask any question relating to such record, make notes and take copies of the whole or any part of the record [section 11(2)(c)];
- instruct any financial institution or cash dealer to take such steps as may be appropriate to facilitate any investigation anticipated by the Transaction Reporting Authority [section 11(2)(e)];
- apply to the Supreme Court for a warrant to enter any premises of a financial institution or cash dealer or any officer or employer thereof and remove documents, materials or things, as per ordered by the SC [section 20(1)];
- apply to the Supreme Court for a property tracking/monitoring order for the provision by any person of documents/information relevant to identifying, locating or quantifying property [section 21]; and
- apply to Supreme Court for an order (to financial institutions or cash dealers) to enforce compliance with obligations under sections 12 – 16 of the Act [section 22].

257. No applications have been submitted to the Supreme Court under these provisions.

[13] It is noted that draft amendments to the MLPC Act would provide the TRA with enhanced powers to collect and to request information from both commercial and government entities.

258. In addition to these specific powers, under section 44 of the National Reserve Bank of Tonga Act, a financial institution is required to furnish to the Bank such information regarding its business, or that of any related company in Tonga or elsewhere, as the Bank may require for the purposes of this Act. The NRBT has confirmed the powers afforded during inspections can also identify details relating to AML/CFT supervision, and effectively could undertake a compliance visit to obtain the details. This arrangement is not entirely satisfactory and in any case only applies to reporting entities subject to the NRBT's supervision. It is noted that the TRA's powers to obtain additional information from reporting parties are clarified and enhanced in the proposed amendments to the MLPC Act.

259. During the on-site visit, the TRA advised that information on the results of investigations carried out by Police will be passed on to the relevant FI when a result in respect of a completed investigation becomes available. In the absence of such an occurrence, this cannot be verified.

260. Section 13 of the MLPC Act requires FIs and cash dealers to establish and maintain records of all transactions of $10,000 or more, or any series of transactions occurring in any four week period, totalling $25,000 or more or the equivalent in foreign cash carried out by it. In practice, the NRBT currently requires the preparation of monthly summaries of all transactions of $10,000 or more (or $25,000 or more over a four week period) from those FIs it actually supervises. This information is available to the TRA. It was apparent during the on-site visit that some FIs 'automatically' submit a list of these transactions to the NRBT on a monthly basis, while others retain the records and are able to produce them if required to do so by the TRA. This is a record-keeping requirement only, as there is no power under the MLPC Act to require the submission of reports as a matter of course. These reports identify significant transactions, and are provided in addition to STR reports relating to suspicious transactions. Since 2006, 13 out of the 20 STRs disseminated to the TCU involved large transactions.

Dissemination

261. Section 11(2)(b) of the MLPC Act states that the TRA "shall send any [suspicious transaction] report to the appropriate law enforcement authorities if the report gives the Transaction Reporting Authority reasonable grounds to suspect that the transaction is suspicious".

262. The TRA has received an annual average of 10 STRs since 2004, with peaks of 16 STRs in 2007 and 17 in 2009, though a number of the 2007 STRs were from cash dealers which were reporting based on transaction amount alone. Of the 51 STRs received since 2005, 19 have been disseminated to the TCU for investigation, 14 having been referred in 2009. STRs not passed onto the TCU are entered into the TRA's spreadsheet for future reference.

263. Following a recommendation from the TRO, decisions to disseminate an STR (or to close a file) are made by the TRA Management Committee which, as noted above, comprises the Governor of the NRBT, Deputy Governor, Manager and Assistant Manager of Financial Markets/Institutions and two Transaction Reporting Officers. The TRA aims to disseminate STRs to the TCU for investigation within 24 hours of receiving the STR, though it is not always possible to meet this deadline, including because of the involvement of the members of the TRA Management Committee in other central bank functions and also because additional information from banks is often required. STR Analysis Reports are generally provided by the TRA to the TCU within two to three days of completion. Should the volume of STRs increase in the future, it will be very difficult for this level of timeliness to be maintained without an increase in analytical resources in the TRA. Enhanced training of financial institution staff is also required in order to improve the quality of STRs to avoid the need for the TRA to request additional information.

264. It is usual that a proportion of STRs reported relate to transactions likely to identify tax evasion or avoidance. As there is currently regular liaison between the TRA and Revenue Department, this provides an opportunity for STRs that may relate to revenue related matters to be referred for their information. It is unlikely STRs of this nature would be investigated by the TCU or other LEAs.

Independence and autonomy

265. The TRA is housed within the premises occupied by the NRBT, and reports to the Governor of the NRBT and the TRA Management Committee. The TRA does not have its own individual budget and is dependent on the central bank for funds to run the unit. Managers of other departments of the NRBT cannot however interfere with the TRA, which has operational independence for financial resources and administrative support.

Protection of information

266. The NRBT building is very secure, and guarded by security staff employed by the NRBT for the purpose. Staff and visitor access to the building is restricted and must be approved by the NRBT Guard Commander. There is restricted entry to the TRA office. Information held by the TRA is securely stored in the TRA Office in a filing cabinet though this is not fire-proof. Access to the TRA computer records is restricted to the TRA staff and their supervisor by computer security measures preventing unauthorised use. The computer is housed within the NRBT building.

267. There is no specific legislative provision requiring the TRA to keep information obtained confidential, however, due to the TRA's location within the NRBT, it is subject to the confidentiality provisions of the NRBT Act. Under no circumstances would NRBT disclose actual reports received, nor permit disclosure of the completing teller's details. There is currently no legislative provision requiring the NRBT to house and supervise the TRA, therefore any change in the location of the TRA in the future may result in lower confidentiality and security standards.

Public reports

268. The TRA does not publish an annual report. Currently, the NRBT Annual Report, which is published and posted on the NRBT website, is the only publication which refers in any way to the TRA's activities. The 2007-08 Annual Report notes that six STRs were reported, of which two were forwarded to the Police for further investigation. The TRA does not undertake any trend analysis or identify or publish typologies.

269. The NRBT has regular meetings with the Association of Banks in Tonga, which comprises representatives from the four banks, where issues are identified such as the incidence of Nigerian scams which may affect the community. In these circumstances, as required, the NRBT will issue press releases alerting the public of their existence.

Membership of Egmont Group of FIUs and exchange of information

270. Tonga has not yet applied for membership of the Egmont Group of FIUs, although consideration has been given to the issue.

271. The MLPC Act is currently an impediment to the TRA applying for membership of the Egmont Group due to the TRA's inability to freely share information with foreign counterparts. The TRA is seeking assistance to review and develop its framework and functions to make it a more

effective and fully operational FIU to comply with AML laws in Tonga, and international standards, before it applies for membership of the Egmont Group.

272. The TRA considers that it does not have clear or sufficient power under the MLPC Act or any other legislative provision to allow it to exchange information with foreign FIUs. As noted above, draft amendments to the MLPC Act will address this deficiency and a review of the TRA is planned which will include establishing a framework for exchange of information with foreign counterparts.

273. Section 11(2)(f) of the MLPC Act allows the TRA to "…compile statistics and records, disseminate information within Tonga or elsewhere…". The NRBT's view is that this power is restricted to information in relation to s13(1) - records of all transactions of $10,000 or more or a series of transactions of $25,000 or more and records of evidence obtained by an FI of a persons identity and s14(1) – suspicious matter information.

274. In practice, however, there has never been a request for assistance from a foreign FIU nor are there any current MOUs in force, which would formally clarify the present issues restricting information sharing with foreign counterparts. There is apparent interest from overseas evidenced by a draft MOU received from one foreign FIU.

Resources (FIU)

275. There are currently two full-time staff employed in the TRA. Both staff have recently taken up their positions, though one has previous experience as a bank examiner with the NRBT while the other is a trainee. The two TROs' duties also include AML/CFT supervision and assessing the compliance of financial institutions with their AML obligations. Their supervisor is a senior NRBT staff member with other duties who spends approximately 30% of her time on TRA related functions. This is important in particular as the two full time officers are still developing the required technical skills and knowledge.

276. As noted above, the TRA is housed within the NRBT, and funded within the NRBT's overall budget. Current staffing resources allocated to the TRA are considered inadequate to meet its functions both as an FIU and as AML/CFT supervisor. Once the proposed amendments to the MLPC Act are in force, which will increase the responsibilities of the TRA and extend reporting requirements to the DNFBP sector, the current shortfall in resources will become even more pronounced. NRBT staff advised that there is no approval to increase resources in the TRA.

277. As noted above, AUSTRAC's computer program "FIU in a Box" is not functioning, which has required a conversion of the records to Excel. Arrangements are underway to rectify this issue which should hopefully overcome this problem.

Integrity and professional standards (FIU)

278. The TRA adopts the NRBT's recruitment and personnel policies, which ensures high professional standards including the maintaining of confidentiality are maintained. The staff of the NRBT are all required to sign an oath of secrecy, and are prohibited by legislation to disclose to any person any material information relating to the affairs of the Bank, or of any financial institution or other person which he has acquired in the performance of his duties, and if convicted may face a term of imprisonment.

Training for FIU Staff

279. The current TROs lack adequate training/experience to fully perform their duties and responsibilities, due to their recent appointments, but this situation is slowly improving. The full-time TRO has attended a Pacific FIU workshop, and an AML/CFT workshop on policy development in Pacific Island countries, both in June 2008. The trainee has received no external training. Intelligence analysis training would be an advantage.

280. The TRA supervisors have received training which has been conducted externally, funded by AUSTRAC, the Australian Money Laundering Assistance Team (AMLAT), the IMF, and technical assistance funded by the Pacific Anti-money Laundering Program (PALP) and AMLAT, which has assisted current TRA staff on AML issues and on-site visits. The training received has strengthened the TRA's operations, such as formalising procedures for the STR analytical process, which will assist in maintaining high integrity and appropriately skilled staff.

281. Both TROs have undertaken the UNODC AML/CFT training package based at the Police Training facility which has also been provided to financial institutions and investigation agencies.

Statistics and effectiveness

282. The TRA maintains basic STR statistics, which are reported in the NRBT Annual Report.

Table 7: STRs reported to TRA 2005 to 2009

Year	No of STRs	Type of Financial Institutions	No. of STRs forwarded to the TCU
2009	17	Banks	14
2008	6	Banks	3
2007	16	Banks (4 STRs) Licensed Cash Dealers/money remitters (12 STRs)	0
2006	8	Banks (7) Licensed Cash Dealers/money remitters (1)	2
2005	4	Banks	0

283. There has been a total of 51 STRs submitted to the TRA since the beginning of 2005, all received from the four banks and four licensed cash dealers regulated by the NRBT. There have been no STRs received from any of the financial sector institutions supervised/regulated by the MLCI. While predicate crime levels in Tonga appear to be relatively low, overall the Evaluation Team felt that STR reporting levels were relatively low, in particular from the licensed cash dealer/money remitter sector. In addition, the failure to extend in practice the statutory STR reporting requirement to the full range of FIs and cash dealers has a significant adverse impact on the effectiveness of the FIU's function.

284. Section 11(2) of the MLPC Act outlines the TRA's functions, which include receiving reports of suspicious transactions from financial institutions and cash dealers; and sending STRs to appropriate law enforcement authorities if "suspicious". The current analysis undertaken is however unable to ensure that the reported transaction is in fact suspicious. As noted above, as there is no

current legal provision allowing the TRA to have access to relevant government and law enforcement information, the ability to conduct any analysis is severely limited, which in turn limits the value of information it can disseminate to the TCU. The TRA is limited to providing details of the STR and any supporting documents provided, and further details held within the NRBT that may relate to the transaction. As a result, the TRA is unable to effectively test the level of suspicion, and therefore has been obliged to disseminate approximately one third of all STRs it has received (and the majority of those received in 2009) to the TCU, which has access to the required information to carry out the required analysis. Further analysis is restricted by the current provisions of the MLPC Act.

285. As earlier stated, legislative restrictions do not allow the undertaking of a full analysis of STRs. Ideally, a STR analysis report disseminated by the TRA to the designated investigative authority should contain a number of essential elements as follows:

- an explanation of the details of the transaction and details of the grounds for suspicion as advised by the reporting FI;
- copies of supporting documents submitted if they are relevant to the investigation;
- details of any information relating to previous reports made and any other details held by the NRBT in their records that are relevant and able to be provided;
- details of other bank accounts held with other FIs by the person(s) of interest;
- details of transactions recorded by FIs over $10,000.00 which are captured by them;
- details of business and registered company interests, including directorships, shareholders, and details of business partners, including details of any STRs in respect of the companies and other persons identified;
- details of landed property interests of all persons, and companies;
- details of passport(s) held, travel undertaken, and intelligence held by Customs Department in respect of the person, his family, and other associates identified;
- details of immigration status of all persons identified in the report; and
- details of intelligence available from foreign FIUs, if any person is an overseas resident.

286. As can be seen from the summary above, there is a requirement for access to a wide range of information and intelligence resources held by Government entities, including Customs, Immigration, Department of Lands, and MLCI for the TRA to effectively perform its analysis function as an FIU. The current legislation, however, prevents collection of information by and information sharing with the TRA. As a result, the extent of analysis is minimal, and is effectively required to be undertaken by the TCU.

287. In order to be effective, the TRA must have access to all available information and intelligence in order to complete an adequate report that provides comprehensive and worthwhile information on which to consider an investigation.

288. The resources available to the TRA function are below satisfactory levels. Though resources are sufficient for the limited duties the TRA is currently undertaking, the level of expertise is low due to the limited experience of the current TROs. It is certain that when all FIs and cash dealers caught by the MLPC Act commence reporting, when BCRs become available, when the TRA is authorised to undertake full analysis of STRs, and when compliance obligations are undertaken for all FIs in Tonga, the current resources of the TRA (both as FIU and as AML/CFT supervisor) will be totally inadequate.

289. During the on-site visit, the private sector generally indicated that it did not receive adequate feedback on STRs filed.

2.5.2. Recommendations and Comments

290. It is recommended that the TRA ensure awareness of and compliance with reporting requirements of STRs by FIs. This will enhance the information reported to the TRA, assisting in the identification of money laundering in all sectors. Furthermore, it will become a valuable financial intelligence resource to enable the efficient investigation of criminal activity by all LEAs in Tonga.

291. It is recommended that the proposed legislative changes to the MLPC Act, to introduce adequate information gathering, analytical and information sharing provisions to enable the TRA to adequately carry out its functions, both domestically and internationally, are enacted as quickly as possible.

292. It is recommended that the NRBT ask all FIs to provide details each month of transactions over $10,000, which are required to be recorded under the MLPC Act. This would provide more extensive data availability when undertaking analysis of suspicious transactions reported

293. It is recommended that the TROs should regularly familiarise themselves with published trends and typologies, including those on the APG and FATF websites, and ensure staff employed by FIs are aware of their existence and relevance. Further, the TROs should provide details and understanding to FIs whenever appropriate.

294. It is recommended that the TRA should publish periodic reports on its activities, including statistics, typologies and trends.

295. STR analysis undertaken by the TRA does not include access to cross-border currency reports. It is recommended that as soon as these details become available, they are incorporated into reports.

296. It is recommended the TRA should take immediate steps to identify and formalise information sharing protocols with Pacific FIUs, in the form of MOUs if necessary, and that consideration be given to making an application to join the Egmont Group, as soon as the necessary legislative amendments are enacted.

297. It is recommended that STRs that may relate to transactions involving tax evasion should also be referred to the Inland Revenue for their information. Provision of these details may need to be addressed in proposed amendments to the MLPC Act.

298. It is recommended to attribute more budget to improve the TRA's analysis tools and staff resources.

299. It is recommended to formally subject the TRA to appropriate confidentiality requirements by legislation.

2.5.3. Compliance with Recommendation 26

	Rating	Summary of factors relevant to s.2.5 underlying overall rating
R.26	**PC**	• TRA's functions under the section 11 of the MLPC Act do not explicitly include analysis of STRs. Lack of timely access to financial, administrative and law enforcement information severely limiting ability of TRA to provide effective analysis of STRs. • The TRA does not have the ability to complete effective analysis of STRs

		received. • While the larger, supervised financial institutions are required to report STRs, a large proportion of FIs and cash dealers are not in practice required to report STRs. The limited number of reporting entities significantly reduces the effectiveness of the TRA as an FIU. • Lack of guidance to reporting entities others than those directly supervised by the NRBT. The TRA's Guidelines have not in practice been circulated or applied to approximately 259 reporting entities (credit unions and money lenders). • No periodic reports, including on ML/TF trends and typologies • Lack of power under MLPC Act to share information with foreign counterparts. • Additional resources and additional training of TRA staff required.

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

2.6.1. Description and Analysis

Legal framework

300. Law enforcement responsibility is vested with the Minister of Police (under the Police Act) as well as the Attorney General. Tonga Police is the sole investigation authority in Tonga.

301. As noted in section 1.6 of this report, the Customs Service does not have a significant investigative role with respect to ML. Its role in relation to AML is largely limited to processing cross-border declarations. Customs does have a role in investigating smuggling offences in that it conducts joint operations with Tonga Police if there are reasonable grounds to suspect any offence. Customs also receives intelligence from overseas customs authorities which may lead to smuggling investigations. Generally, however, any investigative matters are referred directly to the Tonga Police. The role of Customs is therefore discussed in section 2.7 of this report.

302. The Minister of Police is responsible for enforcement of the Criminal Offences Act, which includes receiving criminal complaints, investigation of alleged offences, laying criminal charges and prosecution of criminal charges in the Magistrates' Court, maintaining law and order and promoting and protecting the safety and peace of the public.

303. The Attorney General (AG) is responsible for prosecution of criminal offences in the Supreme Court; representation of the Crown in all litigation to which it is party in the Court of Appeal, Land Court and Family Court; and provision of legal advice to Government.

304. The AG is the first law officer of Government. The Solicitor General (SG) is the second law officer of Government and heads the Crown Law Department which is responsible for the provision of core legal services to Government. The SG supervises the prosecution of all offences within the jurisdiction of the Supreme Court of Tonga (offences punishable by more than $10,000 and/or three years' imprisonment). The Crown Law Department employs 11 qualified lawyers and it is funded by allocation in the budget from general revenue.

305. The Prosecution Division of the Ministry of Police prosecutes lesser offences not within the jurisdiction of the Supreme Court.

Designation of authorities for ML/TF investigations

306. Investigation of ML/TF predicate offences is the sole responsibility of the Police, who may also apply for seizure of assets under the proceeds of crime provisions in the MLPC Act. The Police are also responsible for undertaking investigations involving foreign offences, including proceeds of crime, laundered through Tonga. The MLPC Act allows investigation of the predicate offence and the ML offence to be conducted together, due to the requirement for a connection between the predicate offence and the proceeds of crime and money laundering offending.

307. Practically, the Transnational Crime Unit (TCU) of Tonga Police is the unit where there is the expertise and responsibility to undertake investigations of this nature, including ML and terrorism related offences. The TCU was established in 2003 and has largely an intelligence focus, although it can undertake investigations as appropriate (as discussed below). It is currently staffed by two sworn, CID trained senior Police. The current Officer in Charge of the TCU is one of two qualified accountants employed by the Tonga Police.

308. The TCU is responsible for investigations which are transnational in nature, including ML and TF. Stipulated in its 2003 General Instructions, the TCU has been tasked with the following core functions:

- to prevent and detect offences arising from transnational criminal activities;
- to undertake intelligence analysis and investigations into transnational criminal activities;
- to act as a platform on which regional criminal operations can be mounted and criminal intelligence operations are coordinated and disseminated;
- to act as an inter-agency criminal intelligence engaged in intelligence collection, collation and analysis;
- to enhance local law enforcement intelligence and investigative capacity through specialist training and short term attachments

309. While the TCU clearly has a transnational focus, the Tongan authorities indicated that the TCU would be asked to investigate any purely domestic money laundering case that might arise, in which a domestic predicate offence generated proceeds of crime laundered domestically for and by Tongans.

310. In addition to its intelligence function, the TCU has an investigative responsibility. It is currently holding 18 active files, relating to drugs (8), serious fraud (7), passport scams (1), and illegal fishing (2). There are no current ML investigations, although it was indicated to the Evaluation Team that a number of the files may also support money laundering charges being laid. One ML charge was previously laid, which was not the result of a STR, and which was subsequently withdrawn by Crown Law due to full restitution being made, and the complainant's unwillingness to proceed with the prosecution. There are no proceeds of crime actions presently contemplated. These files are retained in the office and not referred to CID staff due to the complexity of the investigations required.

311. One of the TCU's duties is to receive STR reports disseminated by the TRA, for further enquiry, and in this regard, a total of 16 reports have been referred since the enactment of the MLPC Act. Analysis and preliminary investigations have been conducted by the TCU in relation to the STRs referred from the TRA, but none have triggered any further investigation by the TCU, or referral for

further investigation to the CID. The details provided within the reports are recorded in the intelligence resources of the TCU prior to file inactivation.

312. Investigation of ML/TF offences is a new area for Tonga. Training is required for both the investigators and prosecutors who are or may be directly involved in investigation and prosecution of ML offences. There have been no ML/TF convictions, prosecutions, property frozen, seized and confiscated, nor any formal mutual legal assistance received by Crown Law in relation to ML/TF matters, however police regularly receive foreign related requests for cooperation or assistance direct from foreign counterparts on other issues.

313. The Pacific Transnational Crime Network (PTCN), which was established in 2003 by the Australian Federal Police (AFP) and is based in Fiji, has the primary purpose of combating transnational crime in the wider Pacific region, through intelligence-led law enforcement. Under this group is the Pacific Transnational Crime Co-ordination Centre (PTCCC), which is regionally based in Samoa, operating within the Pacific, that enables investigative and intelligence resources to be provided as required. The TCU is a member of and participant in the PTCN and PTCCC, which enables requests for assistance in both directions to be undertaken promptly, and without the requirement of legislative requests to be enacted.

314. There have been no proceedings for asset seizure undertaken for domestic prosecutions, though Crown Law indicated that they do consider the possibility when they receive the file for prosecution. In general, assets considered for restraint are generally of low value and difficulties are experienced in identifying ownership.

Ability to postpone/waive arrests and seizure of money

315. The MLPC Act does not provide any legislative guidance relating to delaying or waiving arrest, and/or allow delay of freezing or seizure of property for evidence gathering purposes. As a matter of procedural practice, however, the Tonga Police, during the course of any investigation, can suspend or waive the arrest of a suspected person or the seizure of property for the purpose of identifying persons involved in such criminal activities or for evidence gathering."

Additional elements

316. The use of controlled deliveries, covert monitoring, use of tracking devices, and telephone intercept provisions is stipulated in the Illicit Drugs Control Act 2003. However, these powers have never been used in Tonga as the police do not have the technical capability. The provisions in the Illicit Drugs Control Act 2003 do not preclude the availability of the evidence to be used to support a ML charge, or in subsequent forfeiture or confiscations following the conviction. The use of informants by police is not uncommon.

317. The recent arrival of an AFP mentor, who will be working with investigators in Tonga for a six month period, will develop skills within the CID, and increases the likelihood of such powers being used in the future.

318. In general, the special powers given to police are currently limited and the provisions complicated, and may affect the admissibility of evidence. The Magistrates' Court, using general powers under the Magistrates Court Act, may grant orders allowing access to information such as telephone records, but such orders are subject to limitations provided by the law.

319. During the investigation of predicate offences, the TCU has utilised the skills of a financial investigator, informants, surveillance and local and international inter-agency cooperation. Though there have been no ML/TF investigations, Tongan authorities believe that there is no impediment to the use of special investigation techniques provided in legislation.

320. There is currently no high level response to this specialised area, and no designated ML or Proceeds of Crime Unit due to the unavailability of the required skilled personnel.

321. There have been no previous examples of a law enforcement Task Force response to criminal investigations.

322. TCU members have been gazetted to be "authorised officers" in enforcing the Mutual Assistance in Criminal Matters Act. There have however been no formal requests sent or received by Tonga under this legislation. The TCU also liaises closely with overseas counterparts in less formal agency to agency information sharing.

323. There have been no inter-agency discussions or meetings between LEAs to review ML and TF methods, techniques and trends.

324. There is a monthly meeting between the TRA and Police to discuss STR and related matters which also considers improvements to current systems and sharing of information. In addition the Commander and Deputy Commander of Tonga Police meet on a regular basis with Crown Law and the Attorney General to discuss general and prosecution related matters. Additionally, written and verbal feedback is provided by Crown Counsel designed to ensure an ongoing improvement in investigation procedures where necessary.

325. Any possible ML investigations or proceeds of crime opportunities would be referred to the TCU, where the expertise is located. As noted above, Crown Counsel do consider opportunities for ML or proceeds of crime proceedings on receipt of domestic offences files for prosecution following call-over, however to date no suitable matters have been identified.

Recommendation 28

Powers to obtain records

326. MLPC Act provisions which may be used, and available to the Police under the MLPC Act are as follows:

- Section 19 – seizure and detention of suspicious imports or exports of cash [suspected to be derived from serious offence or intended to be used in the commission of a serious offence]. Not detained more than 24hrs unless ordered by a Judge;
- Section 49 – search for and seize tainted property;
- Section 51 – search warrants in relation to tainted property;
- Section 53 – search and seizure of suspected tainted property in "emergencies" (subject to return of seized property according to section 55);
- Section 56 - search and seizure of tainted property in relation to foreign offences (provisions of Act applies to property within jurisdiction as per requested by foreign State provided that AG grants approval for mutual assistance);
- Section 75 - power to search for and seize documents relevant to locating property (entry subject to consent of occupier of land/property or warrant issued under section 75); and

- Section 76 – search warrant for location of documents relevant to locating property which could be used by Police under the current Act include powers for seizure and detention of suspicious imports or exports of cash, tainted property including foreign offences; and search and seizure of documents relevant to locating property. These sections have to date, never been used by Police.

327. Though the MLPC Act does not specifically refer to terrorism related offences, such offences fall within the definition of "serious offence" and accordingly are captured by the legislation. This enables competent authorities, including Customs, Fisheries, and Immigration, to use the powers above, and not limited to police

328. As noted previously in this report, a number of deficiencies in the MLPC Act will be rectified in planned amendments. This includes defining ML as a serious offence. As an example, "tainted property" has no definition under the current legislation but is inferred to relate to any kind of property derived either directly or indirectly from the commission of serious crime and instruments used for the commission of the predicate offence. The Personal Properties Securities Bill, currently before Cabinet and still to be tabled, will also include property restraint provisions.

Witness statements

329. There are no specific provisions for the taking of witnesses' statements however they are subject to normal admissibility rules. Police have power to interview any person whom they believe has any information that may help to establish the commission of an offence or identify the perpetrator [Rex v Vaiangina [1990]]. Police can interview witnesses in relation to foreign offences if the witnesses are in Tonga.

330. Investigation is the responsibility of the Ministry of Police, though the police can seek assistance from other institutions such as the TRA, which has authority to obtain evidence under the MLPC Act.

Resources (Law Enforcement and Prosecution Authorities Only)[14]

331. Tonga Police is the principal law enforcement agency in Tonga and is headed by a Police Commander, who reports to the Minister of Police. There are 357 sworn Police and 13 civilian staff, with an official strength of 405. There are currently 74 staff within the CID who undertake criminal investigations in the Police District where the offence is committed. In respect of drug offending, investigations are undertaken by the Drugs Section. The current organisation of the Ministry of Police is set out in the charts at Annex 5 to this report.

332. The Police Commander is currently being assisted by Australia and New Zealand Police staff following the establishment of the Tonga Police Development Program in 2007. They provide assistance in planning, providing expertise, training, and resources aiming to increase investigation capability, and building confidence and trust of Police in the community.

333. Legal support to Police staff is provided by a sworn legal officer, currently the Assistant Commander, and through staff at the Crown Law office.

[14] As related to R.30; see s.7.1 for the compliance rating for this Recommendation.

334. In general there is a shortage of resources, both staff and equipment, throughout the Tonga Police. The Evaluation Team was advised that police resources have previously been allowed to run down and are now only at the stage of being updated to a standard required by a 21st century police force.

335. In respect of ML/TF related investigations, there is limited expertise within the police. It is likely that any investigation would be undertaken by the TCU though there is no formal or legislative mandate for this to occur. The current staffing in the TCU (two staff in total) is well below an acceptable level, however there is current consideration to seek a staff complement of nine, which will require approval from the Police Commander. One major challenge is that only senior, experienced CID staff are likely to be appointed to the TCU, thus depleting the CID and/or Drug Squad resources in Tonga. While working to improve the overall levels of professionalism and expertise within the police, the Police Commander must balance competing demands for resources.

336. As previously noted, there is no dedicated Proceeds of Crime/ML investigation squad currently in the Tonga Police, however the Police Commander indicated that he would be keen to establish such a unit on a small scale if and when resources permit.

337. Crown Law is only providing advice to the Tongan Police on a case-by-case basis. There is no Crown Law Counsel specialised in ML/TF cases. It is the Evaluation Team's view that the staff employed within Crown Law are generally capable and competent. However, due to staff shortages, Crown Counsel are required to manage large caseloads, with a wide rage of responsibilities. There is a high staff turnover amongst Prosecutors and the current level of staffing is inadequate to ensure compliance with ML and POC legislation.

Professional standards, ethical and professional requirements

338. Recruiting of new police staff complies with standards set out in Police General Instructions which specify minimum levels and requirements of officers before entry. There is regular training provided to police staff to ensure awareness of their obligations and requirements relating to the execution of their duties.

339. The Police Commander confirmed there are dismissals of Police staff due to breaches of the Police Act 1988, though there was no known incidence of corruption amongst his staff.

340. There were no issues identified relating to the integrity of Crown Law staff.

Training of staff

341. CID staff trained in investigative techniques do not have the ability to undertake a ML investigation, and would need to refer to the TCU for guidance and assistance. It is more likely the investigation would need to be taken over by the TCU.

342. Currently, Police Prosecutors do not have the knowledge to recognise ML and proceeds of crime cases and opportunities. Due to this lack of knowledge and experience, advice would be required from Crown Law to undertake prosecutions for ML. Training of investigators and Police Prosecutors is currently inadequate to equip them with knowledge and skills required to perform their duties such as precedents and relevant legislation that can be used for the prosecution of ML and TF offences.

343. Opportunities to attend ML courses are limited, with just one TCU member who participated in a ML training course in Fiji in 2006.

344. Legal staff attend courses throughout the year which cover issues such as the scope of predicate offences, ML and TF typologies, and techniques to investigate and prosecute these offences. Studies include techniques for tracing property that is the proceeds of crime or is to be used to finance terrorism; and ensuring that such properly is seized, frozen and confiscated.. They also include training on the use of information technology and other resources relevant to the execution of their functions.

345. With the deployment in Tonga of Australia and New Zealand Police staff following the establishment of the Tonga Police Development Program in 2007, ongoing assistance, training, and development of Tonga Police investigation capability means that there are ongoing opportunities for those staff to assist in specialised opportunities and provide assistance in identifying training needs and solutions to the Tonga Police.

346. The TCU has very recently identified training opportunities for ML/TF related training, through the Joint Inter Agency Task Force (JIATF) in cooperation with the US Federal Bureau of Investigation.

Additional elements

347. Judges in Tonga are predominantly from Australia and New Zealand, and will have gained knowledge in their home country prior to current appointments. Anti-money laundering and proceeds of crime training was provided in 2009 to one Tongan Judge in Kuala Lumpur, Malaysia.

Statistics)/effectiveness:

348. There have been no ML/TF related investigations carried out by police, nor proceeds of crime related inquiries undertaken. There has been no utilisation of special legislative powers provided in the MLPC Act 2000.

349. As noted previously, since introduction of the MLPC Act in 2000, the Evaluation Team believes that there are likely to have been opportunities where this legislation could have been utilised, however specific examples were not identified during the on-site visit. It is also considered likely that during prosecutions of serious offending, Crown Law staff could have identified possible proceedings under MLPC Act provisions.

350. In relation to Tonga Police, AML/CFT training is inadequate, and there is no current structure to ensure that the sole trained staff member in the TCU remains current in her knowledge. There is no formal training as there are capability limitations, and AML/CFT related matters are not in the curriculum.

2.6.2. Recommendations and Comments

351. It is recommended that the police consider establishing a small (eg two person) Proceeds of Crime Unit within Tonga Police, staffed by an experienced AML specialist and one CID investigator ,who could then be supported below by CID staff as required, to undertake investigations. This specialist unit is vital ensure the success of the AML/CFT and proceeds of crime response, and would require identification and employment from outside the current ranks.

352. There is a lack of knowledge and understanding of the offence of ML and also the identification of opportunities for the use of proceeds of crime actions, amongst general police staff. It is recommended that increased awareness is developed among Tonga Police staff, through regular training and outreach by the TCU.

353. It is recommended that the police provide feedback to the TRA on STR reports that have been found not to warrant further investigation, to improve the quality of future reports where necessary, and to enable feedback to be provided to FIs where this does not conflict with operational or confidentiality requirements.

354. It is recommended the police allocate additional investigative resources to the TCU, to enable investigative resources to undertake serious crime investigations, including money laundering investigations and proceeds of crime actions. The initial establishment in 2003 identified a need for eight investigators, in addition to four expert personnel and supervisors.

2.6.3. Compliance with Recommendations 27 & 28

	Rating	Summary of factors relevant to s.2.6 underlying overall rating
R.27	**PC**	• Lack of investigations undertaken • Low level of ML/TF related knowledge amongst police staff not directly working for the TCU • The TCU lacks the resources to undertake its own investigations, and meet its foreign obligations • Lack of awareness training on ML/TF or Proceeds of Crime to general Police staff
R.28	**LC**	• The provisions under the MLPC Act have not yet been tested

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

2.7.1. Description and Analysis

Legal framework

355. The Foreign Exchange Control (Restriction on Removal of Cash) Regulations 2009 provide a restriction on the removal of cash from Tonga over $10,000. Approval is required in writing from the NRBT for amounts in excess of this limit. This regulation replaced a Cabinet Order which came into effect in late 2006. A copy of the approval letter is provided to Customs for their information.

356. It is noted that the draft MLPC Amendment Bill includes a requirement for any person who leaves the Kingdom with cash amounting to more than the prescribed amount (TOP$10000 or US$5000) to make a declaration to the authorised officer prescribed by the MLPC Act. “Cash” is given an extended definition in the Bill, and includes cash of any country, monetary and negotiable instruments, jewellery etc. As noted previously, however, the amendments were not in force and effect at the time of the on-site visit or immediately thereafter.

Disclosure/declaration system

357. Pursuant to Section 21(1) of the Customs and Excise Management Act, a master of an aircraft or ship arriving in the Kingdom shall provide to passengers a prescribed passenger's declaration form for completion prior to arrival in the Kingdom. Under Section 21(2) a passenger shall give a completed prescribed passenger's declaration to a Customs officer or if there is no Customs officer on duty, to the nearest police station on arrival.

358. Regulation 4 of the Foreign Exchange Control (Restriction on Removal of Cash) Regulations 2009 states that any person intending to travel out of the Kingdom shall complete and sign a declaration in the form prescribed in the Schedule to confirm whether or not he is removing any restricted cash. Although the above Regulation has been passed, there is still no practical framework or systems in place to implement the requirements of the Regulation.

359. Although the legislation provides for a declaration reporting system, both on arrival and departure, there are currently no measures in place to monitor inward or outward cash movements. It is planned to introduce the required declaration documents in the near future.

360. The arrival declaration currently provided to incoming passengers is an old form, and does not refer to cash. There is no declaration form for departing passengers. In practice, to obtain information about the cross-border movement of cash, a passenger would need to be questioned on their cash holdings, which is only likely to be completed if suspicion was aroused or the passenger was profiled for Customs' attention. There is no signage at the airport to identify declaration requirements. Accordingly no information on cross-border movement of cash is available to Customs or the TRA.

361. There are three sea ports and two airports on the islands of Tongatapu and Vava'u where a Customs presence is provided at the time of each arrival. When necessary, Customs staff travel to the outer island port of Ha'apai to meet arriving vessels. They are reliant on reports from arriving yachts and vessels.

362. There is a Customs presence at the Post Office and the three courier outlets which are required to obtain Customs clearance prior to release of parcels. A portable x-ray machine is available, however this one machine is not sufficient to cover all inward and outward packages. Where suspicious packages are physically identified by staff, the importer is called to open the package in the presence of Customs staff. The portable x-ray machine is mainly deployed at the sea port on the main Island.

False declarations/disclosures

363. There are no legislative or other provisions giving Customs the authority to request and obtain further information with regard to the origin of funds upon discovery of a false declaration or disclosure.

364. Under draft amendments, it is proposed that any authorised officer may question any person about the source, ownership, acquisition, use or intended destination of any cash in that person's possession.

Restraint of currency

365. The movement of money into Tonga is regulated by Rules made under the Foreign Exchange Control Act in 2009, which provides a power to search, seize and retain funds in respect of undisclosed money and enforce other penalties.

366. As noted above, the Foreign Exchange Control (Restriction on Removal of Cash) Regulations 2009 regulate the movement from Tonga of money including currency of another country, and negotiable instruments payable in the currency of any country. In the event that a Customs officer decides to stop or restrain currency (ie where a person is seeking without approval to take more than $10,000 out of the country), the Customs officer is required to advise the person that the funds will be confiscated and may be forfeited, seize the cash, and provide advice that he may supply evidence to the Minister to apply for the return of the cash, including the reason why a false declaration was made. There have however been no instances where Customs staff have identified border cash movements over the specified limit, or otherwise, that have resulted in seizure.

367. A proposed amendment to the MLPC Act extends the powers to an authorised officer who may seize any cash if he has reasonable grounds for suspecting that it is recoverable cash, intended by any person for use in unlawful conduct or that, or it is undeclared cash intended for use in unlawful conduct. A provision for retention of the cash to enable an investigation to be carried out is also included.

Retention of and access to information

368. As there is no declaration system currently in place, no relevant information is held by Customs. Additionally, there is no capture or availability to the TRA, if authorised, of intelligence holdings for previous years, except for those during the last four months (ie from mid-2009) when a new computer system was installed and became operational.

FIU access to information

369. Following the introduction of the new declaration forms the required information will be available, however current provisions under Section 125 of the Customs and Excise Act regarding the confidentiality of information obtained under the Customs laws, preclude the sharing of the information with the TRA. In the absence of an effective declaration system and in light of the current legislative restrictions, no information sharing agreement between Customs and the TRA has been undertaken.

370. .It is proposed to include an amendment to the MLPC Act to allow Customs Department to share the information with the NRBT.

Domestic cooperation

371. There is inadequate coordination as the law does not allow sharing of information among the domestic agencies.

372. In the interests of security, justice and efficiency, information sharing between law enforcement counterparts does however take place on an informal or ad-hoc basis. The Customs Department has a quarterly meeting with the NRBT to discuss issues relevant to their functions, however these discussions are restricted by legislative restraints.

373. The Immigration Department maintains a computer system to conduct a check on each person on arrival. When details of terrorists, wanted criminals and other persons of interest are received from overseas authorities, they are entered into the computer system. Details can be accessed at the border and, as Immigration Officers all have a right to refuse entry, undesirable persons are turned around at the border.

374. Police staff are present at the arrival of every flight, provide detention as required, ensure a secure environment, and have a police dog capability.

375. Customs relies principally on details provided by the airlines and tip-offs from foreign agencies when identifying risk at the border.

International cooperation

376. As noted previously, current laws do not allow for the formal sharing of information between the TRA or Tongan LEAs and foreign counterparts. Proposed amendments to the MLPC Act include information sharing provisions to the TRA

377. Notwithstanding this, informal cooperation and membership of relevant regional organisations has permitted some sharing of information and intelligence. As an example, on occasions, Customs have received tip-offs from New Zealand relating to details of interest for arriving passengers.

378. Tonga is a member of the OCO (Oceania Customs Organisation) and CRIN (Customs Regional Information Network) reporting through New Zealand. OCO has a secretariat based in Suva, Fiji, and has 25 members. Through this mechanism there is a two-way flow of information between the OCO and member countries. Details of trends and recommended procedures are identified in a regular published bulletin.

379. Aside from government funding, Tonga Customs is also included in the donor aid program of both New Zealand and Australia to ensure that the appropriate leadership, training and resources are available. Recently, AusAID (the Australian Government aid agency) and the Tonga Government partnered in the purchase of mobile and fixed x-ray machines (cargo, luggage) for use at the airport and wharf.

Sanctions

380. The movement of money into Tonga is regulated by Rules made under the Foreign Exchange Control Act in 2009, which provides penalties for non-compliance of provisions.

381. In the event of a cash seizure from a person leaving Tonga, following a false declaration, and seizure of the funds, the Minister may order return of the cash or order forfeiture to the Crown. In addition a person or body corporate may be convicted and fined. An individual is subject to a fine not exceeding $100,000 or imprisonment for a term not exceeding three years or in the case of a body corporate, to a fine not exceeding $200,000.

382. There are no specific criminal, administrative or civil sanctions relating to persons who are carrying out the physical cross-border transportation of currency or bearer negotiable instruments related to ML or TF.

383. A proposed amendment to the MLPC Act states that "any person who enters or leaves the Kingdom with cash amounting to more than the prescribed sum or its equivalent in any other cash shall make a declaration to an authorised officer in the prescribed form in the Foreign Exchange Control Regulations". The proposed MLPC Act amendments also extend the powers to an authorised officer who may seize any cash if he has reasonable grounds for suspecting that it is recoverable cash, intended by any person for use in unlawful conduct or that, or it is undeclared cash intended for use in unlawful conduct. A provision for retention of the cash to enable an investigation to be carried out is also included. The Amendment Bill provides for a fine up to TOP$50,000 for failing to declare the carriage of cash in the proscribed sum. There is however nothing in the proposed amendments prescribing sanctions for persons carrying out the physical cross-border transportation of currency or bearer negotiable instruments related to ML or TF.

Seizing, freezing and confiscation of assets of designated entities

384. There are no specific legislative provisions, however the powers of confiscation under the Foreign Exchange Control (Restriction on Removal of Cash) Regulations 2009 as stated in IX.3 above, would apply.

385. In addition there are proposed amendments to the MLPC Act which outline measures and sanctions to be imposed on financial institutions and cash dealers for the breach any obligation under the Act as described above.

Precious metals and stones

386. This is not authorised under Customs laws due to information sharing restrictions, however each LEA has membership in foreign operational groups that provide informal avenues to provide for notification.

Information protection

387. As noted previously, there is no system in place for reporting cross-border transportation of currency/bearer negotiable instruments. There is no reference to an approved system or protocol referred to in Customs and Excise Regulations to facilitate the release of information, once that information starts to be collected, to any institution outside Customs.

Additional elements

388. Training on AML/CFT is provided to all relevant Government agencies. Data collection remains an individual agency activity but access is open to other Government agencies. Enforcement also is still on an individual agency but once prosecuted it is centralized in the Police and Crown Law.

389. Current procedures and arrangements provide Customs with passenger details, and there is an x-ray machine installed and operated by Customs staff to examine incoming passengers' baggage. Incoming vessels goods are examined by a portable x-ray machine as and when items of interest are identified. Sea traffic is problematic, with three ports and a large number of yachts which visit Tongan waters and are difficult to identify on arrival. These boats also travel other shores and the risk of drug trafficking is high. There are two airports, the principal being on the main island at Nukualofa, and it is at this point that the majority of passengers arrive and depart. Tonga is an end-route destination for most flights.

390. As there is no declaration system for border reporting of cash and negotiable instruments in place there are further matters that require implementation. These will be assisted by the installation of a new computer system this financial year, providing investigative resources to front-line Customs staff to improve capacity in this area. The system has been produced by a New Zealand company, specifically for the needs of the Tonga government, and is in the process of being installed. Training is being provided by the company on its use.

391. Due to the non-existence of declaration forms or a functioning system currently, no recording is undertaken of money being bought into or removed from the country, except for amounts in excess of $10,000.00 which have been approved by the NRBT for export of funds from Tonga. Details of these movements are recorded by the NRBT, but are not released to LEAs except for Customs which is provided with a copy of the signed NRBT approval.

Resources (Customs authorities only)

392. Tonga Customs is a Division within the Revenue Services Department, headed by the Commissioner of Revenue under the mandate of the Chief Commissioner of Revenue. Tonga has recently amended its legislation so that there is now a Minister of Revenue Services. Customs is a priority area for the Government because it is the major revenue source. The Division's funding is included in the Tonga Government Budget yearly and employs 65 officers.

393. Under the Commissioner is the Deputy Commissioner of Revenue (Customs) who is the immediate head of Customs, who is currently funded by AusAID and hails from the Australian Customs Service. This technical assistance was sought primarily because of increasing allegations of corruption hence the need to streamline processes and modernise the Customs Service (including computerisation) in order to minimise the environment that leads to corrupt practices.

394. Customs has had a Code of Conduct in place for the past five years, and there is a zero tolerance attitude to criminal or corrupt practices. Any identified behaviour in breach of law or the Code of Conduct involving staff are promptly referred to the Public Service Commission for disciplinary action.

395. There is regular training provided to Customs staff relating to their duties and obligations. When the extent of corruption was raised by the Evaluation Team, Customs management staff strongly denied the existence of widespread corruption within Customs, though conceded there were staff dismissals for unlawful behaviour relating to actions by Customs staff. It was apparent there is a firm approach taken in respect of any digressions by staff, including dismissal where appropriate, for breaches of the Code of Conduct.

396. Hiring of staff is in accordance with the procedures of the Public Service Commission, and the panel of interviewers includes the Deputy Commissioner (Customs), and hiring is required to strictly adhere to the requirements and specifications of the position as it relates to the qualifications and experience required.

397. Staff are required to maintain high standards and are reminded of this through regular Code of Conduct training.

398. The majority of training is carried out "on-the-job" by experienced staff.

399. Only one senior Customs Officer has undergone external AML/CFT training, when he attended an intelligence course approximately 10 years ago. The current staff are not trained in

AML/CFT related matters nor has there been training undertaken by staff providing aid assistance from overseas.

Statistics and effectiveness

400. Tonga has an extensive coastline, and insufficient resources to ensure prevent illegal passage of persons and property.

401. Regarding intervention options, Customs have a speedboat based on the island of Vava'u and are aided by air patrols from New Zealand. The three Defence vessels are able to be used in certain instances where the seizing of a large vessel is required, however this must be pre-approved.

402. The Customs budget is insufficient to cover operating costs for deployment of the Defence patrol boats, nor for the operation of air search capabilities to protect the shorelines from illegal arrivals by small yachts and illegal vessels. Customs are able, to some extent, to monitor borders in partnership with other agencies, for example Tonga Defence Services and Police. However, full protection from criminal and terrorist related risks cannot be assured.

403. Customs does not have access to previous intelligence, and based on training received, is unable to ensure that the computer system is being utilised to its potential by Customs staff. There are presently no comprehensive statistics on intercepts by staff reflecting the effectiveness and efficiency of systems for combating ML/TF.

2.7.2. Recommendations and Comments

404. It is recommended that Customs increase resources to ensure the borders are adequately protected by the utilisation of an increased air and sea vigilance options, to identify and intercept all vessels trying to obtain illegal entry.

405. It is recommended that information sharing protocols be developed with other LEAs either by legislative changes to the Customs & Excise Act, or formal MOUs between LEAs.

406. The Customs legislation does not specifically allow for co-operation between foreign counterparts. It is recommended the Customs legislation be amended to allow for agreements and sharing of information with overseas agencies.

407. Customs Officers require training on ML/TF related issues that either do or may impact on the border, including methodology, trends and typologies used by criminals to carry illegal items including cash to Tonga

408. Customs Officers require training on the full potential of the intelligence system within the new computer system including intelligence principles not able to be taught by the New Zealand firm writing the operating programs.

2.7.3. Compliance with Special Recommendation IX

	Rating	Summary of factors relevant to s.2.7 underlying overall rating
SR.IX	**NC**	• There is no mechanism in place to notify travellers of cash reporting requirements. • There is no reporting mechanism in place.

		• There is no system for tracking cross border currency movement. • Powers to stop or restrain currency and bearer negotiable instruments are not clearly articulated in law. • Sanctions are not effective, proportionate and dissuasive and are not clearly specified in law in relation to ML/TF. • Customs does not have systems in place for analysing or identifying - border information in terms of suspicious cases related to ML/TF in order to notify the TRA • There is no formal information sharing capability with internal and foreign LEA counterparts • Borders are not effectively protected • Insufficient training undertaken on AML/TF related matters and intelligence recording

3. PREVENTIVE MEASURES —FINANCIAL INSTITUTIONS

Scope issues and law, regulation and other enforceable means

Scope issues

409. The regulatory framework in relation to financial institutions is summarised in the table below and described in detail in the subsequent paragraphs.

Table 8: Main laws applying to financial institutions

Act & Description	Regulatory Body	Guidelines and/or Regulations issued (as relevant)	Applicability to entities and activities
Money Laundering and Proceeds of Crime Act 2000 An act to enable the unlawful proceeds of all serious crime including drug trafficking to be identified, traced, frozen, seized and eventually confiscated; to establish a transaction reporting authority; and to require financial institutions and cash dealers to take prudential measures to help combat money laundering	Transaction Reporting Authority	• Guidelines may be issued to 'Financial Institutions' (s11(2)(f)). Four such guidelines have been issued but only 8 of the entities covered by the Act – 4 banks and 4 foreign exchange dealers – are aware of them. The guidelines cover Background (money laundering and its nature), Suspicious Transactions, Customer Due Diligence and Implementation of Compliance Regimes. The guidelines have been issued under NRBT signature. • Regulations may be made (s80) but have not been formalised to date, having been drafted but not finalised.	• Financial Institutions and cash dealers - see paragraphs 402 & 403 below. • Apply to the following activities (see paragraph 400 below): Commercial Banks, Foreign Exchange Dealers, Development Bank, Credit Unions, Money Lenders, Retirement Scheme
Financial Institutions Act 2004 An act to regulate the licensing and supervision of licensed financial institutions in Tonga and for purposes connected thereto	National Reserve Bank of Tonga (NRBT)	• Guidelines and Prudential Standards may be issued by NRBT (s15(1)). Relevant prudential standards issued include Audit Arrangements (PS7) and Governance (PS9). • Regulations may also be made (s88)	• Banks and Banking business, Credit Institutions and financial institutions (as defined in the National Reserve Bank of Tonga Act)
National Reserve Bank of Tonga Act An act to establish the national reserve bank of Tonga and for purposes connected therewith	NA	• Guidelines cannot be issued. • Regulations can be made (s61)	• Defines financial institution as an entity doing banking business. Banking business is defined as accepting deposits. Credit Institutions are defined as financial institutions not doing banking business

410. The MLPC Act provides the following AML/CFT preventive measures with which financial institutions and cash dealers are required to comply:

- Identify and verify identity of customers, including third party customers;
- Establish and maintain customer records on all transaction over TOP$10,000 or series of transactions totalling TOP$25,000 or more over a four week period; and copies of identification data;
- Report suspicious transactions to the TRA within three days of forming the suspicion; immunity for employees or officers reporting the STR is provided by the Act; secrecy obligations under other Acts are overridden by the MLPC Act
- Establish and maintain internal reporting procedures, including the appointment of a compliance officer
- Establish and maintain internal procedures to make employees aware of domestic AML-related laws, and AML policies established pursuant to the Act, and provide employees with appropriate training in the recognition and handling of money laundering transactions.

411. A “financial institution” (FI) is defined as any natural or legal person who carries on a business of:

(a) acceptance of deposits and other repayable funds from the public including for life insurance and investment related insurance;
(b) lending, including consumer credit, mortgage credit, factoring (with or without recourse) and financing of commercial transactions;
(c) financial leasing;
(d) money transmission services;
(e) issuing and administering means of payment (such as credit cards, travellers' cheques and bankers' drafts);
(f) entering into guarantees and commitments;
(g) trading on its own account or on account of customers in money market instruments (such as cheques, bills, certificates of deposit), foreign exchange, financial futures and options, exchange and interest rate instruments, and transferable securities;
(h) underwriting share issues and participation in such issues;
(i) giving advice to undertakings on capital structure, industrial strategy and related questions, and advice and services relating to mergers and the purchase of undertakings;
(j) money-broking;
(k) portfolio management and advice;
(l) safekeeping and administration of securities;
(m) providing credit reference services; or
(n) providing safe custody services.

412. A cash dealer is defined as any natural or legal person who carries on a business of:

(a) an insurer, an insurance intermediary, a securities dealer or a futures broker;
(b) dealing in bullion, of issuing, selling or redeeming travellers’ cheques, money orders or similar instruments, or of collecting holding and delivering cash as part of the business of providing payroll services;
(c) a gambling house, casino or lottery; or
(d) a trustee or manager of a unit trust.

413. The introduction of the MLPC Act and the establishment of the TRA have provided Tonga with a basic level of customer due diligence requirements across a comprehensive range of financial institutions and cash dealers that operate in Tonga. These include the following entities:

Table 9: Entities captured by the MLPC Act

Activity	**Number of Entities**
Commercial Banks	3
Foreign Exchange Dealers	4
Development Bank (Tonga Development Bank)	1
Credit Unions	65
Money Lenders	194
Insurance Companies: Life Insurance Property, House & Vehicle	 5 8
Retirement Scheme (Retirement Fund Board)	1
Lawyers-Legal firms and practitioners	Private firms- 11 Private practitioners- 23 Government lawyers- 11
Accountants/Auditors	14
Real Estate Agent – rent or lease house/land	4
Total entities	**344**

414. While the MLPC Act as worded captures a wide range of financial institutions and cash dealers, in practice, due to resource constraints the TRA has imposed the MLPC Act requirements only on the four licensed banks and four authorised restricted foreign exchange dealers supervised by the NRBT. Other financial institutions and cash dealers have not been made aware of the MLPC Act requirements, nor has the compliance of those other FIs or cash dealers been assessed or enforced by any competent authority.

415. Four AML Guidelines have been issued pursuant to s11(2)(f) of the MLPC Act covering the AML/CFT measures under the MLPC Act and other measures required by the FATF Recommendations. On paper, like the MLPC Act, these Guidelines apply to all financial institutions and cash dealers. In practice, however, they have only been issued to the eight NRBT-supervised entities. The TRA has conducted onsite visits on the eight NRBT supervised entities to assess their compliance status as well as enforce compliance with the AML requirements, but has not extended any such visits to other FIs or cash dealers caught by the MLPC Act. The limited application in practice of the MLPC Act to FIs and cash dealers is noted in the analysis that follows, and has necessarily affected the ratings as they relate to the application of preventive measures.

AML Guidelines and "other enforceable means"

416. No Regulations have been issued as yet under the MLPC Act[15]. However, as noted above, AML Guidelines were issued by the TRA in 2004. The question arises as to whether these AML Guidelines constitute "other enforceable means' and, if so, for which entities.

417. The Guidelines are not considered by the Evaluation Team to be "other enforceable means" for the great majority of financial institutions and cash dealers in Tonga. The NRBT has advised that compliance with the Guidelines has been made a licence condition for the eight FI Act licensed entities (ie the four banks and four foreign exchange dealers) licensed by the NRBT. The Guidelines can only be considered OEM with respect to the FI Act licensed entities The Evaluation Team's analysis of the status of the Guidelines is as follows:

- The Guidelines are structured so that they address the relevant FATF Recommendations in language that implies the requirements in the guidelines are mandatory;
- The Guidelines have been issued by a competent authority (the TRA);
- However, Guidelines may be issued only to 'financial institutions' under section 11(2)(f) of the MLPC Act, and not to 'cash dealers'. In practice, the Guidelines have been issued only to a subset of the financial institutions captured by the MLPC Act, ie to the four banks and four licensed foreign exchange dealers licensed and supervised by the NRBT (and not to credit unions or money lenders);
- The MLPC Act does not clearly provide for sanctions with respect to the Guidelines. Section 18(2)(a) of the MPLC Act provides that "A financial institution or cash dealer who fails to comply with any requirement of this Part [ie Part II] for which no penalty is specified commits an offence and shall upon conviction be liable to imprisonment for a period not exceeding 2 years or to a fine not exceeding $20,000 or both, and in the case of a body corporate, to a fine not exceeding $100,000." Part II includes section 11(2)(f), under which the AML Guidelines were issued. However, section 11 of the MLPC outlines the powers and functions of the TRA; it does not (directly) impose obligations on FIs or cash dealers, which are set out in other relevant sections of Part II. Therefore, in the Evaluation Team's view, the sanctions outlined in section 18(2)(a) do not apply to the requirements set out in the Guidelines issued under section 11(2)(f). This interpretation of section 18(2)(a) is reinforced by the fact that section 18(2)(b) of the MLPC Act provides that the Supreme Court, in determining if a person has complied with 18(2)(a), may take into account "…any relevant guidance adopted or approved by a public authority…"
- Section 15(3) of the Financial Institutions Act 2004 allows the NRBT to issue guidelines to licensed financial institutions. Section 33 of the FI Act provides penalties for non-compliance with the provisions of the Act, including compliance with Guidelines issued by the NRBT. While the AML Guidelines were issued by the TRA, and the NRBT has been appointed as the TRA, the AML Guidelines were **not** issued by the NRBT for the purposes of the FI Act and therefore cannot be considered to be enforceable for the purposes of the MLPC Act;

[15] These requirements are included in the proposed MLPC Regulations which are to be issued under section 80 of the MLPC Act. The TRA is also in the process of licensing/registering money transfer businesses to enforce the AML requirements. In addition, awareness training will be conducted by the TRA covering entities that are under the definition of "financial institutions" and "cash dealers" which are currently operating in Tonga, with the intention of enforcing the AML requirements on these entities. However, as at the time of the on-site visit, these measures were not in force and effect.

- The NRBT has advised that a licence condition has been imposed on their licensed entities requiring them to meet the guidelines. In addition the entities interviewed by the Evaluation team indicate that they treat the Guidelines as a requirement. Section 33 of the FI Act provides for a reasonable range of sanctions against NRBT-licensed financial institutions including warnings, remedial agreements, administrative penalties, restriction of operations and revocation of licences for contraventions of licence conditions.
- For the eight FI Act licensed entities, sanctions available with respect to the Guidelines are considered effective, proportionate and dissuasive because of the penalty powers available under s33 of the FI Act. The Evaluation Team was satisfied that the NRBT/TRA apply the AML requirements to in practice, but only to the eight NRBT-supervised FIs, through inspections and where appropriate follow-up/remedial action (though the extent of supervision is discussed further in section 3.10 of this report). Interviews conducted by the Evaluation Team with licensed entities indicated that the AML Guidelines are treated as requirements rather than optional
- Therefore, the AML Guidelines are considered to be "other enforceable means" for the eight entities licensed by the NRBT. They are not however enforceable for the great majority of financial institutions and cash dealers that are not licensed by the NRBT (credit unions, money lenders, insurance companies) or for the designated non-financial business and professions (as discussed in section 4 of this report).

3.1. Risk of money laundering or terrorist financing

418. Competent authorities have not undertaken any risk assessment to determine the degree of risk attached to particular parts of the financial sector, types of institutions, customers, business relationships, transactions or products. There have been no decisions to exclude specific institutions or types of activity from the AML/CFT regime on the basis that they pose a low or negligible risk for ML/TF purposes. The TRA has expressed an intention to conduct a risk assessment of the smaller financial industry (money lenders, transmitters, etc) and the DNFBPs to determine how these institutions will come under the national AML/CFT regime, but plans for such an assessment have not been considered in detail, and there is uncertainty as to when and by whom it will be conducted.

419. Section 80 of the MLPC Act permits the issuing of Regulations, which could address issues of risk, but no such Regulations have been issued to date[16].

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

3.2.1. Description and Analysis

Legal framework

420. The overarching AML/CFT legislation laying down the framework within which financial institutions operate is the Money Laundering and Proceeds of Crime Act 2000 (MLPC Act). Other related legislation is

[16] Proposed MLPC Regulations have been prepared, a draft of which was seen by the Evaluation Team. As currently drafted, these Regulations would specify, amongst other things, policies and practices covering risk-based CDD. The draft Regulations also specify enhanced CDD for high risk customers and simplified CDD for lower risk customers. However these Regulations have yet to be formally passed and implemented, and as a result cannot be relied upon to assess the risk management systems regarding CDD.

- National Reserve Bank of Tonga Act Cap 102 (revised 2007);
- Financial Institutions Act (2004);
- Foreign Exchange Control Act Cap 103 and regulations; and
- Business Licensing Act 2002 and Licensing Regulations.

421. Section 11 of the MLPC Act establishes a Transaction Reporting Authority (TRA). A Cabinet memorandum dated 5 July 2001 established the National Reserve Bank of Tonga as the TRA.

422. The TRA has issued AML Guideline 3 under s11(2)(f) of the MLPC Act covering customer due diligence but as already noted they are only considered other enforceable means for the eight FI Act licensed entities.

423. As noted above, these guidelines only relate to "financial institutions" and not to "cash dealers" as defined in the MLPC Act. Amendments currently proposed to the MLPC Act will provide for the issuance of guidance to cash dealers.

424. Section 12 of the MLPC Act requires financial institutions and cash dealers to establish and verify customer identity. The MLPC Act requires financial institutions and cash dealers to take reasonable measures to satisfy themselves of the true identity of any customer seeking to enter into a business relationship or to carry out a transaction or series of transactions. The production of an official record reasonably capable of establishing the true identity of the applicant is required. When the applicant is a body corporate a certificate of incorporation together with the latest annual return to the Registrar of Companies is required to be produced.

425. Tonga is a small island country and there is a lack of official photograph identification. Many Tongans do not have a passport or driver's licence. Other identification measures such as third party introductions (for example, district officer or church minister or a member of bank staff) are provided for in the guidelines as an acceptable form of identification with confirmation obtained in writing from the District / Town Officer or a bank staff member or a well known existing customer of the bank.

426. Financial institutions and cash dealers are required to determine if a third party is conducting a transaction on behalf of another person. The institution or cash dealer is to take reasonable measures to establish the true identity of any person on whose behalf or for whose ultimate benefit the applicant may be acting in the proposed transaction, whether as trustee, nominee, agent or otherwise.

427. Section 22(1) of the MLPC Act provides for the Supreme Court, upon application by the TRA, and after being satisfied that a financial institution or cash dealer has failed to comply with any obligation provided for under sections 12, 13, 14, 15 or 16, to make an order against all or any officers or employees of the institution or dealer in such terms as the Supreme Court deems necessary, in order to enforce compliance those sections' obligations.

428. Commercial banks, foreign exchange dealers and the Tonga Development Bank are actively supervised for AML/CFT purposes, including customer due diligence, by the TRA. Credit unions, money lenders and money transfer businesses are licensed by the Ministry of Labour, Commerce and Industry (MLCI) but there does not appear to be any active supervision of their activities for AML/CFT purposes by the MLCI or the TRA. They are considered to have no or few AML/CFT policies and procedures and therefore the CDD process is very weak or lacking in these entities.

429. The TRA requires commercial banks, foreign exchange dealers, and the Tonga Development Bank to have AML/CFT policies, including in relation to customer due diligence, in place, a copy of which is provided to the NRBT. On-site visits are also conducted by the NRBT/TRA to assess

compliance with AML/CFT requirements and for the smaller financial institutions, the TRA offers assistance in ensuring compliance through training and commenting on draft policies.

430. Regulations which could be issued under the MLPC Act to address the shortcomings of the framework have not been issued despite being in draft form and under consideration. The draft Regulations specify policies and practices covering risk-based CDD, record keeping and retention, reporting of suspicious transactions to the TRA, and internal procedures, policies and controls to ensure compliance with the Regulations. The Regulations specify how to identify customers, including a requirement not to keep anonymous accounts or accounts in fictitious names, ongoing monitoring of customer transactions, termination of customer relationship, enhanced CDD for high risk customers, simplified CDD for lower risk customers, policies and procedures for conducting money transfer/wire transfers through licensed financial institutions, and policies and procedures on cross border correspondent banking and similar relationships.

Recommendations 5

Anonymous Accounts

431. Section 13(2) of the MLPC Act requires customer accounts to be kept in the true name of the account holder.

432. Section 18(1) of the MLPC Act states that is it an offence punishable on conviction to open or operate an account in a false name.

When is CDD required?

433. In relation to the timing of CDD, section 12(1) of the MLPC Act states that a financial institution and cash dealer shall take reasonable measures to satisfy itself as to the true identity of any applicant seeking to enter into a business relationship with it and or carry out a transaction or series of transaction with it by obtaining an official record reasonably capable of establishing the true identity of the applicant.

434. The MLPC Act does not address CDD requirements in relation to occasional customers, doubts about the veracity of previously obtained customer identification data, or a requirement for CDD regardless of transaction size when a suspicion arises. It also does not cover carrying out occasional transactions that are wire transfers.

435. The proposed amendments to the MLPC Act and new Regulations appear to address these shortcomings.

Identification and verification

436. In relation to identification measures and verification sources, section 12 of the MLPC Act sets out that financial institutions and cash dealers shall take reasonable measures to satisfy themselves as to the true identity of any applicant seeking to enter into a business relationship with them and or carry out a transaction or series of transaction with them by obtaining an official record reasonably capable of establishing the true identity of the applicant. However “applicant” is not defined within the Act and it is not clear if this includes occasional customers. The MLPC Act also does not require reliable, independent source documents to be used for identification but simply "an official record reasonably capable of establishing the true identity of the applicant".

437. The proposed amendments to the MLPC Act and new Regulations appear to address current shortcomings.

Identification of legal persons or other arrangements

438. For identification of legal persons or other arrangements, sections 12(2) and 12(3) of the MLPC Act require financial institutions and cash dealers to take reasonable measures to determine whether a customer is acting on behalf of another person. Where this is the case, reasonable measures shall be taken to establish the true identity of the person on whose behalf or for whose ultimate benefit the applicant may be acting in the proposed transaction

439. The MLPC Act does not however require financial institutions and cash dealers to verify the legal status of the arrangement, only that a person is acting for another.

440. The proposed amendments to the MLPC Act and new Regulations appear to address these shortcomings.

Identification of beneficial owners

441. As noted above, sections 12(2) and 12(3) require financial institutions and cash dealers to take reasonable measures to determine whether a customer is acting on behalf of another person but there is no requirement to identify beneficial owners, understand the ownership and control structure of the customer nor the natural persons ultimately controlling the customer.

442. There is also no requirement to obtain information on the intended purpose and nature of the business relationship.

443. TRA AML Guideline 3 asks a financial institution or cash dealer to understand the structure of the company, determine the source of funds, and identify the beneficial owners and those who have control over the funds. In practice, however, banks are not in compliance with this requirement, which is not in any case enforceable for entities not licensed by the NRBT.

444. The proposed amendments to the MLPC Act and new Regulations appear to address these shortcomings.

Purpose and nature of business relationship

445. The requirement to obtain information on purpose and nature of business relationship is not covered in any provision of the MLPC Act. This requirement may be met by "other enforceable means". AML Guideline 3 requires that financial institutions or cash dealer should obtain all information necessary to establish to their full satisfaction the identity of each applicant and the purpose and intended nature of the business relationship. This is only "other enforceable means" for the eight NRBT licensed entities.

446. The proposed amendments to the MLPC Act and new Regulations appear to address this shortcoming. The draft Regulation requires, for example, institutions to establish a customer profile.

Ongoing due diligence

447. The basic requirement to conduct ongoing due diligence on business relationships is not covered in any provision of the MLPC Act or by regulation.

448. The proposed amendments to the MLPC Act and new Regulations appear to address this shortcoming. The draft Regulations require, for example, institutions to establish a customer profile.

449. Ongoing due diligence on business relationships, including scrutiny of transactions undertaken throughout the course of a relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, and source of funds is not covered in any provision of the MLPC Act.

450. AML Guideline 3 requires financial institutions and cash dealers to have an understanding of normal and reasonable account activity of their customers so that they have a means of identifying transaction which fall outside the regular pattern of an account's activity.

451. A requirement to ensure that documents, data or information collected under CDD process is kept up to date and relevant is not covered in any provision of the MLPC Act.

452. AML Guideline 3 requires financial institutions and cash dealers to ensure that records remain up-to-date and relevant, by undertaking regular reviews of existing records. It states that where there is an existing business relationship further verification is not required if the applicant has already produced satisfactory evidence of identity. However, financial institutions and cash dealers should ensure that records remain up-to-date and relevant, by undertaking regular reviews of existing records.

453. The proposed amendments to the MLPC Act and new Regulations appear to address these shortcomings.

Enhanced due diligence

454. The requirement to perform enhanced due diligence for higher risk customers, business relationships or customers is not covered in any provision of the MLPC Act.

455. AML Guideline 3 requires financial institutions and cash dealers to conduct enhanced due diligence on higher risk customers in general terms only by indicating that financial institutions and cash dealers should develop policy and procedures including a description of the types of customers that are likely to pose a higher then average risk. The Guideline does not provide specific details of the types of customers that might be high risk.

456. The proposed amendments to the MLPC Act and new Regulations appear to address current shortcomings in relation to higher risk customers.

Simplified/reduced CDD

457. Section 12(4)(a) of the MLPC Act states that the financial institution or cash dealer shall, in determining what reasonable CDD measures to impose on customers, consider whether the applicant is a person based or incorporated in a country in which there are in force provisions applicable to it to prevent the use of the financial system for the purpose of ML. This implies a reduced or simplified customer due diligence measure may be appropriate. Neither the Act nor Guidelines provide examples of customers, transactions or products that may be subject to reduced CDD measures.

458. Section 12(5) of the MLPC Act states that there is no need for production of any evidence of identity where the applicant is itself a financial institution or cash dealer, or there is a transaction of series of transactions taking place in the course of a business relationship, in respect of which the applicant has already produced satisfactory evidence of identity.

459. The definition of "financial institution" in the MLPC Act includes credit unions and money lenders. Under the definition of "financial institution" in the NRBT Act, credit unions can be subject to licensing by the NRBT but have not in fact been licensed by the NRBT. In any case, neither credit unions nor money lenders are subject to supervision by the TRA for AML/CFT requirements. Section 12(5) of the MLPC Act therefore introduces a potential vulnerability through a simpler identification option. It should be noted that core financial institutions met with during the on-site evaluation visit indicated that simpler identification requirements are not applied to credit unions or money lenders.

460. Proposed MLPC Regulation 15 will require financial institutions and cash dealers to apply to the TRA for authorisation to apply a simplified CDD procedure. This would be when the risk of ML/TF is lower, where information of the customer's identity and beneficial owner is publicly available, or where adequate checks and controls exist elsewhere in national systems.

461. The MLPC Act does not specifically address the requirement for institutions to consider the implementation of FATF recommendations. Section 12(4)(a) of the MLPC Act states that the financial institution or cash dealer shall, in determining what reasonable CDD measures to impose on customers, consider whether the applicant is a person based or incorporated in a country in which there are in force provisions applicable to it to prevent the use of the financial system for the purpose of ML.

462. The proposed amendments to the MLPC Act and new Regulations appear to address this shortcoming.

463. There is nothing in the MLPC Act or the TRA's AML Guidelines to provide that simplified CDD measures are not acceptable whenever there is suspicion of ML or TF or specific higher risk scenarios apply. The proposed amendments to the MLPC Act and new Regulations appear to address this requirement.

464. The MLPC Act at section 12 sets out requirements for financial institutions and cash dealers to take reasonable measures to establish the true identity of a customer. This is not however considered a risk-based application as there is no requirement to undertake a risk assessment in relation ML/TF risks. The TRA AML Guideline 3 states that financial institutions or cash dealers may conduct a risk assessment of their customers and apply CDD measures accordingly.

465. The proposed amendments to the MLPC Act and new Regulations appears to address these shortcomings

Timing of verification

466. Section 12 of the MLPC Act requires verification of customer's ID by financial institutions and cash dealers when any applicant is seeking to enter into a business relationship with them or to carry out a transaction or series of transactions with them by taking reasonable measures to satisfy itself as to the true identity. The term 'seeking' is considered to adequately address the requirement that institutions be required to verify the identity of a customer *before or during* the course of establishing a business relationship. 'Satisfy itself as to the true identity' is considered to mean that the identity is verified.

467. As section 12 includes a requirement in relation to carrying out a transaction or series of a transaction independently of establishing a business relationship occasional customers appear to be covered by the MLPC Act.

468. Treatment of exceptional circumstances is not covered in any provision of the MLPC Act or the TRA's AML Guidelines as the MLPC Act requires that the identity of a customer should be established when an applicant is seek to establish a business relationship or conduct a transaction. There is no allowance for completion of verification of identity after the relationship is established or the transaction conducted.

469. The proposed amendments to the MLPC Act and new Regulations appear to address this issue.

Failure to complete CDD

470. Requirements where there is a failure to complete CDD before commencing a business relationship is not covered in any provisions of the MLPC Act. The Act only requires a financial institution or cash dealer to take "reasonable measures to satisfy itself as to the true identity".

471. TRA AML Guideline 3 outlines procedures for the financial institution or cash dealer if CDD requirements are not complied with by stating that in the absence of satisfactory identification, an account should not be opened or a transaction conducted. Also, the Guideline suggests that if problems arise in the CDD process the institutions should submit an STR. The proposed amendments to the MLPC Act and new Regulations appear to address these shortcomings

472. Failure to complete CDD after commencing a business relationship is not covered in any provisions of the MLPC, in regulation or in the AML Guideline 3. Once again, the proposed amendments to the MLPC Act and new Regulations appear to address these shortcomings

Existing customers

473. CDD requirements for existing customers are not covered in any provisions of the MLPC Act.

474. AML Guideline 3 asks financial institutions and cash dealers to ensure that records remain up-to-date and relevant, by undertaking regular reviews of existing records. An appropriate time to do so is when a transaction of significance takes place or when there is a material change in the way the account is operated.

475. Under the Guideline, banks are to develop a risk classification system which would act as a trigger for increased due diligence at commencement of customer relationship including identification as well as ongoing monitoring measures. The proposed MLPC Regulation requires the following:

- Regulation 11 requires regulated institutions to gather and maintain customer information on an ongoing basis so that the information collected in the CDD process is kept up to date and relevant.
- Regulation 4(2) states that CDD shall be applied on a risk basis and shall comply with the provisions of the Regulations
- The proposed regulations do not require performance of CDD on existing customers - that is those prior to the introduction of the MLPC Act.

476. For dormant accounts (inactive for six months to one year), CDD is conducted and updated before any transaction is carried out.

Existing anonymous-account customers

477. Section 13(2) of the MLPC Act requires customer accounts to be kept in the true name of the account holder.

478. Section 18(1) of the MLPC Act states that is it an offence punishable on conviction to open or operate an account in a false name.

479. The proposed MLPC Regulation 5(1) states that regulated institutions may not keep anonymous accounts or accounts in obviously fictitious names.

480. There is no requirement proposed that would have CDD applied to existing customers, that is, those prior to the introduction of the MLPC Act. However, the Tongan authorities advised prior to the MLPC Act's introduction, anonymous accounts were not in fact maintained by financial institutions.

Recommendation 6

481. There are no provisions in the MLPC Act that cover politically exposed persons (PEPs).

482. AML Guideline 3, which is OEM for the eight entities supervised by the NRBT, contains some relevant requirements. The Guideline states:

> ***Politically exposed persons***
>
> *Business relationships with individuals holding important public positions and with persons or companies clearly related to them may expose a financial institution or cash dealer to significant reputational and/or legal risks. Such politically exposed persons ("PEPs") are individuals who are or have been entrusted with prominent public functions, including heads of state or of government, senior politicians, senior government, judicial or military officials, senior executives of publicly owned corporations and important political party officials.*
>
> *Accepting and managing funds from or initiating transactions on behalf of corrupt PEPs will severely damage the financial institution's or cash dealer's own reputation and can undermine public confidence in the ethical standards of Tonga's financial system. In addition, a financial institution or cash dealer may be subject to costly information requests and seizure orders from law enforcement or judicial authorities (including international mutual assistance procedures in criminal matters) and could be liable to actions for damages by the state concerned or the victims of a regime. Under certain circumstances, a financial institution or cash dealer and/or its officers and employees themselves can be exposed to charges of money laundering, if they know or should have known that the funds stemmed from corruption or other serious crimes.*
> *Financial Institutions or cash dealers should gather sufficient information from an applicant, and check publicly available information, in order to establish whether or not the applicant is a PEP. Financial institutions or cash dealers should investigate the source of funds before accepting a PEP. The decision to open an account for, or transact on behalf of, a PEP should be taken at senior management level.*

483. The proposed MLPC Regulation 14 provides a definition of PEPs and requires enhanced CDD on PEPs, however as mentioned earlier, the regulations have not been passed and implemented.

Requirement to identify PEPs

484. There is no requirement in law or regulation for financial institutions or cash dealers to put in place appropriate risk management systems to determine whether a potential customer, a customer or the beneficial owner is a PEP.

485. AML Guideline 3, which as noted previously is OEM only for the eight entities supervised by the NRBT, provides that financial institutions and cash dealers implement CDD measures to be applicable to PEPs, as outlined above. These measures are consistent with the requirements of Recommendation 6.

Risk management

486. There is no requirement in law or regulation for financial institutions or cash dealers to require senior management approval for establishing a business relationship with a PEP.

487. AML Guideline 3 requires that the decision to open an account for, or transact o behalf of, a PEP should be taken at senior management level.

488. The requirement to obtain senior management approval to continue a business relationship where a customer is subsequently found to be or becomes a PEP is not covered in the MLPC Act or the TRA AML Guidelines (or in the draft MLPC Amendment Bill).

Requirement to determine source of wealth and funds

489. The requirement to determine the source of wealth and funds of customers and beneficial owners identified as PEPs is not covered in the MLPC Act, but is addressed in AML Guideline 3.

Ongoing Monitoring

490. There is currently no explicit requirement for FIs to conduct enhanced ongoing monitoring on business relationships with PEPs in law or regulation or AML Guideline 3. , However proposed MLPC Regulation 14(1) covers this requirement.

Additional Elements

491. The AML Guideline 3 extends identification requirements to domestic PEPs.

492. The banks have developed customer listings of domestic PEPs, which require the approval of senior management before opening the account. There are however no simplified or enhanced CDD requirements imposed on these domestic PEPs.

493. The 2003 United Nations Convention against Corruption has yet to be signed, ratified or implemented. This is being considered as Tonga has been invited to UNODC meetings to encourage ratification. Tonga, however is complying with the conditions set out in the convention through its Anti-Corruption Commissioner Act 2007.

Recommendation 7

494. For the two largest financial institutions, all aspects of their cross border correspondent relationships are handled by head office, including opening of correspondent accounts. Local and smaller financial institutions or money transfer businesses (MTBs) lack AML/CFT policies and procedures and therefore the CDD measures to be imposed on any cross-border correspondent banking or other similar relationships are weak or non-existent. The small local bank has limited foreign correspondent accounts. These accounts are held mainly in US dollars and Australian dollars. Senior management approval is obtained.

495. The entities that maintain cross-boarder correspondent accounts are limited to the eight NRBT licensed under the FI Act. The AML Guidelines are relevant for them because of licence conditions.

496. The requirement to gather sufficient information about a respondent institution is not covered by the MLPC Act.

497. AML Guideline 3 provides CDD measures to be applicable to cross-border correspondent banking or other similar relationships and that financial institutions or cash dealers should be particularly alert to the risk that correspondent accounts might be used directly by third parties to transact business on their own behalf (e.g. payable-through accounts). The wording of Guideline 3 is broadly consistent with the requirements of Recommendation 7.

498. It should be noted that it is difficult for the TRA to verify whether the overseas agent/branch of the local MTBs is licensed and supervised for AML/CFT purposes. As noted previously, the TRA's ability to liaise with foreign counterparts (FIUs) is limited by the MLPC Act. The proposed amendments to the Act would overcome this obstacle.

499. The proposed MLPC Regulation 17 provides policies and procedures for correspondent banking outlining the CDD measures applicable for such relationships.

Recommendation 8

500. There are no provisions in the MLPC Act or in regulation that cover measures for preventing of the misuse of technological developments in ML/TF or covering non-face to face business relationships or transactions.

501. AML Guideline 3 provides CDD measures to be applicable to non-face to face banking relationships and other technological products (e.g. internet banking).

502. Due to the foreign exchange control requirements, overseas transfers services are not offered under internet banking. The financial institutions that are branches of foreign banks (the two large banks) offer internet banking products limited to transferring from one customer's one account to another, e.g. transfer from savings to cheque account, and electronic payment of bills such as telephone and electricity bills. Due to the foreign exchange control requirements, overseas transfers services are not offered under the internet banking. The two smaller banks do not offer highly technological products e.g. internet banking, EFTPOS, telephone banking etc. therefore they do not have policies relating to countering ML/TF when using these products.

Misuse of new technology for ML/TF

503. There are no provisions in the MLPC Act or in regulation that cover measures for preventing of the misuse of technological developments in ML/TF. In addition, there are no provisions covering non-face to face business relationships or transactions.

504. AML Guideline 3 provides CDD measures to be applicable to non-face to face banking relationships and other technological products (e.g. internet banking). A typical example of a non-face-to-face customer is one who wishes to conduct electronic banking via the Internet or similar technology. The Guideline indicates that the TRA expects that financial institutions or cash dealers pro-actively assess various risks posed by emerging technologies and design customer identification procedures with due regard to such risks.

505. The Schedule to the proposed MLPC Regulations (Part B) provides examples of non-face to face business relationships or transactions, and the CDD measures applicable for such relationships. The examples of non face to face transactions include but are not limited to: business relationships

concluded over the Internet or by other means such as through the post; services and transactions over the Internet including trading in securities by retail investors over the Internet or other interactive computer services; use of ATM machines; telephone banking; transmission of instructions or applications via facsimile or similar means; and making payments and receiving cash withdrawals as part of electronic point of sale transaction using prepaid or re-loadable or account-linked value cards.

Procedures re risks associated with non-face to face business relationships/transactions

506. The NRBT/TRA requires licensed financial institutions to have AML/CFT policies in place, a copy of which is provided to the NRBT.

507. AML Guideline 3 expects that financial institutions and cash dealers should pro-actively assess various risks posed by emerging technologies and design customer identification procedures with due regard to the risks. The Guideline provides that, in accepting business from non-face-to-face customers:

- Financial institutions or cash dealers should apply equally effective customer identification procedures for non-face-to-face customers as for those available for interview; and
- There must be specific and adequate measures to mitigate the higher risk.

508. Examples of measures to mitigate risk outlined in the Guideline include:

- Certification of documents presented;
- Requisition of additional documents to complement those which are required for face-to-face customers;
- Independent contact with the customer by the financial institution;
- Third party introduction,
- Seeking verification of the source of funds for the initial deposit, including sighting documentary evidence confirming the source of the funds.

509. The proposed MLPC Regulations (Part B) provides for non-face to face business relationships or transactions and enhanced due diligence for non-face to face business relationships or transactions.

510. The two foreign banks provide internet banking, telephone banking, and ATMs. All four banks provide services allowing transmission of instructions via facsimile particularly for wire transfers if the customer is not in the country. A bank cannot carry out any transaction via fax if the customer does not have a fax indemnity. The banks in Tonga do not provide services such as trading in securities.

511. The smaller banks do not allow non face to face customers.

512. Measures for managing risks are not covered in the existing legislation but the Schedule to the proposed MLPC Regulations (Part B) provides examples of enhanced due diligence for non-face to face business relationships or transactions:

(a) certification of documents presented;
(b) requisition of additional documents to complement those that are required for face to face customers;
(c) development of independent contact with the customer.

513. However, as noted above the AML Guidelines are considered not to be generally enforceable and the proposed MLPC Regulations are not yet in force.

Effectiveness of CDD measures

514. Core financial institutions (three commercial banks, the Tongan Development Bank and four foreign exchange dealers) are monitored by the TRA as well as licensed and prudentially supervised by the NRBT. However, as currently drafted, the MLPC Act is insufficient to comprehensively meet the requirements of FATF Recommendations 5 to 8.

515. AML Guidelines have been issued to these core financial institutions covering, customer due diligence, background on money laundering/terrorist financing, suspicious transaction reporting and compliance regimes. The Evaluation Team was advised by the NRBT that the core financial institutions have as a licence condition imposed on them by the NRBT, through its administration of the FI Act, a requirement to implement the Guidelines.

516. The MLPC Amendment Bill, along with the proposed MLPC Regulations, addresses a majority of the current deficiencies. However, the Bill and Regulations have yet to be finalized and as a result, could not be taken into account in assessing the AML/CFT systems in Tonga.

517. Interviews conducted by the Evaluation Team with four banks and two foreign exchange dealers indicated that the Guidelines are treated as requirements rather than optional. The TRA indicated that it is generally comfortable with the level of compliance within the core financial institutions (ie those licensed by the NRBT) with the MLPC Act and the AML Guidelines.

518. However not all financial institutions and cash dealers licensed by the NRBT have been subject to compliance reviews by the TRA and the TRA has only undertaken a limited number assessments of the compliance of the core financial institutions since the MLPC Act was introduced. Consequently it would seem that very limited conclusions can drawn from the TRA's activities to date.

519. The credit unions, money lenders and cash dealers (insurance companies and the retirement scheme) are not monitored by the TRA. They are required to hold a business licence (where they operate a business) from the MLCI that is required to be renewed annually, but are not subject to AML/CFT supervision by the MLCI. The sample of non-NRBT/TRA supervised institutions interviewed by the Evaluation Team (one money lender and two insurance companies) indicated that they were unaware of the TRA Guidelines or AML/CFT requirements generally.

520. There is also an informal money remitter sector said by the private sector representatives interviewed by the Evaluation Team to amount o approximately TOP$22m per year (this figure was unable to be confirmed however by Tongan authorities). The money lender sector is said by the competent authorities in Tonga to be increasing in size, particularly over the last five years.

521. Foreign PEPs are effectively identified by the two foreign banks and one of the money transfer entities. The other financial institutions however do not have appropriate processes or controls in place to identify foreign PEPs. The explanation provided was that the customers are all local.

522. Banks provided the Evaluation Team with copies of their policies and procedures manuals. These were comprehensive and detailed in terms of outlining the general aspects of money laundering and suspicious transaction reporting. Some minor deficiencies were however noted concerning the policies and procedures surrounding CDD. One of the bank's AML/CFT manuals included aspects that were only applicable to the home office of the bank in Australia. This is of some concern as the local laws and the need to report to the TRA seemed to be excluded. Banks' AML/CFT manuals may need to be reviewed again to ensure that they are relevant to and reflective of the Tongan context and requirements.

523. The AML Guidelines require financial institutions to conduct risk assessments on existing and emerging technologies to design identification procedures. The TRA's on-site inspections of financial institutions indicated that this was not occurring in practice, however it was made clear to the Evaluation Team that only the two foreign banks provide technological products, which are subject to the standard CDD requirements. They also do not open accounts on a non-face to face basis.

524. Since 2004 the TRA has undertaken five on-site examinations of the Banks and two of the foreign exchange dealers. The on-site examinations include testing of the institutions policies and procedures through sampling of records. During these examinations, the banks have been found to be largely compliant with the MLPC Act and Guidelines. One foreign exchange dealer was been found to non-compliant with respect to record keeping.

525. More frequent and detailed examinations are a challenge for the TRA because of a lack of resource capacity (see section 3.10).

3.2.2. Recommendations and Comments

526. Tonga should enact the draft amendments and implement the regulations as soon as possible. This will bring required terms of the CDD requirements within the Act and adopt the content of the current guidelines as regulations so that they are enforceable for all entities covered by the MLPC Act.

527. The TRA should ensure that all financial institutions have the appropriate controls and measures in place in the form of AML/CFT policies or manuals, to address the requirements under the legislation regardless of the risk level. Where simplified requirements are applied, the TRA should ensure an appropriate risk assessment was conducted and that the institution's standards or policies are clearly documented.

528. The TRA should conduct an AML/CFT on-site compliance visit for those financial institutions and cash dealers licensed by the NRBT which have yet to have their first review. This will provide an indication of the level of awareness and compliance within these corresponding sectors.

529. The core financial institutions are subject to NRBT licensing and the prudential statements issued by the NRBT. Prudential statements have been issued in relation to Audit Arrangements (PS 7) and Governance (PS 9). PS 7 requires External Auditors to express an opinion as to whether the institution has "...complied with all statutory requirements, any conditions on the banking license..." and for Internal Auditors the scope of their audit is to "...include a review of compliance with laws, regulations and the Reserve Bank's prudential guidelines."

530. PS 9 places similar requirements on executives with respect to attestation of risk management systems.

531. The NRBT may also appoint an external auditor to "...perform a financial or operational audit on a licensed financial and any expense incurred shall be paid by that licensed financial institution."

532. To reduce capacity pressures the TRA should consider using these NRBT powers to ensure compliance with the MLPC Act and Guidelines rather than having the TRA undertake detailed examinations including sampling itself. The work of the external and internal auditors could be reviewed as an on-site examination so that fewer NRBT/TRA resources are utilised in ensuring the compliance of these entities. The TRA would be required to test the veracity of the auditors' work and the content of reports produced, following up with the institutions on required rectification plans.

Consideration should be given to introducing specific requirements for auditors to review procedures with respect to higher risk activities such as wire transfers and non face-to-face transactions.

533. The TRA should consider undertaking an assessment of the potential impact of non-compliance with CDD requirements by the money lenders, informal remitters and credit unions to formally determine to what extent these entities need to adopt appropriate CDD measures. Consideration should be given to awareness raising programs with these entities through group meetings and also general awareness raising with the public in general.

534. To comply with criterion5.18, the TRA should consider introducing in the proposed regulations a requirement for financial institutions to perform CDD measures on existing customers.

535. The TRA should consider a simpler approach to meeting correspondent banking requirements of Recommendation 7. As the two largest banks in Tonga do not open correspondent bank accounts (as the function is performed by their head offices), and the requirement for additional correspondent bank accounts by the remaining financial institutions is limited, a provision could be introduced in the proposed amendments to the MLPC Act and Regulations that no further correspondent accounts be opened without approval by the TRA. Audit requirements in PS 7 could be introduced to verify this.

3.2.3. Compliance with Recommendations 5 to 8

	Rating	Summary of factors underlying rating
R.5	**NC**	• CDD measures and verification requirements set out in guidelines which are only enforceable for a small minority of FIs/cash dealers • Legal status of arrangements where third parties are acting for customers is not required to be verified. • Beneficial owners are not required to be identified. • There is no requirement to obtain information about the intended purpose and nature of the business relationship • Ongoing due diligence on the business relation is not required • Enhanced due diligence for higher risk customers is not required • Simplified reduced CDD measures may be applied to financial institutions that are subject to very limited oversight • Simplified/ reduced CDD may apply when a suspicious ML/TF or other higher risk scenarios exist • Risk based application of CDD is not covered in existing legislation • Timing of verification of identity - treatment of exceptional circumstances not covered in MLPC Act • There is no requirement to have existing customers subject to CDD
R.6	**PC**	• Requirements are set out in other enforceable means which are only enforceable for a small minority of FIs/cash dealers, albeit the larger financial institutions. • Deficiencies noted within the financial institutions' AML/CFT policies and manuals provided
R.7	**PC**	• Requirements are set out in other enforceable means which are only

		enforceable for a small minority of FIs/cash dealers, albeit the larger financial institutions
R.8	**PC**	• Requirements are set out in other enforceable means which are only enforceable for a small minority of FIs/cash dealers, albeit the larger financial institutions Not all financial institutions clearly outline in their AML/CFT manuals the policies and procedures concerning technological products and non-face to face customers.

3.3. Third Parties and Introduced Business (R.9)

3.3.1. Description and Analysis

Legal framework

536. The MLPC Act does not cover situations where financial institutions or cash dealers rely on another party to undertake CDD processes for them.

537. AML Guideline 3, which is other enforceable means for the eight NRBT licensed financial institutions, states that financial institutions or cash dealers should not rely on introducers that are subject to weaker standards than those governing their own procedures or that are unwilling to share copies of due diligence documentation.

538. The Guidelines suggest that the following criteria should be met:

- The introducer must comply with minimum customer due diligence practices identified in this guideline;
- The customer due diligence procedures of the introducer should be as rigorous as those which the financial institution would have conducted itself for the customer;
- The financial institution or cash dealer must satisfy itself as to the reliability of the systems put in place by the introducer to verify the identity of the customer;
- The financial institution or cash dealer must reach agreement with the introducer that it will be permitted to verify the due diligence undertaken by the introducer at any stage; and
- All relevant identification data and other documentation pertaining to the customer's identity should be immediately submitted by the introducer to the financial institution or cash dealer, who must carefully review the documentation provided. Such information must be available for review by the Transaction Reporting Authority. In addition, financial institutions and cash dealers should conduct periodic reviews to ensure that an introducer that it relies on continues to conform to the criteria set out above.

539. The proposed MLPC Regulation 9(1) states regulated institutions may apply to the TRA for authorisation to rely on intermediaries such as trust or company service providers to perform the CDD duties. Permission will be granted by TRA only if the regulated institution presents a plan of internal policies and practices that comply with the regulations. Regulated institutions may rely upon non-resident intermediaries if the regulated institution is satisfied that the third party is adequately regulated and supervised and has measures in place to comply with the CDD requirements in the regulations.

540. The draft Regulation further provides that in each instance on intermediaries, the regulated institution must immediately obtain from the third party the information required in Regulation 5 (identification of customers) and 6 (determination of beneficial ownership of the customer). While it is

not necessary to obtain copies of related documents, regulated institutions should take adequate documentation relating to the information obtained will be made available without delay. The ultimate responsibility for implementation of CDD requirements remains with the regulated institution. However, compliance will be assumed if the regulated institution adequately executes the TRA approved plan internal policies and practices that comply with the regulation.

541. As noted previously, the MLPC Regulations are not yet in force.

Requirement to obtain CDD elements from third parties

542. The requirement that financial institutions relying upon a third party be required to immediately obtain from the third party the necessary information concerning certain elements of the CDD process is not covered in the MLPC Act.

543. The TRA AML Guideline 3 requires all relevant identification data and other documentation pertaining to the customer's identity should be immediately submitted by the introducer to the financial institution or cash dealer, who must carefully review the documentation provided. Such information must be available for review by the TRA. In addition, financial institutions and cash dealers should conduct periodic reviews to ensure that an introducer that it relies on continues to conform to the criteria set out above.

544. The proposed MLPC Regulation 9(4) requires the regulated institution must immediately obtain from the third party the information required in Regulation 5 (identification of customers) and 6 (determination of beneficial ownership of the customer).

Availability of identification data from third parties

545. The requirement that financial institutions take adequate steps to satisfy themselves that copies of identification data and other relevant documentation relating to CDD requirements will be made available from the third party upon request without delay is not covered in the MLPC Act.

546. The proposed MLPC Regulation 9(4) requires copies of identification data and other relevant documentation relating to the information obtained under sub-Regulation 3 (reliance on non-resident intermediaries) would be made available without delay.

Regulation and supervision of third party

547. The requirement that financial institutions satisfy themselves that the third party is regulated and supervised, and has measures in place to comply with, the CDD requirements set out in FATF Recommendations 5 and 10 is not covered in the MLPC Act nor the current guidelines.

548. The proposed MLPC Regulation 9(3) states that non-resident intermediary is subject to ML/TF policies comparable with the FATF 40+9 Recommendations is subject to licensing and supervision to enforce these policies and has not been subject to material disciplinary action that calls into question its execution of these policies and is located in a jurisdiction that is implementing effectively the 40+9 Recommendations.

Adequacy of application of FATF Recommendations

549. The requirement that, in determining in which countries the third party that meets the conditions can be based, competent authorities should take into account information available on

whether those countries adequately apply the FATF Recommendations, is not covered in the MLPC Act or in the current guidelines.

550. The proposed MLPC Regulation 9(3) states that non-resident intermediary is subject to ML/TF policies comparable with the FATF 40+9 Recommendations is subject to licensing and supervision to enforce these policies and has not been subject to material disciplinary action that calls into question its execution of these policies and is located in a jurisdiction that is implementing effectively the 40+9 Recommendations.

Ultimate responsibility for CDD

551. Neither the MLPC Act nor the current guidelines provide that the ultimate responsibility for customer identification and verification should remain with the financial institution relying on the third party.

552. The proposed MLPC Regulation 9(6) states the ultimate responsibility for implementation of the CDD requirements remains with the regulated institution.

3.3.2. Recommendations and Comments

553. Tonga should review the proposed regulations to the MLPC Act for consistency with Recommendation 9, enact the amendments and implement the regulations as soon as possible so that they are applicable to all financial institutions and cash dealers subject to the MLPC Act.

3.3.3. Compliance with Recommendation 9

	Rating	Summary of factors underlying rating
R.9	**NC**	• Neither the MLPC Act, nor other enforceable means applicable to all entities, cover: o obtaining the necessary information concerning elements of the CDD process; o Taking steps to ensure that copies of identification data and relevant documentation will be made available o Taking steps to ensure that the 3rd party is regulated, supervised and has measures in place to comply with CDD requirements, o Taking into consideration if the countries in which the 3rd party is based have implemented the FATAF recommendations o Where the ultimate responsibility for customer identification rests

3.4. Financial Institution Secrecy or Confidentiality (R.4)

3.4.1. Description and Analysis

Legal framework

554. Section 23 of the MLPC Act states that the provisions of the Act shall have effect notwithstanding any obligation as to any secrecy or other restriction on disclosure of information

imposed by law or otherwise. In short, the secrecy provisions of any other law are overridden by the MLPC Act.

555. Section 11 of the MPLC sets out the powers of the TRA. Section 11 explicitly authorizes the TRA to receive STRs from financial institutions (section 11(2)(a)); to send STR information to law enforcement authorities if it finds the transactions suspicious (section 11(2)(b)); to obtain additional information from records or inspections (sections 11 (2)(c) and (e)) or inquiry (section 14); and expressly authorizes TRA to compile statistics and records, disseminate information within Tonga or elsewhere (Section 11(f). (2)(c) of the MLPC Act provides that the TRA may enter the premises of any financial institution or cash dealer during ordinary business hours to inspect any record kept pursuant to section 13(1), and ask any question relating to such record, make notes and take copies of the whole or any part of the record. Section 11(2)(e) provides that the TRA may instruct any financial institution or cash dealer to take such steps as may be appropriate to facilitate any investigation anticipated by the Transaction Reporting Authority.

Access to and sharing of information

556. The TRA possesses the ability to effectively access information from financial institutions and cash dealers to perform its functions in combating ML and TF. This is enforced by section 23 of the MLPC Act and seems to work effectively in practice based on discussions with TRA staff and financial institutions visited during the on-site visit.

557. As previously noted, however, the competent authorities believe that they are not able to readily access information from relevant domestic and foreign competent authorities they require to perform their functions in combating ML/TF due to the lack of clear legislative authority concerning information sharing amongst themselves. While section 11(2)(b) authorises the dissemination of information by the TRA to law enforcement authorities, there is no similar provision allowing the TRA to *obtain* information from law enforcement authorities for the purpose of analysis. There is no legal provision that allows the FIU to have access to relevant government and law enforcement information.[17] While the TRA can obtain financial records, the TCU, which does have direct access to government databases, effectively performs most of the analytical function normally performed by an FIU. The TRA is unable formally to obtain information from the TCU.

558. Information exchange between financial institutions in Tonga is not covered by legislation in relation to Recommendation 7, 9 or SR VII. The AML Guidelines do outline controls and procedures that address this issue, and from on-site visits conducted by the TRA, the corresponding level of compliance is satisfactory. As noted previously, however, the Evaluation Team considers the AML Guidelines to be unenforceable for the great majority of FIs/cash dealers.

3.4.2. Recommendations and Comments

559. Tonga should review the current information sharing legal framework between Tongan competent authorities, as soon as possible.

[17] Section 11(2)(A)(1)(g) of the draft MLPC Bill states that the TRA shall have the authority to obtain from any government department any records of a person under investigation for committing or attempting to commit a serious offence, a money laundering offence, an offence of financing of terrorism or a violation of this Act.

560. Tonga should ensure that the proposed MLPC amendments comprehensively capture the information sharing requirements between financial institutions with regards to FATF Recommendations 7 (correspondent banking), 9 (third parties and introducers) and SRVII (wire transfers).

3.4.3. Compliance with Recommendation 4

	Rating	Summary of factors underlying rating
R.4	**PC**	• Laws do not prohibit collection of information by competent authorities but there are insufficient provisions under which the information can be shared between competent authorities either domestically or internationally. • The absence of clear legislation and/or controls on information sharing between financial institutions to meet the requirements of Recommendations 7, 9 and SR VII.

3.5. Record keeping and wire transfer rules (R.10 & SR.VII)

3.5.1. Description and Analysis

Legal framework

561. Section 13 of the MLPC Act sets out requirements for financial institutions and cash dealers to establish and maintain customer records. The records required to be kept relate to transactions and evidence of a person's identity.

562. Under section 13(1)(a) of the MLPC Act, records of all transactions over TOP$10,000, or totalling more the TOP$25,000 over a four week period, are required to be made. Recommendation 10 however requires that records of all transactions be kept, therefore the threshold included for record keeping under the MLPC Act constitutes a deficiency.

563. Section 13(3) of the MLPC Act requires that t records required under subsection 13(1)(a) shall contain particulars sufficient to identify:

- name, address and occupation of the person conducting the transaction or of a person on whose behalf the transaction is being conducted;
- the method of identification;
- the nature and date of the transaction;
- the amount and currency, account type and number. If the transaction involves an instrument, the drawer, name of the institution on which it is drawn, name of the payee, amount and date of the instrument, the number of and endorsements on the instrument; and
- the name of the person and institution creating the record.

564. Records are required to be kept by the financial institution for five years from the date the transaction was completed or upon which action was last taken.

565. From on-site examinations the TRA has determined that the banks are generally compliant with the record keeping requirements of the MLPC Act. However, the foreign exchange dealers are not similarly compliant.

566. Some record keeping requirements also exist in other legislation. The Customs and Excise Management Act 2007 requires importers to keep documents for seven years. The Revenue and Services Administration Act 2002 requires that taxpayers must keep documents for five years.

Maintaining necessary records for at least five years

567. The MLPC Act does not stipulate that the record retention should be regardless of whether the account or business relationship has been terminated.

568. The proposed MLPC Regulation 18(1) states regulated institutions shall ensure all necessary records or transactions, both domestic and international, are retained for at least 7 years following completion of the transaction. This requirement would apply regardless of whether the account or business relationship is ongoing or has been terminated.

569. The banks are compliant with the current record keeping requirement.

570. The MLPC Act does not require that the transaction records should be sufficient to permit reconstruction of individual transactions so as to provide evidence for prosecution of criminal activity.

571. The proposed MLPC Regulation 18(2) states that transactions should be sufficient to permit reconstruction of individual transactions so as to provide, if necessary, evidence for prosecution of criminal activity. Necessary of transaction records include: customer's (and beneficiary's) name, address (or other identifying information normally recorded by the intermediary), the nature and date of the transaction, the type and amount of currency involved, and the type and identifying number of any account involved in the transaction

572. Where evidence of a person's identity is obtained in accordance with section 12 of the MLCP Act, section 13(1)(b) requires a financial institution or cash dealer to establish and maintain a record that indicates the nature of the evidence obtained, and which comprises either a copy of the evidence or such information as would enable a copy of it to be obtained.

573. The MLPC Act requirements do not however extend to business correspondence and do not require retention of records for at least five years from termination of the business relationship or account. Rather the MLPC Act provides for retention for five years following completion of the transaction or upon which action was last taken.

574. The proposed MLPC Regulation 19(1) states regulated institutions shall ensure that all necessary records on the identification data, account files and business correspondence for at least seven (7) years following the termination of an account or business relationship (or longer) if requested by a competent authority in specific cases upon proper authority).

Availability of records and information to authorities

575. The MLPC Act does not provide for records to be available to the competent authority on a timely basis.

576. The proposed MLPC Regulation 19(2) states all customers and transaction records and information shall be made available on a timely basis to the TRA and other domestic competent authorities upon request by the appropriate authority.

Special Recommendation VII

Originator information

577. It should be noted that the financial institutions that undertake wire transfers are licensed under the FI Act by the NRBT and therefore the AML Guidelines are considered other enforceable means for them, through licence conditions. The two large banks are monitored by the Australian Prudential Regulatory Authority and the Australian Transaction and Report Analysis Centre and are obliged to comply with the Australian laws and regulations relating to wire transfers.

578. The requirements of SR VII are not provided for in the MLPC Act and as outlined above the MLPC Act is deficient in terms relevant Recommendation 5 requirements.

579. AML Guideline 3 does address wire transfer issues but has some shortcomings in addressing the requirements, as set out below. It states that financial institutions or cash dealers should include originator information and related messages on funds transfers that should remain with the transfer throughout the payment chain. Originator information should include name, address and account number (when being transferred from an account). Financial institutions or cash dealers should give enhanced scrutiny to inwards funds transfers that do not contain originator information.

580. The proposed MLPC Regulation 16 requires regulated institutions to include accurate and meaningful originator information (name, address, account number and originator's identification card number or address) on fund transfers and related messages. Termination and restriction of business relationships with financial institutions may be appropriate if non compliance with this regulation.

Inclusion of originator information in cross-border and domestic wire transfers

581. The requirement to include originator information in cross-border wire transfers is currently not set out in law or regulation.

582. AML Guideline 3 states that financial institutions or cash dealers should include originator information and related messages on funds transfers that should remain with the transfer throughout the payment chain. Originator information should include name, address and account number (when being transferred from an account).

583. The proposed MLPC Regulation 16(3) requires for cross-border wire transfers (including batch transfers and transactions using a credit or debit card to effect a funds transfer), the ordering regulated institution should be required to include full originator information in the message or payment form accompanying the wire transfer, except in the circumstances provided for batch transfers.

584. The requirement to include originator information in domestic wire transfers is also not currently set out as required in law or regulation. AML Guideline 3 does not address domestic transfers.

585. The proposed MLPC Regulation 16(4)(a) (b) requires domestic wire transfers (including transactions using credit or debit card as a payment system to effect a money transfer), the ordering regulated institution must include either (a) full originator information in the message or payment form accompanying the wire transfer, or (b) only the originator's account number or, where no account number exists a unique identifier, within the message or payment form.

586. Proposed regulation 16(5) states that the same section sub section (4)(b) may be used only if full originator information can be made available to the beneficiary regulated institution and the TRA within three (3) business days of receiving a request.

Maintenance of originator information

587. This criterion to maintain originator information in the transfer is met through AML Guideline 3. The proposed MLPC Regulation 16(8) requires each intermediary in the payment chain to maintain all the required originator information with the accompanying wire transfer.

Risk based procedures for transfers not accompanied by originator information

588. The requirement for a risk-based procedure for transfers not accompanied by originator information is partly addressed in AML Guideline 3 but is not currently addressed in law or regulation.

589. AML Guideline 3 requires that financial institutions or cash dealers should give enhanced scrutiny to inward funds transfers that do not contain originator information. Should problems of verification arise that cannot be resolved, the financial institution or cash dealer should return the monies to the source from which they were received. It may also be appropriate, if the financial institution or cash dealer has reasonable grounds to suspect that the funds may be derived from illegal activities, for it to prepare a Suspicious Transaction Report and submit this report to the Transactions Reporting Authority.

590. The proposed MLPC Regulation 16(10) requires beneficiary financial institutions to identify and handle wire transfers that are not accompanied by complete originator information on the basis of perceived risk of ML and TF.

Measures to monitor compliance

591. The TRA ensures compliance with its issued guidelines through maintenance of compliance registers, conducting onsite examination, and follow up through quarterly technical meetings. As noted in section 3.10 of this report, the number of on-site visits to date has however been quite limited, which reduces the effectiveness of compliance monitoring in relation to SRVII.

Sanctions

592. Section 16 of MLPC Act requires financial institutions and cash dealer to establish and maintain internal procedures to:

(a) make employees aware of domestic laws relating to money laundering, and the procedures and related policies established and maintained by it pursuant to this Act;

(b) provide its employees with appropriate training in the recognition and handling of money laundering transactions.

593. Section 22 of the MLPC Act provides for the TRA to apply to the Supreme Court for an order enforcing s16 (amongst others). There are however no provisions for the TRA to apply proportionate and appropriate sanctions through administrative powers.

594. Section 16A of the proposed MLPC Amendment Act outlines measures and sanctions such as include: written warnings, orders to comply with specific instructions, ordering regular reports from the cash dealer, over the counter cash dealer, financial institution or other regulated business on the measures it is taking, barring individuals from employment within that sector, replacing or restricting

the powers of managers, directors, principals, partners or controlling owners including the appointing of ad hoc administrator, a temporary administration of the cash dealer of financial institution or suspending, restricting or withdrawing the licence of the cash dealer or financial institution.

Additional elements

595. The TRA on-site examinations review wire transfers to check for compliance with the requirements of the TRA AML Guidelines. There is no threshold on keeping of originator information on wire transfers.

596. The proposed MLPC Regulation 16(9) provides exemptions for wire transfers below TOP$3000 (US$1500) from the requirements of sub-Regulation (3) and (4). The TRA will grant permission for exemption from keeping originator information on wire transfer if the regulated institution presents a procedure that complies with this Regulation.

597. In the proposed Regulations the de minimis threshold should be altered to US$1,000.

3.5.2. Recommendations and Comments

598. Only basic record keeping requirements are currently in place. While there are record keeping requirements, the $10,000 threshold above which records are required to be kept means that records of many transactions, including wire transfers, are not required to be kept. Tonga should review the proposed amendments to the MLPC Act for consistency with the FATF Recommendations, in particular SRVII, enact the amendments and implement the draft Regulations as soon as possible.

599. The de minimis threshold in the proposed regulations should be lowered to US$1,000.

600. To reduce capacity pressures, the TRA should consider using general NRBT powers to ensure compliance with the MLPC Act and Guidelines rather itself undertaking detailed examinations including sampling. The work of the external and internal auditors could be reviewed as an on-site examination so that fewer NRBT/TRA resources are utilised in ensuring the compliance. The TRA would be required to test the veracity of the Auditors' work and the content of reports produced, following up with the institutions on required rectification plans. Consideration should be given to introducing specific requirements for Auditors to review procedures with respect to higher risk activities such as wire transfers and non face-to-face transactions.

601. Anecdotal evidence suggests that the informal remitter sector of Tonga is growing. The TRA should consider undertaking an assessment of the potential impact of non-compliance with record keeping and wire transfer requirements by the informal remitter sector to formally determine to what extent these entities are non-compliant. Consideration should be given to awareness raising programs with these entities through group meetings and also general awareness raising with the public in general. Current business licensing requirements should be enforced for these entities so that the extent of their operations can be known and appropriate action taken.

3.5.3. Compliance with Recommendation 10 and Special Recommendation VII

	Rating	Summary of factors underlying rating
R.10	**NC**	• Records only need to be kept for transactions over $10,000 or totalling more the $25,000 over a four week period. • The MLPC Act does not stipulate that the record retention should be

		regardless of whether the account or business relationship has been terminated. • The MLPC Act does not require that the records should be sufficient to reconstruct the transaction • Record keeping requirements do not extend to business correspondence and do not allow for retention for five years from termination of the relationship or account (rather from the transaction) • The MLPC Act does not allow for records to be available to the competent authority on a timely basis
SR.VII	**PC**	• The MLPC Act does not allow for: o inclusion of originator information in wire transfers, o processing of non routine transactions, o maintenance of originator information, or o risk based procedures for incomplete originator information. • AML Guideline 3 addresses some requirements of SRVII, but effectiveness of compliance monitoring is limited. • Relevant sanctions are not proportional

Unusual and Suspicious Transactions

3.6. Monitoring of Transactions and Relationships (R.11 & 21)

3.6.1. Description and Analysis

Recommendation 11

Legal framework

602. The requirement that financial institutions pay special attention to all complex, unusual large transactions, or unusual patterns of transactions, that have no apparent or visible economic or lawful purpose is not covered by the MLPC Act or regulation.[18]

603. AML Guideline 2, which relates to suspicious transactions, requires that institutions be alert to unusual transactions so that they can report STRs but the most of the requirements of Recommendations 11 and 21 are not specifically addressed by the Guideline. In addition, as noted previously, the AML Guidelines are considered not to be enforceable for the majority of entities.

[18] Recommendation 11 will be addressed by the proposed MLPC Regulations. Proposed MLPC Regulation 12(2) requires regulated institutions to pay special attention to all complex, unusual large transactions, or unusual pattern of transactions that have no visible economic or lawful purpose. Regulated institutions must examine as far as possible the background and purpose of such transactions and set forth their findings in writing and must keep such findings available for examination by the TRA, auditors, and any other competent authorities, for a minimum of five years. In such cases regulated institutions should determine if they should file a suspicious transaction report.

Special attention to complex, unusual large transactions

604. AML Guideline 2 outlines certain types of transactions that should alert financial institutions and cash dealers to the possibility that the customer is conducting unusual or suspicious activities. This may include transactions that do not appear to make economic or commercial sense, or that involve large amounts of cash deposits that are not consistent with the normal and expected transactions of the customer. The Guidelines also indicate that very high account turnover, inconsistent with the size of the balance, may indicate that funds are being "washed" through the account.

605. While AML Guideline 2 does not contain an explicit requirement to pay attention to complex or unusual transaction, the wording of the Guideline is basically consistent with the requirement for financial institutions to pay special attention to all complex, unusual large transactions, or unusual patterns of transactions, that have no apparent or visible economic or lawful purpose.

Examination of complex and unusual transactions

606. There is no requirement in the MLPC Act, in regulation or in the AML Guidelines for financial institutions and cash dealers to examine as far as possible the background and purpose of such transactions and to set forth their findings in writing.

Record-keeping of findings of examination

607. There is no requirement in the MLPC Act, in regulation or in the AML Guidelines for financial institutions or cash dealers to keep findings available for competent authorities and auditors for at least five years.

Recommendation 21

608. Section 12(4)(a) of the MLPC Act requires consideration to be given whether the applicant is a person based or incorporated in a country in which there are in force provisions applicable to it to prevent the use of the financial system for the purpose of money laundering. However, it does not require that financial institutions should give special attention to business relationships and transactions with persons from countries which do not or insufficiently apply the FATF Recommendations.[19]

Special attention to countries not sufficiently applying FATF Recommendations

609. There is no requirement in law, regulation or OEM for financial institutions or cash dealers to give special attention to business relationships and transactions with persons from or in countries which do not or insufficiently apply the FATF Recommendations.

610. In practice, the TRA disseminates the OFAC / OCC list. Banks do not deal with countries or persons on the OFAC / OCC list. Banks refer to these lists for designated persons/organisations and the list of Non Co-operative Countries and Territories (NCCTs) for any business relationship or transaction with persons from these countries therefore enhanced due diligence is applied. However,

[19] The proposed regulations to be issued under the MLPC Act would address the requirements of Recommendation 21.

there are no enforceable requirements in law, regulation or OEM to pay special attention to such relationships or transactions[20].

611. From the Evaluation Team's visits to non-banking financial institutions, there was a clear lack of awareness and implementation of the designated persons/organisations associated with countries not sufficiently applying the FATF Recommendations. Not all FIs and cash dealers receive the OFAC / OCC lists, only those institutions licensed by the NRBT.

Examinations of transactions with no apparent economic or visible lawful purpose

612. There are no requirements in law, regulation, or other enforceable means, where transactions have no apparent economic or visible lawful purpose, to examine the background and purpose of such transactions as far as possible and make written findings available to competent authorities and auditors. [21]

Ability to apply counter-measures

613. Tonga does not have any legislated or proposed counter-measures in place for competent authorities to apply to jurisdictions which have been identified by FATF as insufficiently applying the FATF Recommendations.

3.6.2. Recommendations and Comments

614. The requirements of FATF Recommendations 11 and 21 are generally not provided for in law, regulation or other enforceable means. While section 12(4)(a) of the MLPC Act addresses criterion 21.1 to a certain extent, the requirements is a general one and in any case implementation is lacking in the non-bank financial sector.

615. The Evaluation Team notes and supports Tonga's intention to make the requirements outlined in the AML Guidelines in relation to unusual transactions enforceable through either amendments to the MLPC Act or proposed Regulations.

616. Tonga should ensure that the MLPC Regulations are finalized and brought into force as soon as possible, and made available to all relevant stakeholders.

617. Tonga should also consider developing and implementing legislation that would provide for the competent authorities to apply counter measures against jurisdictions which insufficiently meet the FATF Recommendations.

[20] Tongan authorities indicated in April 2010 that the TRA is to start downloading from the FATF website countries that are subject to public warnings/statements by the FATF ICRG and will henceforth include them in the lists that are disseminated on a monthly basis to all FIs and cash dealers.

[21] While not yet finalised or in force, the proposed MLPC Regulation 12(2) states regulated institutions must examine as far as possible the background and purpose of such transactions and set forth their findings in writing. Regulated institutions shall keep such findings available for examination by the TRA, auditors and any other competent authorities.

3.6.3. Compliance with Recommendations 11 & 21

	Rating	Summary of factors underlying rating
R.11	**NC**	• There are no specific obligations for financial institutions to monitor all complex, unusual large transactions, transactions with no visible economic purposes, to further examine these situations and to set out these findings in writing and to retain these findings for 5 years; the monitoring obligation is only implied and indirect, and it does not cover the full range of monitoring situations as stipulated in Recommendation 11. • The limited requirements to comply with this Recommendation are set out in the form of guidelines, which are considered not to be enforceable for most entities. • The effectiveness of the requirements remains limited. Only banks have adopted some measures. These measures are limited and not verified by supervisory examination. Other financial institutions and cash dealers do not yet implement these requirements.
R.21	**NC**	• There is no requirement for all reporting parties to give special attention and conduct appropriate counter-measures to business relationships and transactions with persons (including legal persons and other financial institutions) from or in countries which do not or insufficiently apply the FATF Recommendations. Lack of any requirement to apply counter-measures against jurisdictions which insufficiently meet the FATF Recommendations. • Lack of effective implementation of current, limited requirements in the non-bank sector.

3.7. Suspicious Transaction Reports and Other Reporting (R.13-14, 19, 25 & SR.IV)

3.7.1. Description and Analysis

Recommendation 13 and SRIV

Legal framework

618. Section 14 of the MLPC Act requires a financial institution or cash dealer to report suspicious transactions to the TRA as soon as possible but no later than 3 working days after forming that suspicion and wherever possible before the transaction is carried out, "if it has reasonable grounds to suspect that information that it has concerning the transaction may be relevant to the investigation or prosecution of a person for a serious offence".

619. Section 15 of the MLPC Act requires financial institutions and cash dealers to establish and maintain internal reporting procedures to identify persons to whom an employee is to report any information which comes to the employee's attention in the course of employment and which gives rise to knowledge or suspicion by the employee that another person is engaged in money laundering; to enable any person identified in accordance with paragraph (a) to have reasonable access to information that may be relevant to determining whether sufficient basis exists to report the matter pursuant to

section 14(1); and to require the identified person to report the matter pursuant to section 14(1) where he determines that sufficient basis exists.

620. AML Guideline 2 explains how to report a suspicious transaction. It also provides guidance on how to identify a suspicious transaction, including general and industry-specific indicators that may help when conducting or evaluating transactions. As noted above, the requirements of the AML Guidelines have only been extended to, and are enforceable on, the eight licensed entities supervised by the NRBT.

Requirement to make STRs on ML and TF to FIU

621. Section 14(1) of the MLPC Act provides as follows:

> (1) Whenever a financial institution or cash dealer is a party to a transaction and has reasonable grounds to suspect that information that it has concerning the transaction may be relevant to the investigation or prosecution of a person for a serious offence, it shall as soon as possible but no later than 3 working days after forming that suspicion and wherever possible before the transaction is carried out —
>
> (a) take reasonable measures to ascertain the purpose of the transaction, the origin and ultimate destination of the funds involved, and the identity and address of any ultimate beneficiary;
>
> (b) prepare a report of the transaction in accordance with subsection (2);
>
> (c) pass the report to the Transaction Reporting Authority.

622. The MLPC Act defines a "serious offence" to include an offence against a provision of any law in Tonga or elsewhere that carries a maximum penalty which is greater than 12 months imprisonment. This includes most serious offences under Tongan law including drug trafficking, bribery, fraud, forgery, murder, robbery, counterfeiting, etc. As noted in section 2.1 of this report, however, not all of the FATF's 20 designated categories of offences under Recommendation 1 are currently captured by the definition of "serious offence", which has a flow on effect to the scope of the STR reporting obligation.

623. In addition to scope issue noted in the previous paragraph, the wording of the STR obligation in section 14 of the MLPC Act further narrows the scope of reporting. FATF Recommendation 13 requires that FIs should be required to submit an STR if it "*suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity*...". Section 14 of the MLPC Act requires an STR to be lodged where a financial institution "*has reasonable grounds to suspect that information that it has concerning the transaction may be relevant to the investigation or prosecution of a person for a serious offence*". A transaction may involve the proceeds of crime, but not necessarily be "relevant to the investigation or prosecution of a person for a serious offence". The STR obligation should apply whether or not there is any investigation or prosecutions. While there may be little difference in practice between the requirement under section 14 of the MLPC Act and the broader requirement under FATF Recommendation 13, the difference in wording creates unnecessary ambiguity and uncertainty and should be addressed.[22]

[22] Tongan authorities are aware of this issue and intend to address it through the proposed Regulations under the MLPC Act. Proposed MLPC Regulation 20 requires regulated institutions to report to the TRA when the entity suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity; or linked or related to, or to be used for terrorism, terrorist acts, by an individual terrorist, terrorist organizations or (continued)

624. As noted previously, the TRA only actively supervises the four banks and four money transfer entities for AML/CFT compliance. This is of particular concern as a significant portion of Tonga's financial activity is not captured under the AML/CFT regime, including the requirement to report STRs. These unsupervised entities are considered by Tongan authorities to be small operations and of lower risk. However, no detailed risk analysis or review has been conducted on this sector, and the lack of AML/CFT training and awareness provided to these entities raises concerns as to the vulnerability of this sector. To date, no STRs have been submitted by those entities captured under the MLPC Act which are **not** actively supervised by the NRBT/TRA.

625. Although not explicitly stated, the obligation to make a STR where there are reasonable grounds to suspect that the funds are related or linked to terrorist activity, exists in the definition of "serious offence". Terrorism and terrorist financing offences are, broadly speaking, predicate offences for money laundering since they fall under the definition of "serious offence" under the MLPC Act (See section 2.1 of this report. Shortcomings in relation to the criminalisation of terrorist financing in Tonga are outlined in section 2.2 of this report).

626. The proposed MLPC Regulation 20(1) requires regulated institutions to report to the TRA when the entity suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity; or linked or related to, or to be used for terrorism, terrorist acts, by an individual terrorist, terrorist organizations or terrorist financing.

Attempted transactions and STR reporting regardless of the amount of the transaction

627. The requirement to report attempted transactions not covered by the MLPC Act or by regulation.

628. The proposed MLPC Regulation 20(2) requires all suspicious funds and transactions, including attempted transactions, should be reported.

STR reporting should apply regardless of whether tax matters may be involved

629. This is not covered by the MLPC Act, AML guidelines or the proposed MLPC regulations.

Additional element

630. Financial institutions are not specifically required to report to the FIU when they suspect or have reasonable grounds to suspect that funds are the proceeds of all criminal acts that would constitute a predicate offence for money laundering domestically. A number of examples of possibly suspicious transactions contained in the attachment to AML Guideline 2 involve transactions emanating from overseas, but do not directly address the issue. This issue is not addressed in the current planned amendments to the MPLC or the proposed MLPC regulations.

Recommendation 14

631. Section 24 of the MLPC Act provides for immunity where suspicious transactions are reported in good faith.

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terrorist financing. All suspicious funds and transactions, including attempted transactions, should be reported. The requirement to report is not otherwise limited.

632. AML Guideline 2 states that the MLPC Act protects a financial institution or cash dealers or their officers, employees or other representatives, against any action, suit or proceeding in relation to the reporting process.

Protection for making STRs in good faith

633. Section 24 of MLPC Act states that no action, suit or other proceedings shall lie against any financial institution or cash dealer, or any officer, employee or other representative thereof acting in the ordinary course of the person's employment or representation, in relation to any action taken in good faith pursuant to section 14 (reporting of STRs). Tongan authorities indicated that they interpret this protection to apply to both criminal and civil liability, as the definition of 'proceedings' in the MLPC Act is "any procedure conducted by or under the supervision of a Judge, magistrate or judicial officer however described, in relation to any alleged or proven offence or property derived from such offence and including an inquiry, investigation and preliminary or final determination of facts". .

Prohibition against tipping-off

634. Section 18(3)(a) of the MLPC Act provides that a person commits an offence if they disclose that an STR has been prepared or sent to the TRA.

635. However, it is a defence under section 18(3)(b) of the MLPC Act if the person "did not know or have reasonable grounds to suspect that the disclosure was likely to prejudice any investigation...". This defence is not consistent with the requirements of Recommendation 14 and is of concern.

636. The proposed MLPC Regulation 21 states that regulated institutions, their directors, officers and employees permanent and temporary) may not disclose ("tipping off') that a STR or related information is being reported or provided to the TRA.

Additional element

637. The MLPC Act does not provide for the confidentiality of the names and personal details of staff of financial institutions or cash dealers that make a STR.

Recommendation 19

638. There is no requirement to report large cash transactions to the TRA or any national central agency.

639. Tonga has not given consideration to the feasibility and utility of implementing a system where financial institutions report all transactions in a currency above a fixed threshold.

Recommendation 25 (Guidance and Feedback Related to STRs)

640. There has been no feedback provided to regulated institutions on STRs, beyond acknowledgement of receipt of and STR. No feedback on statistics or disclosures, or on typologies or other information developed from STRs.

Statistics and effectiveness

Table 10: STRs reported 2005 – 09

Year	No of STRs	Type of Financial Institutions	No. of STRs disseminated to LEAs
2009(Aug)	17	Banks	14
2008	6	Banks	3
2007	16	Banks (4) Licensed Cash Dealers (12)	0
2006	8	Banks (7) Licensed Cash Dealers (1)	2
2005	4	Banks	0

641. The TRA maintains STR statistics which are reported in the NRBT Annual Report.

642. Of the 57 STRs received in total, 19 have been referred to the TCU for investigation. Preliminary investigations into 11 of these STRs have been closed. Five cases were scams. There have been no ML/TF convictions, prosecutions, property frozen, seized and confiscated.

643. Thirty-eight STRs were not passed on by the TRA to the TCU due to low quality and incomplete information in the STRs submitted. Some STRs related to international scams that required no further investigation locally (and could not be passed on to foreign FIUs or law enforcement agencies due to the current limitations on sharing information internationally), and others were significant (ie large) transactions that were able to be explained and were not suspicious. Due to staffing constraints at the TRA, training for the financial institutions and cash dealers in this area has been minimal. Enhanced training by the financial institutions and cash dealers of their staff is also required.

644. While predicate crime levels in Tonga appear to be relatively low, overall the Evaluation Team felt that STR reporting levels were too low, in particular from the licensed cash dealer/money remitter sector. In addition, the failure to extend in practice the statutory STR reporting requirement to the full range of FIs and cash dealers has a significant adverse impact on the level of reporting.

645. The banks and foreign exchange dealers are required to monitor and report on any further developments in the STRs submitted to the TRA. On receipt of any updated information on the STRs, the TRA relays it to the TCU. The TRA and TCU meet monthly to discuss progress on investigation of STRs.

646. The TRA has conducted on-site examination of the four banks and two licensed foreign exchange dealers. Systems for and levels of STR reporting have generally been found to be satisfactory in the reporting entities which have been examined, however not all banks have been examined and most reporting entities have not yet been examined. No sanctions have been applied for failure to report.

647. From the Evaluation Team's discussions with the banks and one money transfer business, there was a clear indication that they were familiar with the requirements for suspicious transaction reporting based on the MLPC Act and the AML Guidelines. All the STRs submitted to the TRA have come from the entities regulated/supervised by the NRBT.

648. In relation to the other financial institutions and cash dealers visited, the Evaluation Team noted a lack of compliance and awareness in terms of STRs. No STRs have been submitted by these other entities. The TRA believes that the majority of these entities typically undertake small, non-suspicious transactions of TOP 150-200, which are considered to pose a limited AML risk. These include "underground" or informal bankers and alternative remittance agents, loan providers, and pawn shop type operations, whose operations are financed from residents' own resources. While this perceived lower AML/CFT risk for such entities seems plausible, the Evaluation Team nonetheless considers that the complete lack of reporting from the non bank/money transfer entities is unsatisfactory and reflects a lack of awareness and implementation of the reporting requirements. It is noted that in a current matter, registration of a large non-registered cash dealer is being insisted upon by the NRBT. Following the cash dealer's licensing by the NRBT, requirements under the MLPC Act will be imposed.

3.7.2. Recommendations and Comments

649. Tonga should review the proposed amendments to the MLPC Act for consistency with the FATF Recommendations, in particular Recommendations 13 and 14, and enact the amendments and implement the regulations as soon as possible. In doing this, Tonga should ensure that the regulations that will address the deficiencies and shortfalls in the MLPC Act concerning suspicious transaction reporting, specifically relating to terrorist activity, attempted transactions and tax matters are carefully reviewed and implemented as soon as possible.

650. There is an overall lack of understanding amongst the majority of Government Departments and law enforcement staff not directly involved in the field, of reporting requirements. It is recommended that the TRA arrange regular awareness training workshops to improve understanding of current and proposed legislative requirements amongst relevant Government staff. It is also recommended that the TRA should conduct outreach to all reporting entities under the MLPC Act and provide awareness and guidance on the AML/CFT requirements, specifically suspicious transaction reporting.

651. Tonga should implement processes that provide regulated institutions with appropriate feedback on STRs submitted, statistics of disclosures and information/guidance on current ML/TF typologies.

652. Tonga should consider the utility of receiving the Financial Institutions' records of transactions over $10,000. This would provide an additional source of information for the TRA in analysing STRs and add value to reports made to law enforcement.

3.7.3. Compliance with Recommendations 13, 14, 19 and 25 (criteria 25.2), and Special Recommendation IV

	Rating	Summary of factors underlying rating
R.13	**PC**	• Reporting requirement narrower than required under R13, as a reporting entity must suspect that information that it has concerning a transaction "may be relevant to the investigation or prosecution of a person for a serious

		offence” • Cascading effect from Recommendation 1 where not all predicate offences are covered. • Low reporting levels from some sectors. • Absence in the current law for financial institutions to report transactions they suspect are related to attempted transactions of a suspicious nature and suspicious transactions thought to be related to tax matters. • Not all financial institutions and cash dealers are effectively captured and monitored for the STR requirements.
R.14	**PC**	• Offence of tipping off provides for a defence
R.19	**NC**	• The feasibility and utility of receiving threshold transaction reports has not been considered
R.25	**[NC]**	*For feedback (this is a composite rating):* • No feedback is provided from the TRA to financial institutions and cash dealers, on outcomes of STRs submitted, statistics on disclosures and ML/TF typologies
SR.IV	**PC**	• Limitations in the TF offence have an impact on the breadth of the STR obligation. • Concerns raised above in Recommendation 13 about the scope and effectiveness of the reporting system apply equally to SR IV

3.8. Internal Controls, Compliance, Audit and Foreign Branches (R.15 & 22)

3.8.1. Description and Analysis

Legal framework

653. The relevant requirements of the MPLC Act are set out in sections 15 and 16. These requirements do not fully address the requirements of the FATF Recommendations. AML Guideline 4 contains relevant additional requirements which are “other enforceable means” for the eight entities licensed by the NRBT and supervised by the TRA for AML/CFT purposes.

Recommendation 15

Internal procedures, policies and controls to prevent ML and TF

654. Section 15 of the MLPC Act states that a financial institution or cash dealer shall establish and maintain internal reporting procedures to:

a. identify persons to whom an employee is to report any information which comes to the employee’s attention in the course of employment and which gives rise to knowledge or suspicion by the employee that another person is engaged in money laundering

b. enable any person identified in accordance with paragraph (a) to have reasonable access to information that may be relevant to determining whether sufficient basis exists to report the matter pursuant to section 14(1) and

c. require the identified person to report the matter pursuant to section 14 (1) where he determines that sufficient basis exists.

655. Section 16 of the MLPC Act states that a financial institution or cash dealer shall establish and maintain internal procedures to:

a. make employees aware of domestic laws relating to money laundering and the procedures and related policies established and maintained by it pursuant to this Act

b. provide its employees with appropriate training in the recognition and handling of money laundering transactions.

656. It is unclear whether Section 15 and 16 of the MLPC Act, singly or combined, actually require FIs to establish and maintain internal procedures, policies and controls to prevent ML and TF, as required by R15. Section 16 does not expressly do this; it directs financial institutions and cash dealers to establish and maintain internal procedures to make employees aware of domestic ML laws and procedures and polices established by the institution relating to the MLPC Act, but does not directly require the institution to establish such internal AML/CFT procedures and policies.

657. AML Guideline 4 further explains and expands on the requirements for financial institutions and cash dealers to implement a regime to ensure compliance with their obligations under the MLPC Act. AML Guideline 4, paragraph 3 states that the compliance regime should include the following:

- the appointment of a compliance officer;
- the development and application of compliance policies and procedures which are approved by the board in the case of Tongan incorporated entities and appropriate senior management in the case of foreign entities;
- establishment and maintenance of a record of all transactions of more than $10,000 or any series of transactions occurring in any 4 week period totalling $25,000 or more(Section 13(1)(a) of the MLPC Act;
- establishment and maintenance of evidence of a person's identity (Section 13(1)(b) of the MLPC Act);
- internal procedures to make employees aware of Tongan anti money laundering requirements and procedures and provide appropriate training in the recognition and handling of money laundering transactions; and
- independent review by internal or external audit of compliance on at least an annual basis.

658. These requirements go further than the MLPC Act and largely address the requirements of section 1 (in particular criterion 15.1). As noted previously, however, the Guidelines are considered to be other enforceable means only for the eight NRBT licensed entities. They are not enforceable for the remainder of the financial institutions and cash dealers.

659. The requirement to develop appropriate compliance management arrangements, including the designation of an AML/CFT compliance officer at management level, is not addressed in the MLPC Act.

660. Section 4 of AML Guideline 4 states that "compliance officer should have the authority and the resources necessary to discharge his or her responsibilities effectively and should report, on a regular basis, to the board of directors or senior management, or to the owner or chief operator." As noted previously, however, the Guidelines are considered to be other enforceable means only for the eight NRBT licensed entities. They are not enforceable for the remainder of the financial institutions and cash dealers.

661. The requirement that the compliance officer and other appropriate staff should have timely access to customer identification data and other CDD information, transaction records, and other relevant information is only partially addressed in the MLPC Act. Section 15(b) of the MLPC Act states that the compliance officer (ie the person to whom an employee is to report any information which comes to the employee's attention in the course of employment and which gives rise to knowledge or suspicion by the employee that another person is engaged in money laundering) should have reasonable access to information that may be relevant to determining whether sufficient basis exists to report a matter pursuant to section 14(1). That is, to lodge an STR.

662. AML Guideline 4 goes further. Section 4 of the Guidelines states that all staff should be aware of the identity of the compliance officer and report suspicious transactions to them for forwarding, if thought appropriate, to the TRA. It also specifies that the compliance officer is responsible for:

- ensuring that internal policies and procedures are up-to-date and adequate for the task of identifying and deterring money laundering;
- ensuring that all relevant staff have access to up-to-date lists of persons of interest supplied by the TRA or international bodies involved in anti-money laundering and combating the financing of terrorism;
- analysing reports of suspect money laundering from staff and reporting suspicious transactions to the TRA within 3 days of the suspicion being formed;
- keeping a record of suspect transactions reported by staff and the actions taken or reasons for not pursuing the matter;
- reviewing on a daily basis transactions in excess of $10,000 or any series of transactions totalling $25,000 or more in a four week period;
- identifying high risk accounts and ensuring that additional monitoring is applied;
- ensuring that identity and transaction records are maintained for the required period under Tongan law; and
- ensuring that all relevant staff are trained and undergo refresher courses in money laundering methods and prevention no less frequently than annually.

663. Banks have adequate IT systems and programs to maintain information on customers and to provide access to such records. As noted above, AML/CFT requirements have not however been extended to or applied in the non-bank financial sector.

Independent audit function

664. MLPC Act does not specifically require financial institutions to maintain an adequately resourced and independent audit function to test compliance (including sample testing) with internal procedures, policies and controls. However, Prudential Statement 7 sets out the requirements for an internal audit function in financial institutions licensed by the NRBT.

665. The proposed MLPC Regulation 22(3) requires regulated institutions to maintain an adequately resourced and independent audit function to test compliance (including sample testing) with these procedures, policies and controls.

666. AML Guideline 4 states that an independent review of compliance policies and procedures to test their effectiveness on an annual basis is component of a comprehensive compliance regime. This review should be conducted by an internal or external auditor. It should include interviews, tests and samplings such as the following:

- interviews with those handling transactions and with their supervisors to determine their knowledge of the legislative requirements and the financial institution's policies and procedures;
- evaluation of the financial institution's or cash dealer's own policies and procedures including legal regulatory requirements;
- a review of the processes for identifying and reporting suspicious transactions including the handling of these by the compliance officer;
- a sampling and review of large transactions including their assessment and recording;
- a sampling of electronic funds transfers and the recording of such transactions;
- a test of the record-keeping system for compliance with the legislation, regulations and guidelines.

667. The scope and results of the review should be documented.

668. If a financial institution or cash dealer does not have an internal or external auditor, a self-review should be conducted by an individual who is independent of the reporting, record-keeping and compliance-monitoring functions. This could be an employee or an outside consultant. The objective of a self-review is the same as the objective of a review conducted by internal or external auditors.

669. Banks' compliance officers conduct the compliance checks. However, there is no evidence of compliance checking in the non-bank financial sector.

Employee training

670. Section 16 of the MLPC Act require a financial institution or cash dealer shall establish and maintain internal procedures to:

> a. make employees aware of domestic laws relating to money laundering and the procedures and related policies established and maintained by it pursuant to this Act;
>
> b. provide its employees with appropriate training in the recognition and handling of money laundering transactions.

671. AML Guideline 4 also outlines the compliance officers' responsibilities to ensure that all relevant staff are trained and undergo refresher courses in money laundering methods and prevention no less than frequently than annually. In addition, employees, agents or other individuals authorized to act for a financial institution or cash dealer must be trained in recognition of money laundering techniques, compliance policies and reporting and record keeping obligations.

672. The proposed MLPC Regulation 22(4) states that regulated institutions must establish ongoing employee training to ensure that employees are kept informed of new developments, including information on current money laundering and terrorist financing techniques, methods and trends; and that there is clear explanation of all aspects of money laundering and terrorist financing laws and obligations, and in particular, requirements concerning CDD and suspicious transaction reporting.

673. Banks' staffs have undergone the UNODC training on AML/CFT, in addition to their own internal monthly training programs.

674. As noted above, similar requirements have not been implemented in the non-bank financial sector.

Employee screening

675. Employee screening procedures are not covered by the MLPC Act.

676. The proposed MLPC Regulation 22(5) requires regulated institutions to establish screening procedures to ensure appropriate standards when hiring employees.

677. It is part of the banks' internal recruitment policies to ensure high standards when hiring employees. Competency tests are conducted and police records are required to be submitted.

678. The NRBT has issued a Prudential Statement 8 on Fit and Proper to ensure that a licensed financial institution is well managed and that persons occupying key positions within the institution must have the degree of probity and competence commensurate with their responsibilities. The fit and proper prudential statement was issued in February 2009. No action has been taken under the statement.

Effectiveness

679. The TRA conducts compliance checks to assess banks' and foreign exchange dealers' compliance with the requirements of the MLPC Act. From the TRA's onsite visits and compliance registers, the banks and some of the licensed foreign exchange dealers have policies and procedures in place for AML/CFT. Ongoing training of staff on AML/CFT is conducted by the institutions. The two large banks, which are Australian based, adopt the head office AML/CFT system. Banks' staff have also undertaken the UNODC computer-based AML/CFT training, at the Ministry of Police. .

680. The non-bank financial sector is not effectively supervised by the TRA. There has been no interaction between the TRA and the money lenders or insurance companies. Those non-bank entities visited by the Evaluation Team indicated they were unaware of the requirements of the MLPC Act.

Recommendation 22

681. Section 32 of the Financial Institutions Act 2004 relates to the opening of new branches both within and outside Tonga.

682. The banks incorporated in Tonga do not in fact have any foreign branches.

683. Section 32(2) of the Financial Institutions Act 2004 states that a licensed financial institution incorporated in Tonga shall obtain written approval from the Reserve Bank to operate a branch office or subsidiary outside Tonga. Section 32(3) states that the Reserve Bank shall not grant approval under subsection 32(2) unless it is satisfied that:

(a) the Reserve Bank has the ability and resources to adequately supervise the branch or subsidiary situated outside Tonga; and

(b) the licensed financial institution has the administrative and financial capacity to conduct banking business at a branch or subsidiary outside Tonga, without affecting the stability of the financial system and the safety of the interests of depositors both within and outside Tonga.

684. In practice, however, the banks incorporated in Tonga do not have any foreign branches.

685. The requirement for FIs to inform their home country supervisor if foreign branches and subsidiaries are unable implement AML/CFT measures is not covered in any legislation.

3.8.2. Recommendations and Comments

686. While the MLPC Act and Guidelines address many of the relevant areas of Recommendation 15, implementation has only been assessed at NRBT-licensed financial institutions and not all financial institutions under the MLPC Act. In addition PS 8 only applies to NRBT licensed institutions, and AML Guideline 4, which contains many of the details regarding internal controls, is not enforceable for most entities. It is recommended that obligations to meet the requirements of FATF Recommendation 15 and 22 be set out in law, regulation or other enforceable means, for example through the enactment of the proposed MLPC Regulations.

687. Tonga should consider obtaining documentation from the other financial institutions not licensed by the NRBT through the business licensing process to determine the nature of internal controls and compliance frame works at those institutions.

688. Consideration needs to be given as to the approach of the NRBT should an application be made by a Tongan financial institution to create of a subsidiary or branch outside of Tonga. In this respect it may be prudent to consider the inclusion of a provision in legislation which would deal with such a situation should it occur in the future.

3.8.3. Compliance with Recommendations 15 & 22

	Rating	Summary of factors underlying rating
R.15	**PC**	• Employee screening not covered in the MLPC Act • Many requirements set out in guidance which is only enforceable for a small proportion of all financial institutions and cash dealers. • The internal audit and compliance functions have only been tested / applied to core financial institutions.
R.22	**NA**	• This Recommendation is considered to be non-applicable as no Tongan financial institutions have foreign branches or subsidiaries.

3.9. Shell Banks (R.18)

3.9.1. Description and Analysis

Prohibition of establishment shell banks

689. The MLPC Act does not prohibit the establishment of or dealing with shell banks. However, a physical presence in Tonga, established within six months of being granted a licence, is a licence condition for banks and foreign exchange dealers.

690. The Offshore Banking Act was repealed in 2001 therefore the establishment of offshore banks is illegal. In addition, at the time of the repeal of this Act all licences issued under it were revoked.

Prohibition of correspondent banking with shell banks

691. The MLPC Act does not cover whether or not financial institutions are permitted to enter into, or continue, correspondent banking relationships with shell banks.

692. AML Guideline 3 states that financial institutions or cash dealers should refuse to enter into or continue a correspondent banking relationship with a bank incorporated in a jurisdiction in which it has no physical presence and which is unaffiliated with a regulated financial group.

693. The proposed MLPC Regulation 17(2) states that a bank should in general establish or continue a correspondent relationship with a foreign bank only if it is satisfied that the bank is effectively supervised by the relevant authority. In particular, a bank should not establish or continue a correspondent banking relationship with a bank incorporated in a jurisdiction in which the bank has no presence and which is unaffiliated with a regulated financial group.

694. Banks are in practice compliant with this requirement.

Requirement to satisfy respondent FIs prohibit of use of accounts by shell banks

695. The MLPC Act does not require financial institutions to satisfy themselves that respondent financial institutions in a foreign country do not permit their accounts to be used by shell banks.

696. AML Guideline 3 states that financial institutions or cash dealers should refuse to enter into or continue a correspondent banking relationship with a bank incorporated in a jurisdiction in which it has no physical presence and which is unaffiliated with a regulated financial group.

697. The proposed MLPC Regulation 17(2) states that a bank should in general establish or continue a correspondent relationship with a foreign bank only if it is satisfied that the bank is effectively supervised by the relevant authority. In particular, a bank should not establish or continue a correspondent banking relationship with a bank incorporated in a jurisdiction in which the bank has no presence and which is unaffiliated with a regulated financial group (i.e. a shell hank).

698. Banks are in practice compliant with this requirement.

3.9.2. Recommendations and Comments

699. There is a low volume of correspondent banking business undertaken in Tonga, which is only conducted by three banks. In addition that fact that the two largest banks do not establish correspondent banking relationships mitigates the risk associated with this activity.

700. The Evaluation Team notes and supports Tonga's intention to make the requirements outlined in the AML Guidelines in relation to shell banks enforceable through proposed Regulations. Tonga should ensure that the MLPC Regulations are finalised and brought into force as soon as possible, and made available to all relevant stakeholders.

3.9.3. Compliance with Recommendation 18

	Rating	Summary of factors underlying rating
R.18	**PC**	• Laws do not explicitly prohibit establishment of shell banks, however, the licensing requirements and policies under the Financial Institutions Act indirectly preclude the licensing of a shell bank in Tonga. • The relevant AML Guideline does not specifically deal with shell banks. • There is no enforceable requirement for banks to establish that their respondent banks are not undertaking business with shell banks

Regulation, supervision, guidance, monitoring and sanctions

3.10. The Supervisory and Oversight System - Competent Authorities and SROs: Role, Functions, Duties and Powers (Including Sanctions) (R.23, 30, 29, 17, 32 & 25)

3.10.1. Description and Analysis

Legal framework and overview

701. Under the MLPC Act, all financial institutions are supervised by the TRA for AML/CFT purposes. To date, however, due to resource restraints the TRA has only actively supervised the financial institutions licensed and regulated by the NRBT (ie banks and foreign exchange dealers) and has not extended its supervision to all financial institutions and cash dealers under its authority (eg money remitters, money lenders, credit unions, insurers and insurance intermediaries). The Ministry of Labour, Commerce and Industry only undertakes a business licensing function and has undertaken no supervisory activities in relation to AML/CFT in relation to these entities.

702. The NRBT has general supervisory powers over financial institutions undertaking banking business and foreign exchange transactions.

703. Legislation relevant to the supervisory authorities are the MLPC Act, Financial Institutions Act 2004 (FI Act) (Part II Licensing of Financial Institutions, Part IV Supervision of Licensed Financial Institutions, Part V Controllership and Receivership), The National Reserve Bank of Tonga Act (NRBT Act), and The Business Licensing Act 2002 and Regulations (BL Act).

704. “Financial institution” is broadly defined in the MLPC Act and includes, acceptance of deposits, including for life insurance and investment related insurance, lending, financial leasing, money transmission services, issuing for example credit cards, travellers’ cheques and bankers' drafts, guarantees and commitments, trading in money market instruments, foreign exchange, financial futures and options, exchange and interest rate instruments, and transferable securities, underwriting share issues and participation in such issues, giving advice to undertakings on capital structure, industrial strategy and related questions, and advice and services relating to mergers and the purchase of undertakings, money-broking, portfolio management and advice, safekeeping and administration of securities, providing credit reference services or providing safe custody services.

705. “Financial institution” is also defined in the NRBT Act as an institution doing banking business which is further defined as the taking of deposits and any “other activity recognized by the Bank as customary banking practice”.

706. “Cash dealer” is defined in the MLPC Act and includes insurers, insurance intermediaries, securities dealers or futures brokers, dealing in bullion, of issuing, selling or redeeming travellers' cheques, money orders or similar instruments, payroll services, gambling houses, casinos or lotteries, or a trustee, or manager of a unit trust.

707. The banks are licensed and prudentially supervised by the NRBT under the Financial Institutions Act. The foreign exchange dealers are licensed and prudentially supervised by the NRBT under the Foreign Exchange Control Amendment Regulations 2000.

708. The Ministry of Labour, Commerce and Industries (MLCI) registers companies, charitable trusts and issues licenses to businesses in Tonga. All businesses must have a licence issued by MLCI.

Licences may be restricted to certain business and conditions may be imposed on licences as determined by the MLCI.

709. The TRA has powers to supervise both financial institutions and cash dealers for AML/CFT purposes. Section 11(2) of the MLPC Act outlines the powers of the TRA. The powers and authority of the TRA are:

(a) Shall receive reports of suspicious transactions from financial institutions and cash dealers;
(b) Shall send any such report to the appropriate law enforcement authorities if the report gives the TRA reasonable grounds to suspect that the transaction is suspicious;
(c) Entering the premises of any financial institution or cash dealer, and ask any question relating to records, make notes and take copies of records;
(d) Shall send to the appropriate law enforcement authorities, any information derived from an inspection if it gives the TRA reasonable grounds to suspect that a transaction involves proceeds of crime;
(e) Instructing any financial institution or cash dealer to take such steps as may be appropriate to facilitate any investigation;
(f) compiling statistics and records, disseminate information within Tonga or elsewhere, make recommendations arising out of any information received, issue guidelines to financial institutions and advise the Attorney General;
(g) Shall create training requirements and provide such training for any financial institution in respect of transaction record-keeping and reporting obligations provided for in sections 13(1) and 14(1);
(h) Consulting with any relevant person, institution or organisation for the purpose of exercising its powers or duties under subsections (2) (c), (f) or (g);
(i) Shall not conduct any investigation other than for the purpose of ensuring compliance by a financial institution with the provisions of this Part.

710. A number of these powers relate only to financial institutions and not to cash dealers (ie items f, g, and i above) though it should be noted that the class of entities covered by the cash dealer definition is in practice limited in Tonga to insurers and insurance intermediaries.

711. Section 22(1) of the MLPC Act gives the TRA power to apply to the Supreme Court for an order against all or any employees of a financial institution or cash dealer in terms determined by the court that will effect compliance with sections 12 to 16 of the MLPC Act. These sections relate to customer identification, record keeping, reporting STRs, establishing and maintaining internal reporting procedures and preventative measures by financial institutions and cash dealers.

712. Proposed amendments to the MLPC Act would extend the TRA's powers to enforce compliance with the Act and share information with domestic and international counterparts.

Regulation and supervision of FIs (c. 23.1)

713. The NRBT and FI Acts give the NRBT adequate powers to inspect, issue directives and impose sanctions with regard to the financial institutions and cash dealers. The NRBT also has licensing and regulatory powers with regard to foreign exchange dealers and fund transfer services for the purposes of the Foreign Exchange Control Act.

714. The TRA conducts compliance checks and onsite examinations of financial institutions and cash dealers licensed under the FI Act and the Foreign Exchange Control Regulations. Section 11(2)(c) of the MLPC Act allows the TRA to enter the premises of any financial institution or cash

dealer during ordinary business hours to inspect any record kept and ask any question relating to such record, make notes and take copies of the whole or any part of the record.

715. There have been no powers exercised to date to enforce the TRA's or NRBT's authority. Onsite examinations have been conducted with the cooperation of the financial institutions.

716. The TRA has not extended its supervision to all financial institutions and cash dealers under its authority. It has not undertaken any activity in relation to money lenders, credit unions, or insurers or insurance intermediaries. This is a significant shortfall in the regulation and supervision functions of the TRA.

717. The MLCI only undertakes a business licensing function and has undertaken no supervisory activities in relation to AML/CFT and cannot be considered part of the regulation or supervision capacity for AML/CFT in Tonga.

718. As the TRA does not effectively supervise the non-NRBT licensed financial institutions and cash dealers, the overall level of AML/CFT regulation and supervision is weak.

Designation of competent authority (c. 23.2)

719. In accordance with the MLPC Act, the NRBT was appointed by the Attorney General as the TRA in July 2001. The TRA has been designated the competent authority with respect to Tonga combating money laundering and terrorist financing.

720. Section 22(1) of the MLPC Act states that the Supreme Court may, upon application by the TRA, and being satisfied that a financial institution or cash dealer has failed to comply with any obligation provided for under sections 12, 13, 14, 15 or 16, make an order against all or any officers or employees of the institution or dealer in such terms as the Supreme Court deems necessary, in order to enforce compliance with such obligation.

721. Section 11(2)(A)(1)(l) of the amendments to the MLPC Act will, if enacted, empower the TRA to instruct any financial institution and cash dealer to take steps as may be appropriate in relation to any information or report received by the TRA to enforce compliance with the Act or to facilitate any investigation anticipated by the TRA or a law enforcement agency.

Structure and resources of supervisory authorities[23]

722. The TRA is responsible for the regulating and supervising the following classes of entities:

[23] As related to R.30; see s.7.1 for the compliance rating for this Recommendation.

Table 11: Entities under supervision of the TRA under MLPC Act

Activity	Number of Entities
Commercial Banks	3
Foreign Exchange Dealers/Money Remitters	4
Development Bank (Tonga Development Bank)	1
Credit Unions	65
Money Lenders	194
Insurance Companies (Life Insurance)	5
Total	**272**

723. Conducting regular AML/CFT supervision of financial institutions and cash dealers is a challenge in frequency and scope due to limited resources within the TRA. The TRA currently comprises two full-time and one part-time staff. More training and experience is required for the TRA staff to perform their duties and responsibilities.

724. The TRA is under-resourced to fully undertake its designated role.

725. The TRA is housed under the NRBT. It is funded by the NRBT budget. Statutory powers of the TRA conferred under the MLPC Act are exercised by the TRA Committee of the NRBT. The TRA Committee comprises of the Governor, Deputy Governor, Manager of the Financial Institutions Department (which houses the TRA), and the two Transaction Reporting Officers. The two full time officers, one of whom is a trainee, have been employed in the TRA for less than a year and therefore are still developing the required technical skills and knowledge.

726. While feedback from the private sector on the NRBT and the TRA was generally positive, some private sector representatives indicated that the depth of onsite examinations fell short of what they would normally expect.

727. There are currently no plans to increase the resources of the TRA either immediately or once the proposed amendments to the MLPC Act, which will extend the TRA's responsibilities to the DNFBP sector, are enacted.

Professional standards of staff of competent authorities

728. The TRA adopts the NRBT's recruitment policy which ensures high professional standards including confidentiality are maintained.

729. The staff of the NRBT are all required to sign an oath of secrecy and are prohibited by section 19 of the NRBT Act to disclose to any person any material information relating to the affairs of the Bank or of any financial institution or other person which he has acquired in the performance of his duties under the NRBT Act. Any person contravening section 19 is guilty of an offence and liable on conviction to a fine not exceeding $2000 or imprisonment for not exceeding two years or both.

Training of staff of competent authorities

730. The TRA has received training which has been conducted externally, funded by AUSTRAC, AMLAT, IMF/STI and with technical assistance funded by PALP and AMLAT, which has assisted the TRA staff on AML issues and onsite visits. Computer-based training has been provided by UNODC to the TRA, financial institutions, and investigation agencies. This is based at the Police Training Centre. As noted above, however, the current full-time staff require additional training and on-the-job experience.

Authorities' Powers and Sanctions – R.29 & 17

Recommendation 29 (Supervisory powers)

731. Section 11 of the MLPC Act sets out the authority of the TRA but there are no general provisions for enforcement of that authority in the MLPC Act. Section 22 of the MLPC Act provides for the TRA to apply to the Supreme Court for an order to enforce the provisions of sections 12-16 of the MLPC Act, however, those sections of the MLPC Act do not relate to the supervisory functions of the TRA.

732. With respect to financial institutions that are licensed by the NRBT, reliance is placed on the enforceability of guidelines through ss15 (3) and 33 of the Financial Institutions Act. The FI Act provides for a reasonable range of sanctions against NRBT licensed financial institutions including warnings, remedial agreements, administrative penalties, restrict operations and revocation of licences.

733. However, these sanctions are only applicable to financial institutions licensed by the NRBT and so do not extend to the full range financial institutions and cash dealers caught under the MLPC Act and subject to the TRA's oversight (ie credit unions, money lenders and insurance companies and intermediaries).

734. The proposed amendments to the MLPC Act section 16A provide measures and sanctions that can be imposed on financial institutions or other regulated businesses and supervisors for breaches of any obligations established under the Act.

Powers to monitor compliance

735. Section 22(1) of the MLPC Act states that the Supreme Court may, upon application by the TRA, and being satisfied that a financial institution or cash dealer has failed to comply with any obligation provided for under sections 12, 13, 14, 15 or 16, make an order against all or any officers or employees of the institution or dealer in such terms as the Supreme Court deems necessary, in order to enforce compliance with such obligation

736. Sections 12-16 of the MLPC Act relate to customer identification, record keeping, suspicious transaction reporting, internal reporting procedures and further preventative measures.

737. The power to compel a financial institution or cash dealer to cooperate with the TRA in its supervisory activities is limited. The NRBT has the power to conduct supervisory activity only in relation to financial institutions licensed by it.

738. Section 11(2)(A)(1)(l) of the amendments to the MLPC Act, if enacted, would empower the TRA to instruct any financial institution and cash dealer to take steps as may be appropriate in relation to any information or report received by the TRA to enforce compliance with the Act or to facilitate any investigation anticipated by the TRA or a law enforcement agency.

Authority to conduct AML/CFT inspections

739. The TRA relies on powers under the FI Act to conduct inspections but this is limited to financial institutions licensed under that Act and so does not extend to the full range of financial institutions and cash dealers subject to the TRA's oversight.

740. The MLPC Bill section 11(2)(A)(1)(e) would, if enacted, allow the TRA to enter the premises of the financial institution and cash dealer to inspect any records, ask any questions of any employee of the financial institution or cash dealer relating to such records.

Power compel production of records

741. Section 25 of the FI Act states that the Reserve Bank may-

a. conduct the inspection with or without notice

b. require explanations and the production of books, accounts and documents and such information as may be required to conduct the inspection

c. make copies of and take any papers or electronically stored data from licensed financial institution's premises; and

d. require that copies of documents be certified as "true" copies of the originals retained by the licensed financial institutions.

742. Information can be obtained from the banks under the FI Act. In practice, the banks are very cooperative during onsite visits.

743. The above powers do not however extend to full range of financial institutions and cash dealers subject to the TRA's oversight.

Powers of enforcement & sanction (c. 29.4)

744. As noted above, section 22(1) of the MLPC Act states that the Supreme Court may, upon application by the TRA, and being satisfied that a financial institution or cash dealer has failed to comply with any obligation provided for under sections 12, 13, 14, 15 or 16, make an order against all or any officers or employees of the institution or dealer in such terms as the Supreme Court deems necessary, in order to enforce compliance with such obligation.

745. This power has not been tested. In addition there is no range of powers that are proportionate nor are any administrative powers available to the TRA covering all of the financial institutions and cash dealers. As already indicated a range of enforcement powers and sanctions is available to the TRA covering NRBT licensed institutions through the NRBT's powers under the FI Act.

746. Section 11(2)(A)(1)(l) of the draft amendments to the MLPC Act would, if enacted, empower the TRA to instruct any financial institution and cash dealer to take steps as may be appropriate in relation to any information or report received by the TRA to enforce compliance with the Act or to facilitate any investigation anticipated by the TRA or a law enforcement agency.

747. Section 16A of the draft amendments to the MLPC Act outlines measures and sanctions that any supervisory authority or competent disciplinary authority that discovers breach of the obligations of the Act by a cash dealer, over the counter cash dealer, financial institution or other regulated business, impose are as follows:

- written warnings
- order to comply with specific instructions
- order reports on a regular basis from the cash dealer, over the counter cash dealer, financial institution or other regulated business on the measures it is taking
- barring individuals from employment within the sector
- replacing or restricting the powers of managers, directors, principals, partners or controlling owners, including the appointing of ad hoc administrator
- a temporary administration of cash dealer or financial institution
- suspending, restricting or withdrawing the license of the cash dealer or financial institution.

Recommendation 17 (Sanctions)

748. The MLPC Act provides measures and sanctions that can be imposed on legal persons that are financial institutions, cash dealers, any officers or employees of the institution or dealer, or other regulated business.

Availability of effective, proportionate & dissuasive sanctions

749. The effect of section 22(1) of the MLPC Act is set out above.

750. Section 18 (2) of the MLPC Act provides that a financial institution or cash dealer who fails to comply with any requirement of Part II of the MLPC Act[24] for which no penalty is specified commits an offence and shall upon conviction be liable to imprisonment for a period not exceeding 2 years or to a fine not exceeding $20,000 or both, and in the case of a body corporate, to a fine not exceeding $100,000.

751. Section 17 of the MLPC Act provides that persons committing ML offences shall upon conviction be liable to imprisonment for a period not exceeding 12 months or to a fine not exceeding $10,000 or both, and in the case of a body corporate to a fine not exceeding $50,000.

752. There have been no instances where the sections set out above have been applied. While the sanctions to individuals and seem relatively dissuasive, it is difficult to see how a financial institution or cash dealer can be imprisoned as per section 18(2). The above sanctions are limited in range and there is a lack administrative sanctions which could be used for lesser breaches to promote compliance generally.

753. The NRBT in its administration of the FI Act has a broader and more proportionate range of powers available but they only apply to financial institutions licensed under the FI Act and not to the full range of financial institutions and cash dealers within the MLPC Act.

754. Proposed amendments to the MLPC Act outlines a much broader range of measures and sanctions available to a supervisory authority or competent disciplinary authority that discovers breach of the obligations of the Act by a cash dealer, over the counter cash dealer, financial institution or other regulated business.

[24] Part II of the MLPC Act covers, relevantly, the authority of the TRA, financial institutions' and cash dealers' obligations with respect to customer identification, transaction reporting, record keeping and internal reporting, amongst other things

Designation of authority to impose sanctions

755. The NRBT is designated by the Attorney General under section 11(1) of the MLPC Act as the TRA. The TRA may apply to the Supreme Court under section 22 of the Act for orders against financial institutions and cash dealers.

Ability to sanction directors & senior management of FIs

756. Section 22(1) of the MLPC Act set out above provides for the Supreme Court may, upon application by the TRA, to make an order against all or any officers or employees of the institution or dealer in such terms as the Supreme Court deems necessary, in order to enforce compliance.

757. The NRBT has issued a Fit and Proper Prudential Statement to financial institutions licensed under the FI Act that sets out criteria that financial institutions should use to determine the fitness and propriety of directors and management. The NRBT may issue directions in terms of section 33 of the FI Act to remove a director or officer. Certain classes of people are barred from management of FI Act licensed institutions such as those who held similar positions in a licensed financial institution in Tonga or elsewhere which has had its licence revoked or which has been wound up by a court or has been sentenced by a court in any country for an offence involving dishonesty or is or becomes bankrupt or enters into a scheme of arrangement with his creditors.

758. Under the Companies Act, a person may be disqualified from acting as a director or company secretary or disqualified from managing a company in relation to offences under the Companies Act.

759. The ability to sanction directors and senior management of all financial institutions and cash dealers as defined under the MLPC Act is limited.

760. Section 16A(d) and (e) of the amendments to the MLPC Act, if enacted, will empower the supervisory authority to bar individuals from employment within the sector, and replacing or restricting the powers of managers, directors, principals, partners, or controlling owners including the appointing of ad hoc administrator.

Range of sanctions—scope and proportionality

761. The range of sanctions is set out above. The NRBT does have powers to withdraw, restrict or suspend the financial institution's licence for those licensed under the FI Act. For those institutions not licensed under the FI Act the scope and proportionality of sanctions are limited.

Market entry – Recommendation 23

762. The NRBT has licensing requirements in relation to financial institutions applying to be licensed under the FI Act.

Fit and proper criteria and prevention of criminals from controlling institutions

763. Section 7 of the FI Act states that the NRBT, in considering any application for a license, shall have regard to the ability of the applicant to carry on the proposed business, the character and experience of its directors and management, and those persons who will own 10 percent or more of the voting shares of the applicant. Section 26 of the FI Act states that no person shall be appointed or elected as a director or to the management of a licensed financial institution who has acted in similar positions in a licensed financial institution in Tonga or elsewhere which has had its license revoked or which has been wound up by a court, has been sentenced by a court in any country for an offence

involving dishonesty; or is or becomes bankrupt or enters into a scheme of arrangement with his creditors.

764. The NRBT has issued Prudential Statement 8 on Fit and Proper to licensed financial institutions.

765. The above requirements apply only to the financial institutions and cash dealers that are licensed by the NRBT, that is, the four licensed banks and four foreign exchange dealers.

766. The NRBT's Prudential Statement 8 on Fit and Proper aims to ensure that a licensed financial institution is well managed and that persons occupying key positions within the institution must have the degree of probity and competence commensurate with their responsibilities. These key positions include directors and senior managers as defined in this Statement. Many of the factors outlined in this Statement are also applicable to the assessments of whether a person, company or partnership are fit and proper to acquire or retain a substantial shareholding in a licensed financial institution.

Licensing or registration of value transfer/exchange services

767. The MLCI issues a business licence to money or value transfers and money or currency changing service providers. They are also licensed or registered by the NRBT under Regulation 3 of the Foreign Exchange Control Amendment Regulations. Currently there are four foreign exchange dealers licensed by NRBT. Local money remitters are registered with the MLCI.

768. Tongan competent authorities have identified that there is a significant informal remitter market segment. The size of the informal sector is unknown, though comments from private industry estimated its size at TOP$22m per year.

Licensing and AML/CFT supervision of other FIs

769. Other financial institutions in Tonga comprise money lenders, credit unions, insurance companies and insurance agents. As noted above, the existence of an 'informal remitter' sector has been acknowledged by competent authorities in Tonga.

770. The other financial institutions are licensed by the Ministry of Labour, Commerce and Industry. They are not regulated or supervised.

771. There has been no risk assessment in terms of money laundering or terrorist financing with respect to these other financial institutions or the informal remitter segment by competent authorities in Tonga.

Ongoing supervision and monitoring – Recommendation 23

Application of prudential regulations to AML/CFT

772. Section 7(c) of the FI Act states that the NRBT, in considering any application for a license, shall have regard to the effectiveness of accounting, internal controls, audit and risk management systems that the applicant will put in place.

773. Section 15(1) requires the NRBT to undertake prudential supervision of licensed financial

774. Section 15(3) states that the NRBT may issue in writing prudential statements and requirements including requirements for licensing, ownership and management of licensed financial institutions.

775. Prudential Statements have been issued relevantly for Audit Arrangements; Fit & Proper Requirements and Governance. The Fit and Proper Requirements are described above. The Audit Arrangements and Governance prudential statements set out requirements that impose obligations on External Auditors, Internal Auditors and Executive Officers and Directors to provide opinions (in the case of Auditors) and attest (in the case of officers and directors) to the compliance by the financial institution with laws and regulations generally, in Tonga.

776. There are no Prudential Statements about operational risk in financial institutions that might be expected to address money laundering or terrorist financing risks.

Monitoring and supervision of value transfer/exchange services

777. The MLCI issues a business licence to money or value transfer service providers and money or currency changing service providers. They are also licensed or registered by the NRBT under Regulation 3 of the Foreign Exchange Control Amendment Regulations. The NRBT conducts both offsite and onsite supervision of licensed foreign exchange dealers to ensure compliance with conditions of their licence which includes compliance with AML/CFT requirements. The NRBT has conducted risk-based onsite visits and checks for compliance with licensing requirements. Reports are also monitored for compliance.

778. As previously indicated the existence of an 'informal remitter' market segment has been acknowledged by competent authorities in Tonga. These are neither licensed nor supervised and there has been no risk assessment in terms of money laundering or terrorist financing with respect to these other financial institutions or the informal remitter segment by competent authorities in Tonga.

Guidelines – R.25 (Guidance for financial institutions other than on STRs)

779. The TRA issued AML Guidelines 1 to 4 in 2004 under section 11(2)(f) of the MLPC Act.

780. The AML Guidelines are as follows:

- **Guideline 1: Background** explains money laundering and its international nature. It also provides an outline of the legislative requirements as well as an overview of TRA's mandate and responsibilities.
- **Guideline 2: Suspicious Transactions** explains how to report a suspicious transaction. It also provides guidance on how to identify a suspicious transaction, including general and industry-specific indicators that may help when conducting or evaluating transactions.
- **Guideline 3: Customer Due Diligence** explains the requirement for financial institutions and cash dealers to identify their clients
- **Guideline 4: Implementation of Compliance Regimes** explains the requirement for financial institutions and cash dealers to implement a regime to ensure compliance with their obligations under the MLPC Act

781. These guidelines have not however been issued to financial institutions and cash dealers which are not supervised by the NRBT.

Statistics and effectiveness

782. Since 2004, the NRBT has conducted five onsite examinations on licensed banks and two inspections of licensed foreign exchange dealers based on the requirements contained in the AML Guidelines. However not all licensed banks and foreign exchange dealers have been subject to a specific AML/CFT examination, nor have any other financial institutions/cash dealers been subject to an on-site examination .

783. Onsite inspection procedures include spot checks for compliance with account opening and telegraphic transfer requirements. This includes assessing the application of CDD policies. The AML/CFT training of staff is also reviewed by holding interviews with front line staff. Spot checks of record keeping and retention of records requirements are also made.

784. Offsite supervisory procedure includes analysing of overseas exchange transactions (OET) data for any significant and suspicious activity. Compliance with AML/CFT requirements is monitored offsite in the compliance registers.

785. There have been no sanctions applied.

786. In general the institutions that have received the Guidelines are of the opinion that they are enforceable and make attempts to comply with them.

787. The working relationship between the NRBT/TRA and the financial institutions is generally good in terms of guidance and information sharing. However issues of effectiveness and efficiency in relation to AML/CFT examinations were raised with the team.

3.10.2. Recommendations and Comments

788. Four banks and four foreign exchange dealers are licensed by the NRBT. Reliance is placed on the NRBT's powers to enforce AML/CFT requirements. This appears to be an appropriate approach given that two of the banks are operated by adequately supervised Australian banks, and the other two banks are relatively small and are not complex organisations. Supervision of compliance with some aspects of Tonga's AML/CFT requirements by some of the foreign exchange dealers seems to be reasonably managed at this stage.

789. The powers of the TRA can only be enforced through application to the Supreme Court for an order in relation to sections 12-16 of the MLPC Act. Other than for NRBT licensed entities, the TRA's powers to force cooperation with monitoring and supervision activities are limited.

790. Tonga should consider extending a similar range of powers that apply to the NRBT in its supervision functions to the MLPC Act so that all financial institutions and cash dealers are subject to a sufficiently broad range and scope of sanctions and powers.

791. Sanctions able to be exercised on financial institutions and cash dealers other than those mentioned above are not proportionate to circumstances and do not include administrative penalties.

792. Tonga should consider introducing a range of sanctions as contemplated in FATF Recommendation 17 that can be applied to all financial institutions and cash dealers subject to the MLPC Act.

793. The TRA should provide awareness and training programs for the other regulated institutions currently captured by the MLPC Act and institutions to come under after the planned amendments to the MLPC Act are enacted. This may involve issuing of new and/or Regulations.

794. All business in Tonga are required to have a business licence issued by the MLCI. The MLCI has not taken any action against unlicensed business.

795. The growth and development of the money lender and unofficial remitter sectors is a concern given the resource constraints of the TRA. Tonga should undertake a risk assessment of these growing and unlicensed market segments to determine the appropriate level of regulation and the resources required.

796. The TRA has two full time officers to cover both the supervisory functions of the TRA as well as the TRA's FIU functions. The NRBT's bank examination staff is also limited. Only five onsite examinations have been undertaken by the TRA since 2004. The TRA estimates that they have capacity to do two onsite examinations each year. The ability to conduct examinations is limited due to both staff numbers and expertise. The TRA should consider whether additional resources are required to complete its round of AML/CFT on site examinations of all licensed banks and foreign exchange dealers, as well as other financial institutions not currently actively supervised, to fully assess the effectiveness of the regulatory systems.

797. There are no plans at this stage to expand the resources of the TRA when amendments to the MLPC Act are passed that bring DNFBPs into the AML/CFT system. The need for additional resources should be reviewed once the amendments are passed.

3.10.3. Compliance with Recommendations 17, 23, 25 & 29

	Rating	Summary of factors underlying rating
R.17	**PC**	• Sanctions are limited in scope and proportionality over all financial institutions and cash dealers in Tonga • There are no civil or administrative sanctions in the current legislation that are applicable to all financial institutions and cash dealers in Tonga • The ability to sanction directors and employees of all financial institutes and cash dealers in Tonga is limited
R.23	**PC**	• There has been no supervisory activity with respect to financial institutions and cash dealers that are not licensed by the NRBT • Prudential statements issued to financial institutions subject to the core principles do not cover risk management process to identify, measure, monitor and control material risks such as would be found in an operation risk prudential statement. • There is a significant informal remitter market segment that is not licensed • Other financial institutions (credit unions, money lenders, insurance companies and intermediaries and money remitters) in Tonga are not adequately regulated and licensed.
R.25	**NC**	• Failure to issue guidelines to all financial institutions and cash dealers under the MLPC Act.

R.29	**PC**	• The powers within the MLPC Act to monitor all the financial institutions and cash dealers caught by the Act are limited in scope.

3.11. Money or Value Transfer Services (SR.VI)

3.11.1. Description and Analysis (summary)

Legal framework

798. The NRBT has licensed four foreign exchange dealers under the Foreign Exchange Control Amendment Regulations. While the foreign exchange dealers provide outward remittances, a significant function of foreign exchange dealers is receiving remittances from Tongans living abroad, mainly in the United States, Australia and New Zealand, and disbursement in Tongan pa'anga. Reasons for remittances include, living expenses, funerals, church donations and other family tuition obligations.

799. The foreign exchange dealers transact through accounts with the banks. They are also subject to the NRBT's Exchange Control requirements.

800. As already mentioned there is a significant informal remitter market segment operating in Tonga, with anecdotal evidence that there are unlicensed institutions carrying on the business of money transfer and money changing. It was indicated by the private sector that a significant volume of business was lost in the formal sector with the introduction of the MLPC Act in 2000, but that this business was still being conducted informally. The volume of formal business lost was estimated as being as much as 12% of the value of remittances in 2008 – 09, though this could not be verified. In 2008-09 TOP$73.5M was received by licensed foreign exchange dealers

801. All business in Tonga are required to have a business licence issued by the MLCI and the licence is renewed annually. The licensing process of the MLCI requires production of NRBT's authorisation to operate as a foreign exchange dealer.

Registration or licensing authority

802. The NRBT has been designated as the licensing authority under the Foreign Exchange Control Amendment Regulations. Licensed foreign exchange dealers are published on the Government's ordinary gazette under Regulation 3. The NRBT maintains a list of the licensed and/or registered foreign exchange dealers.

803. The NRBT has not taken action against the identified informal remitter market segment. The MLCI has not prosecuted any person for operating without a licence but simply requests the operator to lodge an application.

Application of FATF Recommendations

804. The MLCI issues a business licence to money or value transfer service providers and money or currency changing service providers. They are also licensed or registered by the NRBT under Regulation 3 of the Foreign Exchange Control Amendment Regulations. The NRBT conducts both offsite and onsite supervision of licensed foreign exchange dealers to ensure compliance with conditions of their licence which includes compliance with AML/CFT requirements. The NRBT has

conducted risk-based onsite visits and checks for compliance with licensing requirements. Reports are also monitored for compliance.

Monitoring compliance and sanctions

805. The NRBT conducts both offsite and onsite supervision of licensed foreign exchange dealers to ensure compliance with conditions of their licence which includes compliance with AML/CFT requirements. The NRBT has conducted risk-based onsite visits and checks for compliance with licensing requirements. Reports are also monitored for compliance.

List of agents

806. Applicants for a foreign exchange dealer licence are required to provide a list of its agents, both locally and abroad, when it applies for a licence. Licensed/registered foreign exchange dealers are also required to provide an updated list of agents when applying for renewal of licence/registration on an annual basis. The NRBT is intending to include as a condition of licence/registration that the NRBT is notified of new agents as and when they are engaged, however this requirement is not yet in place.

807. A list of current agents is not reviewed.

Sanctions

808. Refer to responses to Criteria 17.1 to 17.4 above. Generally, sanctions are limited in scope and proportionality over all financial institutions and cash dealers in Tonga and there are no civil or administrative sanctions in the current legislation that are applicable to all financial institutions and cash dealers in Tonga.

Effectiveness

809. The NRBT licenses and regulates the formal money transfer sector, and has conducted both offsite and onsite supervision of licensed foreign exchange dealers to ensure compliance with conditions of their licence which includes compliance with AML/CFT requirements. However, Tongan authorities acknowledge that there is a significant informal money transfer sector within Tonga, but there has been no effective engagement with the sector or work undertaken to quantify or measure its impact.

810. The completeness of information concerning the foreign exchange dealers is a major issue considering the suspected size of this unregistered sector and the potential for ML/TF. Unknown amounts of money are entering and exiting the country without any regulation or monitoring system, which creates a clear risk/potential for ML/TF.

811. It is insufficient that foreign exchange dealers are required to supply a list of its agents only when applying for a license. There is every chance that these dealers may engage with new agents during its operation period, resulting in third parties or intermediaries that the Tongan supervisory authorities may be unaware of.

3.11.2. Recommendations and Comments

812. The formal market (four banks and four licensed foreign exchange dealers) is regulated and supervised by the NRBT.

813. Tonga should conduct outreach to and identify the informal remitter market segment through effective licensing and application its Business Licensing Act, where necessary taking action against those not holding a licence.

814. Tonga should require that existing licensed foreign exchange dealers provide a current list of agents to the NRBT annually.

3.11.3. Compliance with Special Recommendation VI

	Rating	Summary of factors underlying rating
SR.VI	**PC**	• List of agents of MTV business not available to NRBT • Large informal, unregulated money and value transfer sector • Absence of a range of proportionate sanctions proportionate to severity of non-compliance • A broad range of deficiencies identified under other Recommendations are also relevant to the remittance sector • Resource constraints to effective monitoring and outreach

4. PREVENTIVE MEASURES—DESIGNATED NON-FINANCIAL BUSINESSES AND PROFESSIONS

General Description

4.1. Customer Due Diligence and Record-keeping (R.12)

4.1.1. Description and Analysis

Legal framework and overview

815. Tonga has a relatively small DNFBP sector, which is overseen by the Ministry of Labour, Commerce and Industries (MLCI). Some of the DNFBPs operate under a business licence issued by the MLCI, but this business licence does not however impose any AML/CFT requirements.

816. AML/CFT measures have not yet in practice been extended to the DNFBP sector, though the current definition of "cash dealer" in the MLPC Act captures some DNFBPs and draft amendments to the MLPC Act would, if enacted, extend these measures to the entire DNFBP sector.

817. The current definition of "cash dealer" relevantly includes "a person who carries on a business of dealing in bullion", "an operator of a gambling house, casino or lottery" and "a trustee, or manager of a unit trust". However, there are no casinos including internet casinos, trust and company service providers (registered as such - legal firms may however assist with the formation of trust and companies.) or dealers in precious metals or precious stones actually operating in Tonga. In any case, the Tongan authorities have not actually applied the provisions of the MLPC Act to any DNFBP entities (as noted previously in this report, the AML/CFT requirements have in practice been extended only to the financial institutions licensed by the NRBT.

818. The following is a list of DNFBPs licensed with the MLCI:

Table 12: Licensed DNFBPs

Business	Type	Total
Real Estate Agent – rent or lease house/land	-	5
Lawyers – Legal firms and practitioners	Private firms- 11 Private practitioners- 23 (Government lawyers - 11)	34
Accountants/Auditors	-	14

Casinos

819. There are no casinos / internet casinos operating in Tonga. Casinos are prohibited under section 82 of the Criminal Offences Act.

820. As noted above, the definition of "cash dealer" under the MLPC Act includes casinos. This would appear contradictory and should be addressed by the Tongan competent authorities.

Real estate agents

821. There are five real estate agents operating in Tonga. Real estate agents operate under business licence issued by the MLCI under section 4(1) of the Business Licence Act 2002 and the Business Licence Regulations 2007, Schedule 2(1)(p). The business licence for real estate agents allows for the renting of houses only. The business licence does not allow for the leasing of land.

822. The Tongan Constitution prohibits the sale of land. Land ownership, however, can change for some monetary consideration through a surrender of rights to the land by the holder and his heirs, and then approval by Cabinet, and no other claim by any other person claiming to be an heir, however the person receiving the land must be Tongan. Land can be leased to any person, whether Tongan or non-Tongan. The Constitution prohibits foreigners from owning land in Tonga. They can only have temporary usage of land through lease or permits. Naturalized Tongans cannot own land. Real estate agents operating in Tonga can only be able to sell or buy leases, not land.

823. The current practice however is that the real estate agents are selling land leases, as advertised on the media or over the internet. Real estate agents are only licensed to rent houses. This is therefore unauthorised business as it is not allowed for in the business licence issued by the MLCI.

Dealers in precious metals and precious stones

824. The definition of "cash dealer" under the MLPC Act, includes bullion dealers. There are in fact no dealers in precious metals and precious stones in Tonga. Precious metals are not manufactured in Tonga and therefore there is no need for precious metals dealers. However, no Act or law prohibits the existence of bullion dealers in Tonga.

825. There are a few "jewellery stores" who sell imported low cost jewellery such as gold rings, necklaces and bracelets. More recently there has been some farming of pearls but has not been very successful. The few jewellery stores and handicraft shops sell imported low cost pearl necklaces & bracelets.

826. Tongan artefacts such as traditional mats are worth much more than precious stones in Tonga. According to Tongan authorities, they are more likely to be used as a vehicle for ML/TF than precious stones and metals. They are used as security for small loans offered by the money lenders. Their value often exceeds the amount borrowed e.g. offer a Tongan mat that is worth TOP$1000 for a TOP$200 loan.

Lawyers, notaries, other independent legal professionals and accountants

827. Professional service providers are licensed by the MLCI, including lawyers, notaries and accountants. As well as acting as legal professionals, lawyers can carry out the activities outlined for DNFBPs (e.g. buy and sell leases of real estate, act as trust and company service providers etc) if they have the knowledge and experience.

Trust and Company Service Providers

828. There are no trust and company service providers operating in Tonga. The Offshore Banking Act was repealed in 2001 therefore there are no offshore entities offering by trust and company services in Tonga.

CDD measures for DNFBPs (applying R5)

829. DNFBPs are not covered by the MLPC Act and are not required to comply with the CDD requirements as stipulated in FATF Recommendation 5. The proposed amendments to the MLPC Act captures DNFBPs as "cash dealers" therefore the TRA can enforce CDD requirements on these entities.

830. The MLCI does not implement extensive CDD measures on licensees in the licensing process or as part of any ongoing scrutiny during the life of the business. Minimum requirements / identification required by MLCI for licensees include official photo IDs or just a recent photo with a birth certificate.

831. A risk assessment of DNFBPs and their clients should be conducted to determine the extent of CDD measures required depending on the type of customer, business relationship or transaction.

CDD measures for DNFBPs (applying R. 6 & 8-11)

PEPs:

832. As previously noted, DNFBPs are not covered by the MLPC Act therefore they are not subject to its requirements. Requirements relating to PEPs are set out in the TRA AML Guidelines, however these do not apply to the DNFBP sector.

833. The proposed MLPC Regulations, which would apply to DNFBPs, set out requirements for risk management systems to be in place to determine whether a potential client, client, or beneficial owner of a client is a PEP and enhanced CDD to be conducted on such high risk customers. This includes measures taken to establish the source of wealth and the source of funds of customers and beneficial owners identified as PEPs and approval by senior management required for establishment of relationship with PEPs or continuation of business relationship with PEP. There is no commercial electronic database of PEPs; reference can only be made to publicly available information.

Non-face to face business relationships / transactions:

834. There are no requirements in place regarding non-face to face business relationships / transactions.

835. The proposed MLPC Regulations provide requirements for identification of non-face to face customers, enhanced due diligence to be conducted on such customers and allowance for delayed verification of such customers' identifications.

Third party conducting CDD / introduce business:

836. There are no requirements in place regarding third party customers/transactions applicable to DNFBPs. Requirements relating to third party customers/transactions set out in the TRA AML Guidelines do not apply to DNFBPs.

837. The proposed MLPC Regulations provide requirements applicable when the financial institution/cash dealer relies on intermediaries / third party transactions / customers. This includes requirement for the regulated entity to immediately obtain from the third party the information required on identification of customers and beneficial owners of customers (CDD); ensure the third

party is regulated and supervised and have measures in place to comply with the CDD requirements; ensure that all third party entities are in a country that adequately applies the FATF recommendations.

Record retention:

838. Record retention requirements set out in section 13 of the MLPC Act and the TRA AML Guidelines do not apply to DNFBPs.

839. DNFBPs operating in Tonga do not in practice have any standard record retention policy. Customer and transaction records are not available on a timely basis to competent authorities. MLCI does not enforce the reporting requirements e.g. annual returns, therefore the company registry and business licence information is not comprehensive and reliable.

Complex and unusual transactions:

840. There are no requirements currently applicable to DNFBPs.

4.1.2. Recommendations and Comments

841. Tonga should ensure that the planned amendments to the MLPC Act comprehensively and appropriately capture DNFBPs as "cash dealers", and subsequently finalize and implement these amendments as soon as possible.

842. Consideration should be given as to how the DNFBPs will be approached in terms of imposing the AML/CFT legislative requirements on them. The proposed risk assessment has been identified as the first step, however there needs to be clarity on when and who will develop and implement this measure.

843. In addition, Tongan authorities should:

- Determine the mechanics of an effective regulatory and supervisory framework for DNFBPs, designate the AML/CFT supervisory authorities for the different sectors and provide them with appropriate training, guidance and resources;
- Prepare sector-specific regulations and/or guidelines for each DNFBP sector; and
- Prior to and following amendment of the MLPC Act, conduct outreach for each sector to ensure compliance with the MLPA Act.

4.1.3. Compliance with Recommendation 12

	Rating	Summary of factors relevant to s.4.1 underlying overall rating
R.12	**NC**	• CDD obligations do not apply to the DNFBP sector • No AML/CFT system or regime for DNFBPs has been developed and implemented

4.2. Monitoring Transactions and other Issues (R.16)

(Applying R.13 to 15 & 21)

4.2.1 Description and Analysis

844. As noted previously, DNFBPs are not subject to the MLPC Act and are therefore not required to report suspicious transactions to the TRA or any other designated authority.

845. In addition, the following are not in place:

- requirement to have AML policies;
- internal control requirements;
- policies on treatment of business relationships with legal persons in countries that do not / insufficiently apply the FATF recommendations;
- sanctions for non-compliance with AML/CFT requirements (apart from MLPC Act penalties which are only applicable to financial institutions & cash dealers as defined in the Act).

Statistics and effectiveness

846. There is no effective implementation of any requirements.

4.2.2. Recommendations and Comments

847. Tonga should ensure that planned amendments to the MLPC Act capture DNFBPs as "cash dealers", and subsequently finalize and implement these amendments as soon as possible, so that:

- DNFBPs are required to report STRs. In doing this, authorities should determine how to deal with the issue of legal professional secrecy;
- DNFBPs, their directors, officers, and employees are protected from liability for reporting STRs;
- DNFBPs, their directors, officers, and employees are prohibited from tipping off that an STR has been made;
- DNFBPs are required to develop programs against ML and TF; and,
- DNFBPs are required to give special attention to business relationships and transactions with countries that do not or insufficiently apply the FATF Recommendations as required by R.21 (also see detailed comments under Rec. 14, 15 and 21).

848. In addition, Tongan authorities should conduct further outreach within the sectors as to the proposed obligations under the MLPC Act, and conduct training to improve the various sectors' understanding of money laundering typologies and ability to detect suspicious transactions.

4.2.3. Compliance with Recommendation 16

	Rating	Summary of factors relevant to s.4.2 underlying overall rating
R.16	**NC**	• DNFBPs are not covered under any appropriate AML/CFT legislation. • No AML/CFT system or regime for DNFBPs has yet to be developed and implemented

4.3. Regulation, Supervision, and Monitoring (R.24-25)

4.3.1. Description and Analysis

Recommendation 24 (Supervision of DNFBPs)

Legal framework

849. Under section 82 of the Criminal Offences Act, casinos are not allowed to operate in Tonga and gaming generally is prohibited.

850. The definition of "cash dealer" in the MLPC Act currently includes a casino, gambling house or lottery, which appears to be contradictory to the prohibition contained in the Criminal Offences Act.

Regulation and supervision of casinos

851. Casinos, including internet casinos, are not covered by the MLPC Act. There are no casinos operating in Tonga.

Monitoring systems for other DNFBPs

852. DNFBPs are not covered by the MLPC Act therefore are not required to comply with the requirements of the Act.

853. No assessment has been done to determine the risk of money laundering or terrorist financing in these sectors, and therefore determine the extent of measures that will be necessary.

854. Most DNFBPs operating in Tonga are licensed by the MLCI, but . there is no competent authority / SRO responsible for monitoring DNFBPs' compliance with AML/CFT requirements. However, if the amendments to the MLPC Act are passed then the TRA would be responsible for monitoring and ensuring compliance of DNFBPs with AML/CFT requirements.

Recommendation 25 (Guidance for the DNFBP sectors)

855. DNFBPs are not financial institutions or cash dealers for the purposes of the MLPC Act and as a result no AML Guidelines have been issued under the Act to them.

856. DNFBPs in Tonga have not been advised of the amendments intended to be made to the MLPC Act that will bring them under the AML/CFT regime and regulatory scope of the TRA.

4.3.2. Recommendations and Comments

857. Tonga should ensure that the amendments accurately capture DNFBPs as a cash dealer in the MLPC Act, and subsequently finalize and implement these amendments as soon as possible.

858. Tonga should also take steps to regulate/supervise/monitor the full range of DNFBPs for AML/CFT purposes as soon as possible.

4.3.3. Compliance with Recommendations 24 & 25 (criteria 25.1, DNFBP)

	Rating	Summary of factors relevant to s.4.3 underlying overall rating
R.24	**NC**	• In the absence of any AML/CFT requirements, DNFBPs are not subject to effective systems for monitoring and supervision for AML/CFT.
R.25	**[NC]**	*This is a composite rating. Section-specific rating would be: NC* • No guidelines have been issued for DNFBPs as none of them are subject to AML/CFT requirements

4.4. Other Non-Financial Businesses and Professions—Modern-Secure Transaction Techniques (R.20)

4.4.1. Description and Analysis

Legal framework

859. Other NFBPs are not covered by the MLPC Act and therefore are not required to comply with the requirements of the Act.

860. Other NFBPs (e.g. dealers in high value luxury goods, pawnshops, gambling, auction houses, car dealers, and investment advisers) can operate in Tonga under a business licence issued by the MLCI. There are 13 car dealers operating in Tonga. The MLCI does not impose any reporting requirement or requirement for update of principals including beneficial owners.

861. Tongan authorities advise that the local money lenders are effectively dealing in high value goods / pawnshop type of operations as traditional artefacts/mats are taken as security. These traditional mats are highly valuable. For fast access to loan funds, the high value traditional mats are pledged as security which can be recovered upon full repayment of debt or they can be left altogether in the event of non-repayment of debt.

Application of standards to other non-financial businesses and professions

862. Tonga has not considered applying R5, 6, 8-11, 13-15, 17 and 20 to other non-financial designated businesses such as high value goods, pawnshops, auction houses etc.

863. Other NFBPs are not covered by the MLPC Act and therefore do not comply with the requirements of the Act.

Modern and secure techniques for conducting financial transactions

864. Tonga has not taken measures to encourage the development and use of modern and secure techniques for conducting financial transactions that are less vulnerable to money laundering. Tongan authorities indicated that expertise in the use of modern technology is limited, and the Kingdom would therefore need to seek expertise and knowledge from overseas in order to utilise modern technology positively.

865. Tonga is a cash subsistence society that is heavily reliant on remittances therefore techniques/measures that may be less vulnerable to ML, such as reducing reliance on cash and not issuing very large denomination banknotes, may not be effective. For example, the $100 note was

issued in August 2008 however there has been very low demand for such high denomination note. In addition, the general public still prefers to use cash rather than EFTPOS for transacting. A monthly average for EFTPOS transactions conducted by the two large banks ranged from $2000 to $4000. Only a limited number of customers may be allowed to use this type of service. The service is not provided in the outer islands therefore residents in the outer islands prefer cash as a means of exchange.

866. The TRA has not extensively conducted public awareness programs / measures to encourage the development and use of modern and secure techniques for conducting financial transactions that are less vulnerable to money laundering.

4.4.2 Recommendations and Comments

867. Tonga should consider extending applying R5, 6, 8-11, 13-15, 17 and 20 to other non financial designated businesses such as high value goods, pawnshops, auction houses etc. As indicated above there are 13 motor vehicle dealers in Tonga which is high considering the total population in Tonga of about 100,000.

868. The TRA should consider conducting programs amongst the general population and to currently unregulated entities to raise awareness of money laundering and terrorist financing issues and to promote an acceptance of a lower reliance on cash.

4.4.3. Compliance with Recommendation 20

	Rating	Summary of factors underlying rating
R.20	**NC**	• No consideration has been given to extending FATF Recommendations to other designated non-financial businesses and professions

5. LEGAL PERSONS AND ARRANGEMENTS & NON-PROFIT ORGANIZATIONS

5.1. Legal Persons—Access to Beneficial Ownership and Control Information (R.33)

5.1.1. Description and Analysis

Legal framework

869. In preventing the use of legal persons for illicit purposes, Tonga relies primarily on a centralised system of company registration, corporate record keeping and financial reporting requirements, and the investigative powers of competent authorities.

870. The Ministry of Labour, Commerce and Industries (MLCI) is responsible for the creation and oversight of legal persons under the following relevant legislation:

- Companies Act 1995;
- Business License Act 2002;
- Foreign Investment Act 2002;
- Incorporated Societies Act 1984; and
- Charitable Trust Act 1993.

Measures to prevent unlawful use of legal persons

Companies Act 1995

871. Under section 15 of the Companies Act, any person may, either alone or together with another person, apply for registration of a company. Under section 150(3), a person who is not a natural person cannot be a director of a company. Shareholders are not required to be legal or natural persons. Under Part XVIII, an overseas company (a body corporate incorporated outside Tonga) that carries on a business in Tonga shall be registered as overseas companies in Tonga.

872. All applications under the Companies Act are made to the Registrar of Companies. The Registrar appointed under the Companies Act is the Minister of Labour, Commerce & Industries. According to section 367 of the Companies Act, the Registrar shall ensure that a register of companies registered under Part II of the Act and a register of overseas companies registered under Parts XVIII (overseas companies) and XIX (transfer of registration) are kept in Tonga. The Registrar also keeps records of documents related to the companies (section 368) and any mortgages or charges that the company are subject to (section 368A).

873. An application for registration of a company is made by a prescribed form with details of: name of the company, details on shareholdings, directorship and registered office, and upon payment of an appropriate application fee. A company cannot be registered if those details are incomplete. Registered companies are required to provide annual returns under section 223 of the Companies Act which are in a prescribed form providing details of shareholdings, directorship, registered office, shares issued and transferred, where the company records are kept and resolution on appointment of auditors. If the contents of the annual return are incomplete, the applicants are advised to have them completed before they are duly filed. There is however no mechanism to verify the information submitted by the companies.

874. Under section 369(1), the public may inspect information contained in the Registrar. However, under section 369(2), the provision of copies of certain records is subject to the written authority of the director or shareholder of the company. This requirement has been removed from the

Companies Act by the Companies Amendment Bill that came into force on 1 December 2009. Also, as from 1 December 2009, information kept by the Registrar became available online for public access free of charge. Information concerning the company name; shareholding (names of shareholders, number/class of shares); directorship (name and address); company address (registered for communication or service); charges against the shares of the company and annual returns are now available online. However, if any person wishes to inspect the actual file in the Registrar's office, an inspection fee is charged. The Registrar is conferred with powers to inspect a company in relation to its compliance with the Companies Act (section 371), but that power has never been used.

875. Part XXI provides for a wide range of offences for non-compliance. However the MLCI does not have the resources or expertise to confirm or investigate the validity or invalidity of the information provided, in terms of the financial position, business experiences of the shareholders and/or directors. Therefore no prosecution has ever been instituted under Part XXI.

876. As at the date of MEQ, 1,296 companies have been registered of which 1,259 are locals and 37 are foreign owned.

877. Although the Register maintained by the MLCI contains useful information about the legal ownership of domestic legal persons, and the legal control of both domestic and overseas legal persons, the information is not necessarily kept up to date and in any case it contains no information about the beneficial ownership and control of legal persons (*i.e.* the natural person(s) who ultimately own(s) or control(s) the legal person), which is the focus of Recommendation 33.

Business License Act 2002

878. Under section 4 of the Business License Act, every business person in Tonga carrying on a business activity shall hold a valid business licence. All applications are processed by the Business Licensing Officer (BLO) who is the Secretary for Labour, Commerce and Industries.

879. An application for a business license is made in a prescribed form. The BLO will advise an applicant in writing to provide the necessary information should the application is considered incomplete.

880. An application shall be made for each business activity as listed in Schedule 2 of the Business License Regulation 2007. The BLO may, in his discretion, issue one license that covers more than one related business activity and impose conditions on a license issued for a business activity specified in Schedule 2. The BLO shall within 7 working days either issue the applicant with a business license or advise the applicant of the grounds for refusing the application.

881. Under section 22 of the Business License Act, the BLO shall establish and maintain a register of business licences. Such register shall be available for inspection by the public upon payment of a prescribed fee.

882. A total of 3,738 businesses have been issued with business licenses as at January 2009. Businesses are licensed in four types – 2,751 sole traders, 34 partnerships, 7 societies and 946 companies. Some companies have multiple licenses issued for each business activity.

883. Registered companies must have a business license before they can operate in Tonga. Some registered companies in Tonga do not hold any business license and therefore are not in practice operating. The Tongan authorities are undergoing a re-registration exercise to ascertain the exact number of registered companies that are in operation.

884. A foreign investor shall hold a valid foreign investment registration certificate obtained under the Foreign Investment Act before he can apply for a business licence. The BLO also approves and grants business licenses to businesses that are foreign owned (not a Tongan subject and controls 25% or more of the venture or corporation not incorporated in Tonga)

Foreign Investment Act 2002

885. The Foreign Investment Act came into effect in April 2007. Under the Foreign Investment Act (Section 5(1)), every foreign investment business shall obtain and hold a valid foreign investment registration certificate issued by the Secretary for Ministry of Labour, Commerce & Industries. The Secretary also maintains a register of certificates (section 6).

886. The primary purpose of the Foreign Investment Act is to facilitate all foreign investors planning to invest in Tonga. A foreign investor can be an individual, a partnership or a company. There is a reserved list of business activities that are reserved for Tongan subjects.

887. A total of 274 foreign investment certificates have been granted so far. Subject to Section 10 of the Act, a foreign investment certificate shall be valid from the date of its issue until the termination of its business activity. A foreign investment certificate may be transferred, subject to compliance with the criteria under the Act (section 13).

Incorporated Societies Act 1984

888. A wide range of groups and non-profit organizations such as sports clubs, music, traders, teachers and cultural groups may be registered under the said Act. Forming an incorporated society group requires: 1) that the application must be signed thereto by at least 5 subscribers; 2) ensure that proposed constitution is ready; 3) a statutory declaration made by a member of the society that a majority consented to the application; and, 4) witness(es) is attested to the signatures of the subscribers. Name of society must end with the word "Incorporated". See section 5.3 of this report for further discussion.

Charitable Trust Act 1993

889. Organizations established with charitable purpose, whether it relates to relief of poverty, the advancement of education or religion, or any matter beneficial to the community, may be registered under this Act.

890. Two type of registration: a) the "Trust Board" of any trust which is exclusively or principally for charitable purposes may apply to the Registrar in accordance with this Act for the incorporation of the trust as a Board under this Act; b) the "Society" (as an organization), which exists exclusively or principally for charitable purposes may apply to the Registrar for incorporation. See section 5.3 of this report for further discussion.

Access to information on beneficial owners of legal persons

891. The information is received by the competent authority on the receipt of the application according to the requirements set out in the application forms as per Companies Act and Business Licenses Act. There are no formal procedures in place for verification of information received. The files kept by the Companies Registrar and Business License Registrar are now open to public inspection by payment of an inspection fee, but if the enquiry is in relation to a criminal investigation, no fee is required.

Prevention of misuse of bearer shares

892. Under the Companies Act, legal persons are permitted to issue any types of shares. However, there are no bearer shares registered or issued in Tonga. There are no measures in place to ensure that bearer shares are not misused for money laundering.

Additional element

893. 1. There are no measures in place to facilitate access by financial institutions to beneficial ownership and control information, so as to allow them to more easily verify the customer identification data.

5.1.2. Recommendations and Comments

894. Information of the company name; shareholding (names of shareholders, number/class of shares); directorship (name and address); company address (registered for communication or service); charges against the shares of the company and annual returns are now available online This new online access to the Companies Register has only just come into operation and its effectiveness cannot be confirmed. Since the MLCI does not have the expertise and resources, they may require company service providers to obtain, verify and retain records of the beneficial ownership and control of legal persons. They may also rely on the investigative and other powers of law enforcement agencies or other appropriate authorities to investigate any non-compliance with the relevant statutes. In which case, these appropriate authorities should be conferred with sufficiently strong compulsory powers for the purpose of obtaining the relevant information.

895. Tonga should broaden its requirements to ensure that information on the beneficial ownership and control of legal persons is readily available to the competent authorities in a timely manner. Such measures could include a combination of, for example, requiring overseas companies to maintain a share register in Tonga, requiring legal persons to maintain full information on their beneficial ownership and control, requiring such information to be filed in the Companies Registry, or requiring company service providers to obtain and maintain beneficial ownership information. Such information would then be available to the law enforcement and regulatory/supervisory agencies upon the proper exercise of their existing powers.

5.1.3. Compliance with Recommendations 33

	Rating	Summary of factors underlying rating
R.33	**PC**	• Measures are not in place to ensure that there is sufficient, adequate or timely information held on the beneficial ownership and control of legal persons. • Information submitted to the Registrar pertains to legal ownership and not beneficial ownership and is not verified. • No measures in place to ensure that bearer shares are not misused for money laundering.

5.2. Legal Arrangements—Access to Beneficial Ownership and Control Information (R.34)

896. Tongan authorities provided very little information, statutory or otherwise, on the system of trust law in the country. The MEQ indicated that:

- The Tongan legal system is based on New Zealand law and English common law which recognises a wide range of trusts, including express, discretionary, implied, and many other forms of trusts;
- If a trust is charitable, its trustees may choose to incorporate as a Board under the Charitable Trusts Act 1993. Charitable trusts are overseen by the Registrar of Charitable Trusts who, under the Charitable Trusts Act, is the Registrar of Incorporated Societies under the Incorporated Societies Act. The Registrar is located in the Ministry of Labour, Commerce and Industry (MLCI). It is not mandatory for trust companies to register with the MLCI.
- The MLCI does not have the capacity or resources to verify and there is no provision in the Charitable Trust legislation that requires MLCI to retain records of the details of the trust;
- The MLCI does not have the investigative powers of law enforcement, regulatory or supervisory powers. Competent authorities may have access to information subject to the payment of a small fee.

897. The MEQ was however generally silent on the content of Tonga's trust law.

898. It is the evaluators' understanding, based on open source research, that Tonga has an English common law system of trusts. However apart from the constituent elements of a trust (settler, beneficiary and trustee), there is insufficient information upon which to evaluate Tonga's system against the criteria for Recommendation 34. Based on this lack of information the evaluators are of the view that Tonga has failed to satisfy the team that it meets any of the criteria in this Recommendation.

Measures to prevent the unlawful use of trusts - adequate transparency concerning beneficial ownership and control

899. See above

Access to information on beneficial owners of legal arrangements

900. See above

Additional element

901. See above

5.2.2. Recommendations and Comments

902. See above. No recommendations possible due to lack of sufficient information.

5.2.3. Compliance with Recommendations 34

	Rating	Summary of factors underlying rating
R.34	**NC**	• Tonga has not met the burden on it to satisfy the evaluators that it meets the criteria for this Recommendation

5.3. Non-Profit Organisations (SR.VIII)

5.3.1. Description and Analysis

Overview

903. For a small jurisdiction, Tonga has a large and diverse non-profit organisation (NPO) sector which plays an important role in Tongan society. NPOs include church, youth, women's, cultural, health, welfare, disability and education groups. Most large villages would have 10 or so active NPOs, with even smaller village having their own NPOs. Most NPO activities are for domestic purposes only. Several internationally recognised organisations have branches in Tonga, and a number of NPOs receive external funding primarily through aid organisations such as NZAID, and AusAID. The main NPO umbrella body, the Civil Society Forum, has 60 members and primarily plays an advisory role to NPOs.

904. NPOs may be licensed or registered under the Charitable Trust Act 1993 or the Incorporated Societies Act 1984, however it is not mandatory for trusts or society to be registered or incorporated and most are not. The exact number of NPOs is not known, however it is estimated to be in the thousands; there are 175 registered charitable trusts and 238 incorporated societies.

905. There is no single Government agency responsible for oversight of the NPO sector. The Registrar for Incorporated Societies is contained within the MLCI but, due to capacity constraints and lack of expertise, there is no effective monitoring or supervision of the NPO sector for AML/CFT purposes.

Legal framework

Charitable Trust Act 1993

906. To be registered under the Charitable Trust Act 1993 (CTA), a charitable trust must exist principally or exclusively for a charitable purpose according to the law of Tonga, or for any purpose that is religious or educational.

907. The following purposes may be the basis of registration as a charitable trust: the promotion of education; the promotion of religion; the relief of poverty; other purposes of benefit to the community. It is also charitable to establish facilities for recreation and other leisure-time activities if those facilities are provided in the interests of social welfare and are of public benefit. A charitable purpose may be the object of a trust or the purpose a society is formed. The trustees of the trust or society may apply to the Registrar of Incorporated Societies for incorporation as a trust board.

Incorporated Societies Act 1984

908. An incorporated society is a group of at least five people who have applied for registration as an incorporated society under the Incorporated Societies Act 1984 (ISA). A wide range of groups and organizations apply for incorporation, including sports clubs, music and cultural groups and special interest organizations. An incorporated society will continue in existence as long as it files certain documents with the Registrar, or until its members, or a creditor, decide to bring the society to an end.

909. Forming an incorporated society requires: 1) that the society consists of at least 5 members, 2) ensure that your proposed constitution is ready and 3) witness is ready to attest to the signatures of the subscribers. Name of society must end with the word "Incorporated".

Review of NPO sector

910. Due to capacity constraints, there have been no reviews of the legislation or a stocktake of the activities, size and other relevant features of the non-profit sector for the purpose of identifying the features and types of NPOs that are at risk of being used for terrorist financing, nor has there has been an assessment or review to gauge the sectors potential vulnerability to terrorism. A review of Tonga's 'civil society organisations' was conducted by the International Center for Not-for-Profit Law (ICNL) in 2007 in collaboration with the Tongan Government. It provides a comprehensive overview of the legal and other structures in place, and an overview of the civil society sector in Tonga, but does not address the issue of vulnerability to TF.

911. As noted above, it is not mandatory for trusts or society to be registered or incorporated under the Charitable Trust or Incorporated Societies Act, and most NPOs are not registered under either Act. However, from the annual audited Financial Statements which are submitted to the Registrar of Incorporated Societies, none of the funds held by individual NPOs exceed TOP$500,000.

Outreach to the NPO Sector

912. Due to capacity constraints and lack of expertise, there has been no awareness raising or outreach programs in the NPO sector on the risks of terrorist abuse and available measure to protect against such abuse nor to promote transparency, accountability, integrity and public confidence in the administration and management of all NPOs.

Supervision/monitoring of NPOs

913. As noted above, there is no competent authority that is supervising or monitoring NPOs in Tonga. There is therefore no centralised registry containing information relating to all registered NPOs. The Registrar of Incorporated Societies, housed in the MLCI, does maintain some information of both incorporated societies and charitable trusts (a register of incorporated societies and trust boards is to be kept and managed by the Registrar by virtue of provisions of the Incorporated Societies Act3 and the Charitable Trusts Act), but this information relates to only a small proportion of all NPOs and is not necessarily kept up-to-date, nor is it verified.

914. Other Government departments, such as the Ministry of Youth, Training and Sports, the Ministry of education and the Ministry of Environment, have contact with individual NPOs and with the Civil Society Forum, but this is ad hoc and not coordinated.

Information to be maintained by NPOs

915. Under the ISA and the CTA, NPOs are required to state the purpose and objectives of their stated activities to be registered, the identity of the members and those controlling the society or trust have to be listed. This information is publicly available from the Registrar subject to a small fee during working hours.

916. Under section 22 of the ISA every society is required to keep a register of its members containing the names, addresses, and occupations of its members and, when required by the Registrar to do so, to send to him a list of the names, addresses, and occupations of its members, accompanied by a statutory declaration verifying that list and made by some officer of the society. However, the Registrar indicated that societies are not in fact asked to provide such lists on a regular basis.

917. Under section 23 of the ISA and section 30 of the CTA, societies and charitable trusts are required to submit an annual financial statement setting out, *inter alia*, the income and expenditure and assets and liabilities of the society. The Evaluation Team was informed however that many societies and trusts had failed to lodge annual returns for a number of years.

918. As noted above, a small number of NPOs receive aid funding through NZAID, AusAID, and other international donors. Such funding is subject to strict reporting requirements by the donor organisations.

Sanctions

919. No sanctions have been applied for any violations of oversight rules by NPOs. According to authorities, however, there is nothing which would preclude the application of parallel civil, administrative, or criminal proceedings with respect to NPOs or persons acting on their behalf where appropriate.

Licensing or registration of NPOs

920. NPOs may be licensed or registered under the Charitable Trust or Incorporated Societies Act, however this is not mandatory and most NPOs are not licensed or registered.

921. NPOs generally apply to become incorporated societies only when required to do so (eg by and external donor) or if is perceived it will help to attract donors. It is not necessary to be licensed or registered under the ISA or CTA in order to operate a bank account in Tonga; it is sufficient that the NPO have a system of signatories in place and to provide its constitution, minutes of meetings and a list of office holders to a bank in order to open an operate a bank account.

922. Section 18 of the Income Tax Act 2007 exempts the income (other than business income) of a non-profit organisation. "Non-profit organisation" is defined a one that the Chief Commissioner has certified as conducting activities exclusively for charitable purposes. "Charitable purposes" includes the relief of poverty advancement of education or religion or any other purpose beneficial to the community. Accordingly only business income of NPOs is taxable, not interest from financial institutions or rent they may derive unless conducting a business. Imports by NPOs acquired for charitable purposes are also exempt from duty and consumption tax. Only one NPO has been granted an exemption from income tax under the Income Tax Act.

Maintain and make available records for at least five years

923. Although there is no requirement under the CTA or ISA for NPOs to maintain records for a period of five years and make the information available to appropriate authorities, banks are required under the MLPC Act to maintain records of domestic and international transactions that are sufficiently detailed to verify that funds have been spent in a manner consistent with the purpose and objectives of the organization. Banks are also required to conduct customer due diligence as well as KYC on NPOs and incorporated societies that hold bank accounts with these banks.

Effective investigation and gathering of information

924. There are no particular measures or mechanisms in place to ensure that NPOs can be effectively investigated or to gather information. Tonga Police would investigate any cases of abuse of NPOs, but problems with the scope and quality of information available to the Registrar for

registered NPOs, and a lack of information for unregistered NPOs, would make effective investigation difficult.

Domestic cooperation, coordination and information sharing

925. There is no effective domestic cooperation, coordination and information sharing at appropriate authorities or organizations that hold information on NPOs of potential terrorist financing concern.

926. Access to information on the administration and management of particular NPOs is not readily available due to the gaps in the information and registration system outlined above, and the relevant legislation does not allow for the sharing of information during an investigation.

927. MLCI does not have investigative expertise or specialist capacity to examine NPOs and there are no mechanisms in place for prompt investigative or preventative actions against suspected NPOs. Tongan authorities indicated however that the the Tonga Police would generally be referred any suspicious activity. There would be no legal impediments for any a referral to the police by the MLCI. The NPO legislation does not prohibit information sharing with a foreign regulator. The Police could either refer the matter to CID and/or TCU, if there is a transnational criminal activity, for investigation and the CID and/or TCU could seek assistance of the TRA, Customs or other law enforcement entity to obtain information. The police would not normally be restricted from sharing information with a domestic or foreign authority, unless there are national security issues involved.

International requests for information

928. The MLCI does not have points of contact or procedures to respond to international requests for information regarding NPOs that are suspected of terrorist financing or other forms of terrorist support. However, the Tonga Police would be the point of contact for any investigation regarding possible terrorism financing. This would be is done through inter-agency cooperation within the region, or through international law enforcement agencies such as Interpol, the Australian Federal Police, US FBI and/or other international law enforcement agencies.

5.3.2. Recommendations and Comments

929. Given the nature of the NPO sector in Tonga, it is likely that the risk of TF (and ML) through the NPO sector is very low and there is no evidence to suggest that any NPO in Tonga has been used as a vehicle for TF or ML.

930. Notwithstanding the very low level of risk, Tonga should:

- formally designate an agency as the responsible agency for NPOs, not only in respect to registration but for broader AML/CFT matters including as a coordination point for information sharing;
- undertake a review the adequacy of its laws and regulations relating to NPOs that can be abused for the financing of terrorism;
- provide outreach programs in relation to terrorist financing (and money laundering); and
- centralise information on the activities of the NPO sector to facilitate access and sharing in ML/TF cases.

5.3.3. Compliance with Special Recommendation VIII

	Rating	Summary of factors underlying rating
SR.VIII	**NC**	• Tonga has not undertaken a review of the adequacy of existing laws and regulations that relate to non-profit organizations that can be abused for the financing of terrorism. • No outreach has been undertaken with the NPO sector with a view to protecting the sector from TF abuse. • The authorities have not taken effective steps to promote supervision and monitoring of those NPOs which account for a significant portion of the financial resources under the control of the sector. • NPOs are not required to maintain and make available to appropriate authorities, records of domestic and international transactions that are sufficiently detailed to verify that funds have been spent in a manner consistent with the purpose and objectives of the organization. • While legal authority may exist to investigate the affairs of NPOs there are no effective mechanisms in place to ensure domestic cooperation, co-ordination or information sharing. • No contact points have been identified for dealing with international requests for information about NPOs.

6. NATIONAL AND INTERNATIONAL CO-OPERATION

6.1. National Co-Operation and Coordination (R.31)

6.1.1. Description and Analysis

Legal framework

931. Currently the relevant legislation regarding ML/TF does not expressly provide for national cooperation and coordination, which is therefore based on policy and practice.

Recommendation 31

932. The AML/CFT National Committee is the lead body for AML/CFT. It was established in 2003, and comprises the Attorney General (Chairman); Minister of Finance (Deputy Chairman); Secretary for Foreign Affairs; Solicitor General; Police Commander; Governor of the National Reserve Bank of Tonga; Commissioner of Revenue; Secretary for Labour, Commerce and Industries; and the Secretary for Finance. The Crown Law Department provides the secretariat role.

933. The National Committee's main function is to determine broad policy objectives for AML/CFT. It has the mandate to establish mechanisms for domestic cooperation, and to coordinate the development and implementation of policies and activities to combat money laundering and terrorist financing.

934. The National Committee, which consists of very senior officials, meets only as and when required. The National Committee has however established an AML sub-committee as the AML/CFT working group. It is comprised of agencies similar to the National Committee, but at a senior official level, and is chaired by the Solicitor General. The working group meets several times a year and makes recommendations to the National Committee for decisions or guidance.

935. Accordingly there is cooperation and coordination at an agency to agency level, rather than as a formal national policy, as Tongan officials believe there is a low risk that Tonga will be used as a venue for money laundering and/or financing terrorism. Policy co-ordination in practice originates from the main entities, Crown Law, the NRBT and Tonga Police, which is then submitted to the Cabinet Committee for discussion and directions. Once approved the policies are submitted to Cabinet for final approval, and then implemented as appropriate by the three main entities of Crown Law, NRBT and Tonga Police. To date policies have been submitted for the amendment of legislation and the creation of regulations.

936. The powers and duties prescribed in the MLPC Act and the Transnational Crimes Act provide the legal basis for the national mechanisms and policies to combat money laundering and financing of terrorism.

937. Tongan authorities stated in their questionnaire response that there is no law or procedure that prevents Government agencies exchanging information with each other, or co-operating. For example, Crown Law is available to the TRA, TCU or NRBT for legal advice concerning combating of money laundering and terrorist financing. However, during the on-site visit, concerns were expressed by various agencies that the current legislation does not readily enable formal information sharing. By way of example, the TRA were adamant they had no lawful mandate with any national or international law enforcement agency and accordingly were very reluctant to share information. In other cases, such as between Tongan Police and Tongan Customs, there were no obvious mechanisms in place to

provide intelligence to each other. It was obvious during the onsite visit there is no information sharing culture within Tongan law enforcement agencies which inhibits cooperation between law enforcement agencies including inter-Government investigations. The implementation of formal protocols in the form of MOUs between law enforcement agencies, the NRBT, and other Crown entities which foster and encourage information sharing, is awaiting the amendment of legislation.

938. The inability to formally share information is a major impediment to a combined enforcement response to ML and TF. Cooperation between agencies is presently undertaken on a limited ad hoc basis when the requirement arises, though there are regular meetings between specific agencies eg. Police and Crown Law, to improve procedures and discuss prosecutions, and monthly meetings between the Police TCU and the TRA where additional information required from the banks is requested.

939. The Tongan operational framework in practice consists of the TRA receiving suspicious transaction reports, conducting preliminary analysis of those reports, and then handing them over to the TCU of the Tonga Police Force for further analysis and, if appropriate, investigation.

940. The TCU is the law enforcement unit which will carry out further investigations, including where necessary with the assistance of the Criminal Investigation Division of the Tonga Police. The TCU may also seek the assistance of any Government agency or other entities, including Immigration, Customs, Labour and Commerce, and banks, money transfers, insurance providers etc.

941. Once a criminal case is built to the required standard (i.e. sufficient admissible evidence that establishes a reasonable prospect of conviction), the matter is instigated in the Courts, and then handed over to the Crown Law Department for prosecution. Crown Law is also available to provide the TRA, TCU or NRBT with legal advice concerning combating of money laundering and terrorist financing.

942. The AML/CFT National Committee is an existing structure to ensure domestic coordination and adequate responses are provided to national issues identified by LEAs. It would be a natural extension to the National Committee's current role to develop information/intelligence sharing capability amongst LEAs, ensuring effective protocols across all Government Departments.

Additional element

943. Under the Financial Institutions Act, the NRBT is the main financial sector supervisor for all financial institutions, and also conducts regular consultations with the financial sector and also supervisory and regulatory roles (quarterly meetings, bi-annual meetings with the Association of Banks in Tonga, on-site inspections, reporting).

Statistics/reviews of effectiveness

944. Annual reporting and legislative amendments are the only times when Tonga's systems are reviewed for effectiveness or efficiency.

Resources (policy makers)

945. The AML/CFT National Committee has the formal authority to be the overall policy making body on AML/CFT matters, but in reality is guided by the AML Sub-Committee and, in particular, the three main entities involved in this area: Crown Law, the NRBT and Tonga Police.

946. The members of the National Committee are Heads of Government Ministries or statutory bodies and they are required to maintain a high professional standard and integrity including when dealing with confidential matters.

947. Some training on AML/CFT has been provided to key personnel in agencies but, as noted elsewhere in this report, other agency-specific training needs to enhance staff capacity are still required to ensure effective implementation of the AML/CFT regime and when investigating a serious offence, ML or TF offences, or proceeds of crime investigations. Regional training is provided by the APG, AMLAT and other agencies involved in combating money laundering and terrorist financing. These training courses have covered financial investigation, criminal prosecutions, mutual assistance, extradition, and proceeds of crime forfeiture.

948. Due to low incidence of ML/TF related offending investigated, limited resources and lack of expert personnel in-country, domestic sponsored training is non-existent.

Effectiveness

949. Generally, there is a good level of cooperation and coordination in Tonga, with appropriate mechanisms having been created at both the policy and operational levels. Commitment from all partners involved in ML, TF and POC recovery, and the development of further expertise in these areas, is however required to enable fully effective and timely responses to matters when appropriate.

6.1.2. Recommendations and Comments

950. It is recommended formal MOUs should be established as a matter of urgency, to permit and encourage information sharing among Tonga's LEAs, pending amendment of legislation.

951. Tonga should establish an intelligence sharing group of senior staff from the TRA, Police, Customs, Immigration, and Fisheries to ensure that adequate responses are provided to issues identified across all of the LEAs. This guarantees an informed pool of information, provides adequate staff with wide-ranging powers when required, and builds confidence in the abilities of each of the stakeholders.

6.1.3. Compliance with Recommendation 31

	Rating	Summary of factors underlying rating
R.31	**LC**	• No formal policies, mandates, or regular information sharing presently across LEAs to provide an informed intelligence response

6.2. The Conventions and UN Special Resolutions (R.35 & SR.I)

6.2.1. Description and Analysis

Legal framework

952. Tonga is a member of the United Nations.

953. International treaties ratified by Tonga are not automatically incorporated directly into Tongan law. Instead, if any change in domestic law is needed to enable Tonga to comply with a treaty obligation, the Government makes that change, following normal parliamentary procedures, before it

becomes a party to the treaty. Tonga's policy is not to ratify a treaty unless the Government is satisfied that domestic law and practice enable it to comply.

Ratification of UN Conventions

954. Tonga acceded to the Vienna Convention on 29 April 1996.

955. Tonga is not a party to the Palermo Convention, but is considering its accession.

956. Tonga acceded to the Terrorist Financing Convention on 9 December 2002.

Implementation of Vienna Convention

957. Most of the articles under the Vienna Convention are put into legislation, with certain defects, as described in sections 2 and 6 herein. As noted throughout this report, the Tongan authorities intend to amend various laws, including the MLPC Act and the Transnational Crime Act, to improve its level of compliance.

Implementation of Terrorist Financing Convention

958. Terrorist financing is criminalized in accordance with the Convention for Suppression of the Financing of Terrorism, with deficiencies as described above in sections 2 and 6 herein.

Implementation of Palermo Convention

959. Tonga has not acceded to the Palermo Convention, but the Vienna Convention has been implemented as described in section 2 above.

Implementation of UN SCRs relating to terrorist financing

960. As noted in section 2.4 of this report, Tonga is not compliant with the requirements of SR III for the freezing of terrorist assets. While terrorist financing is criminalised under Part II of the Transnational Crimes Act 2005 (TNC Act), there are serious deficiencies in the TNC Act as well (see section 2.2).

Additional element

961. Tonga has not signed, ratified or implemented any other regional conventions.

6.2.2. Recommendations and Comments

962. It is recommended that Tonga accede to the Palermo Convention.

963. Technical deficiencies in the implementation of the Vienna Convention should be addressed, and the offence and confiscation provisions applied where possible.

964. Measures should also be taken to implement the TF Convention and the UNSCRs relating to prevention and suppression of TF.

6.2.3. Compliance with Recommendation 35 and Special Recommendation I

	Rating	Summary of factors underlying rating
R.35	**PC**	• Tonga has not acceded to the Palermo Convention. • Relevant articles of the Vienna Convention have been largely implemented, but with some technical deficiencies. • A lack of practical application of offences and confiscation provisions. • Shortcomings exist in implementation of the Terrorist Financing Convention.
SR.I	**NC**	• Serious shortcomings in implementation of SR II and SR III (UNSCRs 1267 and 1373)

6.3. Mutual Legal Assistance (R.36-38, SR.V)

6.3.1. Description and Analysis

Legal framework

965. The Mutual Assistance in Criminal Matters Act (MACM Act) sets out the framework for mutual legal assistance in Tonga. In addition to MACM Act, evidence may also be obtained from a foreign jurisdiction and be used in Tongan Courts by virtue of the Foreign Evidence Act. Tonga has not received and acted on any request from overseas jurisdictions pursuant to the MACM Act. Tonga has also never made any request pursuant to the MACM Act. Authorities have however, acted under the Foreign Evidence Act to obtain evidence from overseas jurisdictions.

966. Under section 4 of the MACM Act, the Attorney General may make and act on requests for mutual assistance in any investigation or proceeding relating to a serious offence. "Serious offence" has the same definition as that in the MLPC Act except that (unlike the MLPC Act) it does not exclude application of the offences under the MLPC Act. An offence is a serious offence if, the conduct has occurred in Tonga, would have constituted an offence for which the maximum penalty is not less than 12 months (ie there is a dual criminality requirement). However, it is arguable whether money laundering offences are caught since the current penalty for the ML offence is a maximum penalty for money laundering is imprisonment not exceeding 12 months. Therefore, it is arguable whether Tonga can make or act on a request relating to a money laundering offence under MACM Act. There is no case law on this. This uncertainty will be rectified if and when the penalty for ML is increased, as is the current intention.

Provide the widest possible range of mutual assistance

967. A request shall consist of all the information required under section 7(1) of the MACM Act. The Attorney General may only approve a request if it complies with the requirements set out in section 7 of the MACMA.

> ***7 Contents of requests for assistance***
>
> *(1) A request for mutual assistance shall —*
>
> *(a) give the name of the authority conducting the investigation or proceeding to which the request relates;*

(b) give a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;

(c) give a description of the purpose of the request and of the nature of the assistance being sought;

(d) in the case of a request to restrain or confiscate assets believed on reasonable grounds to be located in the requested State, give details of the offence in question, particulars of any investigation or proceeding commenced in respect of the offence, and be accompanied by a copy of any relevant restraining or confiscation order;

(e) give details of any procedure that the requesting State wishes to be followed by the requested State in giving effect to the request, particularly in the case of a request to take evidence;

(f) include a statement setting out any wishes of the requesting State concerning any confidentiality relating to the request and the reasons for those wishes;

(g) give details of the period within which the requesting State wishes the request to be complied with;

(h) where applicable, give details of the property to be traced, restrained, seized or confiscated, and of the grounds for believing that the property is believed to be in the requested State;

(i) include an agreement on the question of the payment of the damages or costs of fulfilling the request; and

(j) give any other information that may assist in giving effect to the request.

(2) A request for mutual assistance from a foreign State may be considered but shall not be granted by the Attorney General until the request complies with subsection (1).

968. The MACM Act provides for a range of legal assistance that Tonga may provide: obtaining evidence-gathering order or search warrant to obtain evidence (section 8); facilitating the transfer of detained person to give evidence or provide assistance with consent (section 9); obtaining a Tongan restraining order (section 12); enforcing foreign confiscation or restraining orders (section 13); and locating proceeds of a serious offence (section 14).

969. There is no legal provision for service of judicial documents or facilitating the voluntary appearance of persons not in custody for the purpose of providing information or testimony to the requesting country, but this assistance may be provided outside the MACM Act by the Tongan authorities.

970. An evidence-gathering order and a search warrant to obtain evidence may be obtained if a serious offence has been or may have been committed against the law of the foreign state (section 8(2)).

971. An evidence-gathering order may require any person to make a record from data; give evidence on oath before a Judge; or produce any thing including any document (section 8(4)).

972. A search warrant to obtain evidence may be granted only if the Supreme Court is satisfied that an evidence-gathering order would not be more appropriate in all circumstances (section 8(2)).

973. Section 8 does not specify the requirements for applying for a search warrant, but it shall be in the usual form in which a search warrant is issued in Tonga varied to the extent necessary to suit the case (section 8(8)) and section 51 of the Magistrates' Courts Act on search warrant shall apply.

974. A detained person may be transferred, with his consent, to a foreign state to give evidence or assist in an investigation or proceeding relating to a serious offence (section 9(1)).

975. On the application of the Attorney General, the Supreme Court may make a restraining order against property believed to be located in Tonga under the MLPC Act if criminal proceedings have begun in the foreign state in respect of a serious offence, the order against whom the order is sought has been convicted, or there are reasonable grounds to believe that the property is located in Tonga (section 12). It is noted that the third condition "reasonable grounds to believe that the property is located in Tonga" is provided as an alternative condition, but it may in normal cases be an essential element for a restraining order to be made.

976. Foreign confiscation or restraining orders may be registered under section 13 and enforced in accordance with the provisions under MLPC Act (section 12(2) and section 13(10)). Therefore the deficiencies in the MLPC Act as described in section 2.3 above are also relevant here.

977. Under section 14 of the MACM Act, in order to assist in locating property believed to be proceeds of a serious crime, orders under sections 71, 76 or 78 under the MLPC Act may be obtained. Section 76 is on "search warrant for location of documents relevant to locating property" and section 78 is on "monitoring order". However, section 71 of the MLPC Act, which is on "winding up of a company holding realizable property" is not relevant to the location of proceeds of a serious offence. "Proceeds of crime" is used in the title of section 14 and is defined under the MACM Act, but the content of section 14 refers to "proceeds of a serious crime" which is not defined.

Provision of assistance in timely, constructive and effective manner

978. Tonga has not formally received a mutual legal assistance request. It is noted that Tonga is encumbered by limited resources and experienced and trained officers, particularly in forensic accounting and financial investigations.

No unreasonable or unduly restrictive conditions on mutual assistance

979. Under the MACM Act, limitation on the provision of mutual legal assistance is set out in section 2(1) (the definition of "serious offence"), section 4(2) (AG's power to refuse), and also section 7(1) (contents of request) of the MACM Act.

980. Mutual legal assistance may only be provided in relation to a serious offence, as defined in section 2(1) which provides that an offence, if it had occurred in Tonga, would constitute an offence with a maximum penalty of not less than 12 months, including an offence of a purely fiscal character. As noted above, it is arguable whether money laundering currently falls outside the definition of "serious offence". This uncertainty would however be removed with the proposed increase of penalty to 10 years as outlined in the draft MLPC Amendment Bill.

981. The Attorney General may: grant the request with terms and conditions; refuse a request due to sovereignty, security or public interest issues; or, postpone because it may prejudice ongoing Tongan investigations (section 4(2)). The breadth of interpretation of the term "public interest" could have an impact on effectiveness however there is no case law on the application of this subsection and it is unclear what "public interest" means.

4 Authority to make and act on mutual assistance requests

(1) The Attorney General may make requests on behalf of Tonga to a foreign State for mutual assistance in any investigation commenced or proceeding instituted in Tonga, relating to any serious offence.

(2) The Attorney General may, in respect of any request from a foreign State for mutual assistance in any investigation commenced or proceeding instituted in that State relating to a serious offence —

(a) grant the request, in whole or in part, on such terms and conditions as the Attorney General thinks fit;

(b) refuse the request, in whole or in part, on the ground that to grant the request would be likely to prejudice the sovereignty, security of Tonga or would otherwise be against the public interest; or

(c) after consulting with the appropriate authority of the foreign State, postpone the request, in whole or in part on the ground that granting the request immediately would be likely to prejudice the conduct of an investigation or proceeding in Tonga.

(3) Requests on behalf of Tonga to foreign States for assistance shall be made only by or with the authority of the Attorney General.

Efficiency of processes

982. Tonga has so far never received a request for mutual legal assistance. There is no written procedure for dealing with mutual legal assistance requests from foreign states. All requests should be received through the Ministry of Foreign Affairs. Theoretically, the Ministry of Foreign Affairs then submits the request to Crown Law for consideration of the Attorney General. The Attorney General then makes a decision and directions on the request, as necessary. The request is then implemented by Crown Law, with the assistance of the TCU, and any other necessary Government agency. Once the request is implemented Crown Law should then advise the Attorney General for confirmation. Once approval is received from the Attorney General, Crown Law then advises the foreign state, through Foreign Affairs, as to the state of the request.

Provision of assistance regardless of possible involvement of fiscal matters

983. The definition of "serious offence" in relation to a request from a foreign state includes "an offence of a purely fiscal character" (section 3(1)). Therefore, Tonga can process a request from a foreign state if the offence involves fiscal matters.

Provision of assistance regardless of existence of secrecy and confidentiality laws

984. Tonga does not have any restrictive bank secrecy laws which would impede the provision of assistance. Section 20(1)(b) of the Financial Institutions Act 2004 states that "no director, manager, officer, employee, auditor or agent of a licensed financial institution (bank) shall disclose to any person any information in respect of a customer of that financial institution except when lawfully required to do so by any court of competent jurisdiction in Tonga or under the provisions of this Act or the Money Laundering and Proceeds of Crime Act 2000."

985. Where information is to be obtained from a lawyer, such information is protected by legal professional privilege or legal professional secrecy except that anything done or any communication made in furtherance of any illegal purpose or any fact showing that any crime of fraud has been committed since the commencement of his employment.

135 Communications between lawyer and client: lawyer's privilege

No lawyer except with the express consent of his client shall at any time be permitted to disclose in evidence —

(a) any communication made to him by or on behalf of his client in the course and for the purpose of his employment as such lawyer; or

(b) the contents of any document with which he has become acquainted in the course and for the purpose of his employment as such lawyer; or

(c) any advice given to him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure —

(i) anything done or any communication made in furtherance of any illegal purpose; or

(ii) any fact observed by any lawyer in the course of his employment as such showing that any crime of fraud has been committed since the commencement of his employment.

Availability of powers of competent authorities

986. The police are the authorized officers designated by the Attorney General under the MACM Act to assist in the execution of foreign requests in accordance with the provisions of the MACM Act.

Avoiding conflicts of jurisdiction

987. There is currently no arrangement as to preference of jurisdiction when two states have jurisdiction. Accordingly it will be decided on a case by case basis. Tonga is likely to seek jurisdiction only in cases where the offending involved Tongan subjects, and most of the offending physically occurred in Tonga.

Additional element

988. The power to compel production, search persons or premises and seize and obtain based on a request from a foreign counterpart is available pursuant to the MACM Act.

SRV

International Cooperation under SR V (applying R36)

989. TF falls under the definition of "serious offence" under the MACM Act, therefore assistance for TF cases may be provided under the MACM Act. However, the limited scope of FT offences would impede effectiveness of MLA for FT offences (see section 2.2 above).

Additional element

990. As noted above, there is currently no arrangement as to preference of jurisdiction when two states have jurisdiction.

Recommendation 37

991. Dual criminality is required in relation to mutual legal assistance under the MACM Act by the definition of "serious offence".

Dual Criminality and Mutual Assistance

992. If the nature of the assistance sought does not require compulsory measures, a request under MACM Act is not necessary and therefore the dual criminality is not required. So it depends on the nature of the request from the foreign state, and in particular the nature of the assistance required. Where compulsory measures are required, a formal request under MACM Act would be required. Where the assistance is just to seek out information without using compulsory measures, then an agency to agency request would be sufficient.

993. For dual criminality, the conduct test is adopted in paragraph 2 of the definition of "serious offence" under the MACM Act.

994. Mutual legal assistance will have to be provided in accordance with MACM Act, however Tonga's law enforcement authorities are prepared to assist in any agency to agency request involving less intrusive and non compulsory measures.

995. Tonga has a close relationship with law enforcement authorities from New Zealand, Australia and the United States. Tonga has assisted each of the law enforcement agencies with agency to agency requests.

996. The conduct test is adopted in determining dual criminality.

Recommendation 38

Requests for provisional measures including confiscation

997. The MACM Act provides for provisional measures including confiscation: obtaining a Tongan restraining order (section 12); enforcing foreign confiscation or restraining orders (section 13); and locating proceeds of a serious offence (section 14). However, since the restraining orders and confiscation orders are enforced in accordance with the MLPC Act, the deficiencies of the MLPC Act are also relevant here.

998. Also, since it is arguable whether ML is a serious offence by definition under the MACM Act, the above provisional measures and confiscation in relation to proceeds of crime under the MACM Act may not be provided for ML cases.

Property of corresponding value

999. There is currently no specific provision for a request that relates to property of corresponding value.

Coordination of seizure and confiscation actions

1000. There is no arrangement with any foreign state for co-ordinating seizure and confiscations actions. This will be determined on a case by case basis to be negotiated and decided.

International Cooperation under SR V

1001. The MACM Act applies to TF cases by the definition of "serious offence".

Asset Forfeiture Fund

1002. Section 68(3) of the MLPC Act provides for the establishment of a Law Enforcement Fund where amounts confiscated are deposited, after the withdrawal of required amounts. The Fund may be used for law enforcement and related purposes only. The Fund has not yet been established because there has been no confiscation.

Sharing of confiscated assets

1003. There is no provision for sharing of confiscated assets in the current MLPC Act or MACM Act, nor is there any policy decision from Tongan Government to set up sharing of confiscated assets, however this could be considered for negotiation with other countries. There is no plan to consider this policy of sharing at present.

Additional element (R 38)

1004. Foreign confiscation orders may be registered in Tonga under the MACM Act but enforced under the MLPC Act. The deficiencies in the MLPC Act are therefore also applicable. The definition of "foreign confiscation order" is not limited to confiscation order obtained after conviction.

> *"**foreign confiscation order**" means an order, made by a court in a foreign State, for the purposes of —*
>
> *(a) confiscation or forfeiture of property in connection with; or*
>
> *(b) recovery of the proceeds of,*
>
> *a serious offence;*

Additional element (SR V)

1005. As noted above, a Law Enforcement Fund may be established under section 68(3) of the MLPC Act. But it has not yet been established because there has been no confiscation so far.

Resources (central authority for sending/receiving mutual legal assistance/extradition requests)

1006. The central authority for sending or receiving mutual legal assistance or extradition requests is the Attorney General.

1007. Requests shall be transmitted through diplomatic channels through the Ministry of Foreign Affairs and the relevant diplomatic authority.

1008. Requests for mutual assistance or extraditions are primarily handled by Crown Law, and the TCU of the Tonga Police Force provides the ground work or implements instructions. The TRA is approached where necessary and relevant.

1009. Crown Law has a total of nine counsel. They are all general practitioners without specialization. The Crown Law capacity has reduced from 15 since 1998. It is believed that the Crown Law may require a total of about 15 to 20 counsel to fully meet operational demands. The Crown Law has also experienced difficulties in retaining experienced counsel.

Statistics/effectiveness

1010. Crown Law has not received any mutual legal assistance requests under MACM Act from any foreign country.

1011. In relation to extradition, there have been four extradition requests in the last 10 years. Three were from the United States and one from New Zealand. Before then there were two, which were disputed in the Supreme Court, but ended up being successful extraditions.

1012. None of the extraditions were in relation to any money laundering (ML is not an extraditable offence) or terrorist financing offences. The offences were either serious sexual offences or serious assault cases. All the accused had absconded from the foreign jurisdictions after they were released on bail.

6.3.2. Recommendations and Comments

1013. With the increase of maximum penalty of ML offences, the uncertainty as to whether ML cases will be covered by the MACM Act would be removed.

1014. Under the current MACM Act, the restraining and confiscation orders are enforced in accordance with the MLPC Act, the deficiencies in the MLPC Act as described in section 2.3 above are relevant. Tonga should consider reviewing the MLPC Act and the MACM Act to ensure such deficiencies and ambiguities are cleared.

6.3.3. Compliance with Recommendations 36 to 38 and Special Recommendation V

	Rating	Summary of factors relevant to s.6.3 underlying overall rating
R.36	**PC**	• It is unclear whether ML offences are covered by definition under the MACM Act. • According to the MACM Act, the provisions for the enforcement of the foreign restraining and confiscation orders are the same as that provided in the MLPC Act. But there are deficiencies in the MLPC Act as described in section 2.3.
R.37	**LC**	• Dual criminality is provided under the MACM Act. The conduct test is adopted in the MACM Act, however, it has never been tested.
R.38	**PC**	• It is unclear whether ML offences are covered by definition under the MACM Act. • According to the MACM Act, the provisions for the enforcement of the foreign restraining and confiscation orders are the same as that provided in the MLPC Act. But there are deficiencies in the MLPC Act as described in section 2.3 • There is no provision for property of corresponding value.
SR.V	**PC**	*(This is a composite rating.)* • R36 and R 38: TF is covered by the MACM Act, however it has never been tested. • Limited scope of TF offences would impede effectiveness of MLA for TF offences

6.4. Extradition (R.37, 39, SR.V)

6.4.1. Description and Analysis

Legal framework

1015. Extradition is covered under the Extradition Act.

1016. Tonga has received requests for extraditions, but has never made an extradition request. This is mainly because there is a lack of resources by Tonga to pay for the extradition.

Money laundering as extraditable offence

1017. Money laundering is not an extraditable offence under the Extradition Act.

1018. Under the Extradition Act persons can be extradited only for relevant offences. Relevant offences are offences where the penalty is two years' imprisonment or more.

1019. The penalty for money laundering under MLPC Act is however 12 months' imprisonment or a fine of $10,000.

Extradition of nationals

1020. Tonga does allow its nationals to be extradited from Tonga to foreign countries, but foreign countries must be able to cover costs involved.

1021. Tonga will prosecute persons of any nationality if there is a breach of Tongan law.

Cooperation for prosecution of nationals

1022. The case has not arisen in Tonga because Tonga does allow for its nationals to be extradited from Tonga to a foreign country.

Efficiency of extradition process

1023. Requests for extradition are submitted by the requesting jurisdiction through Tonga's Ministry of Foreign Affairs. Ministry of Foreign Affairs then refers the request to Crown Law to process. Crown Law then gives instructions to the Police to locate the fugitive. Once confirmed, Crown Law then commences the extradition before the Chief Magistrate and applies for a warrant of arrest. When the fugitive is arrested, a hearing will take place when the fugitive will decide whether to dispute the request. Once the extradition hearing is completed, including any claim for habeas corpus before the Supreme Court, then the fugitive is referred to the Prime Minister to consider if there are grounds that the fugitive should not be extradited. If there are no such grounds then the Prime Minister will authorize removal. Normally Tongan Police officers escort the fugitive out of Tonga to another airport where the fugitive is picked up by the requesting jurisdiction's law enforcement officers.

1024. ML is not an extraditable offence. In the past 10 years, four extradition requests involving serious sexual offences or serious assault offences have been received. Three were from the United States of America and one was from New Zealand. Two of the cases were contested but all ended up being successful extraditions.

Additional element An accused person may consent and waive his right of appeal under the Extradition Act. But he still has to go through the formal extradition court proceedings. If he consents, he can sign a legal declaration to that effect with the Crown Law after committal to waive his right of appeal.

Dual criminality relating to extradition

1025. Dual criminality is required under section 5(1) of the Extradition Act :

> ***5 Relevant offences***
>
> *(1) For the purpose of this Act an offence of which a person is accused or has been convicted in a designated country is a relevant offence if the offence however described is punishable both in Tonga and in the designated country concerned by imprisonment for a term of 2 years or more.*
>
> *(2) An offence that is a relevant offence under subsection (1) shall not cease to be such by reason only that it is purely fiscal in character.*

1026. It is required under section 5(1) that the offence shall be punishable both in Tonga and the foreign state by imprisonment for a term of two years or more. So there is a requirement that the conduct should constitute an offence in Tonga. In the current legislation, there is no specific requirement as to what is the test for dual criminality. The wording of double criminality is different from that provided in the MACM Act. It is unclear whether its application is different from that provided in the MACM Act.

SRV

Extradition for terrorist acts and TF

1027. Offences of terrorism and TF are extraditable offences under the Extradition Act since they carry a maximum penalty of imprisonment for a period for more than two years (section 7(1)).

Additional element

1028. As in other extradition cases, an accused person may consent and waive his right of appeal under the Extradition Act. But he still has to go through the formal extradition court proceedings. If he consents, he can sign a legal declaration to that effect with the Crown Law upon committal.

Statistics/effectiveness Tonga has never had an extradition case related to terrorism and TF.

6.4.2. Recommendations and Comments

1029. Tonga should immediately rectify the issue in relation to ML offences being excluded from the Extradition Act.

1030. Under the current system, the fugitive may consent to extradition, but only after committal. He/she can only waive his right of appeal. Tonga may consider having a system for the fugitive to give consent before committal.

6.4.3. Compliance with Recommendations 37 & 39, and Special Recommendation V

	Rating	Summary of factors relevant to s.6.4 underlying overall rating
R.39	**NC**	• ML is not an extraditable offence.
R.37	**LC**	• There is specific provision for dual criminality under the Extradition Act. But there is no case law suggesting that it has any impediment to rendering assistance to a requesting party.
SR.V	**PC**	*(This is a composite rating.)* • Applying R39: TF is an extraditable offence under the Extradition Act, but it has never been tested.

6.5. Other Forms of International Co-Operation (R.40 & SR.V)

6.5.1. Description and Analysis

Legal framework

1031. There is limited legislation in Tonga that provides for information sharing with external agencies. Accordingly, cooperation is largely maintained by Tongan agencies through regional and international forums and traditional alliances.

1032. These agencies are based in Pacific Forum Island and Commonwealth countries, and traditional allies and neighbours New Zealand, Australia and the United States.

Competent authorities able to provide widest range of international cooperation

1033. Tonga's LEAs are able to assist their foreign counterparts, with close alliances with their colleagues in the Pacific, Australia and New Zealand.

1034. In the absence of legislative authority, MOUs, or other approved instruments, cooperation with LEAs in other countries is likely to be through Australia or New Zealand.

1035. There is no information formal or informal sharing between the Tonga TRA and foreign counterparts because of the lack of legislative authority in the MLPC Act.

1036. The Tonga Police has close networking associations with the Pacific Transnational Crime Network (PTCN) based in Fiji, and the associated Pacific Transnational Crime Co-ordination Centre (PTCCC), based in Samoa. Furthermore, due to the deployment in Tonga of Australian and New Zealand Police staff under the Tonga Police Development Program, there is ongoing assistance, training, and development of Tonga Police investigation capability.

1037. Tonga Customs is a member of the OCO (Oceania Customs Organisation) and CRIN (Customs Regional Information Network) reporting through New Zealand. OCO has a secretariat based in Suva, Fiji, and has 25 members. This association ensures a two-way flow of information between the OCO and member countries. Aside from the Government funding, Tonga Customs is also included in the donor aid program of both New Zealand and Australia (AusAID) to ensure that the appropriate leadership, training and resources are available.

1038. Tonga Immigration has a close working relationship through its partner colleagues around the Pacific, and principally Australia and New Zealand.

1039. Due to the limitations identified in the current legislation regarding information sharing, the NRBT/TRA has not engaged in any international cooperation or information sharing with relevant international counterparts.

1040. Accordingly, there are effective two way information sharing arrangements established between like agencies. To illustrate, Tonga Police are currently not able to receive Interpol intelligence direct following suspension due to non-payment of the required fees, however are not disadvantaged due to close associations with Australia and New Zealand Police.

1041. The Evaluation Team was provided with examples confirming foreign requests for assistance were given top priority and urgency by the respective Tongan LEAs.

Clear and effective gateways for exchange of information

1042. There are close and effective networks "agency to agency" however LEAs only share information on an ad-hoc request basis.

Spontaneous exchange of information

1043. Examples were provided of ongoing associations between the respective branches of the LEAs and their foreign counterparts.

Inquiries on behalf of foreign counterparts

1044. NRBT/TRA can use its regulatory powers to obtain information from banks and foreign exchange dealers. The NRBT has not received any inquiries in relation to AML issues from foreign counterparts.

1045. FIU authorized to make inquiries on behalf of foreign counterparts

FIU authorized to make inquiries on behalf of foreign counterparts

1046. Tonga's TRA has never made a request to or received a request from a foreign FIU, and indicated it would be unable to provide details in the absence of legislative authority.

Conducting of investigations on behalf of foreign counterparts

1047. Any requests under MACM Act would normally be forwarded to the TCU for further enquiry. The criminal investigation powers of the police are wide ranging, and their use is permitted under the MACM Act.

Conditions on exchanges of information

1048. The agencies have advised they believe there are no legislative restrictions on the exchange of information with foreign LEAs, except where national security issues arise.

Grounds for refusing requests for co-operation

1049. There are no legislative restrictions relating to requests involving fiscal matters.

1050. Requests will not be refused on basis of secrecy or confidentiality on financial institutions or DNFBPs except where legal privilege will apply.

Safeguards in use of exchanged information

1051. Tonga has no legislation dealing with privacy or data protection.

1052. However the MACM Act and MLPC Act require information gained will only be used for purposes under those laws.

Additional elements

1053. During the assessment, there was no evidence provided relating to any exchange of information with non-counterparts except on an ad-hoc basis to satisfy specific infrequent requests.

1054. The requesting party may be required to disclose the reason for requesting the information, and on whose behalf the request is made.

1055. There is no legislative authority for the TRA to release information it holds, with any other agency, except for the reasons stated within the MLCI Act relating to the release of STRs to the TCU. The TRA advise they would not enter into any informal arrangement to release information without legislative approval.

International Cooperation under SR V

1056. Criteria 40.1 and 40.9 also apply to terrorist financing.

1057. Tonga does not have laws allowing it to provide international assistance with respect to the financing of terrorism.

Additional element under SR V

1058. Criteria 40.10 to 40.11 also apply to terrorist financing.

1059. Tonga does not have laws allowing it to provide international assistance with respect to the financing of terrorism.

Statistics/effectiveness

1060. Tonga has not received any mutual legal assistance requests.

6.5.2. Recommendations and Comments

1061. Other than for the TRA, current arrangements appear to be working relatively well. Given the lack of statistical data, however, the Evaluation Team was not able to determine that the mechanisms for international cooperation are fully effective.

1062. It is recommended that all relevant enforcement and regulatory authorities collect sufficient statistics and other evidence to demonstrate that Tonga's mechanisms for international cooperation are fully effective.

1063. It is recommended the TRA commence a process of drafting formal MOUs with FIUs in Australia, New Zealand, and other Pacific based locations as a matter of urgency, to freely permit information sharing and to ensure Tonga TRA are able to address requests when they are received, so that the MOUs can quickly be put into effect once the necessary amendments have been made to the MLPC Act to permit the TRA to cooperate internationally.

6.5.3. Compliance with Recommendation 40 and Special Recommendation V

	Rating	Summary of factors relative to s.6.5 underlying overall rating
R.40	**PC**	• TRA cannot share information with foreign FIUs • Given the lack of statistical data, the evaluation team was not able to determine that the mechanisms for international cooperation are fully effective
SR.V	**PC**	• *(This is a composite rating.)* • Applying R40: No legislation permitting provision of international assistance with respect to the financing of terrorism • TRA cannot share information with foreign FIUs

7. OTHER ISSUES

7.1. Resources and Statistics

1064. The text of the description, analysis and recommendations for improvement that relate to Recommendations 30 and 32 is contained in all the relevant sections of the report, i.e. all of Section 2, parts of Sections 3 and 4, and in Section 6. There is a single rating for each of these Recommendations, even though the Recommendations are addressed in several sections. Section 7.1 of the report contains the boxes showing the rating and the factors underlying the rating.

	Rating	Summary of factors underlying rating
R.30	**PC**	• Tongan authorities have acknowledged that there is a lack of resources and expertise in most of the relevant agencies which may be contributing to a lack of detection of ML and proceeds of crime action. • The resources and technical capacity necessary for the effective implementation of the confiscation system are lacking. • Current staffing resources allocated to the TRA are considered inadequate to meet its functions both as an FIU and as AML/CFT supervisor. • The TCU lacks the resources to undertake its own investigations, and meet its foreign obligations. • Tonga has an extensive coastline, and insufficient resources to ensure prevent illegal passage of persons and property. • There are no plans to increase resources of the TRA/NRBT when amendments to the MLPC Act that capture DNFBPs are implemented. • The MLCI has no capacity to address unlicensed business (informal remitter segment)
R.32	**LC**	• Lack of statistics regarding informal international co-operation • Some uncertainty as to completeness/accuracy of statistics for formal international cooperation.

7.2. Other relevant AML/CFT Measures or Issues

New Legislation

1065. Tonga is currently processing a replacement to the Transnational Crimes Act, and also amendments to the Money Laundering and Proceeds of Crime Act, in order to streamline and enhance Tonga's AML/CFT systems.

1066. These new bills should be before the Legislative Assembly by early 2010, and hopefully enacted by May 2010. Their enactment would significantly improve Tonga's levels of technical compliance with the international standards.

Table 1. Ratings of Compliance with FATF Recommendations

Forty Recommendations	Rating	Summary of factors underlying rating[25]
Legal systems		
1. ML offense	**PC**	• The phrase "renders assistance to another person" in Section 17(b) of the MLPC Act makes an offence under section 17(b) in relation to conversion or transfer of property and concealment or disguise of the true nature of property an ancillary rather than an actual offence. • The predicate offences in Tonga do not cover all the designated categories of offences. Offences relating to illicit arms trafficking, illicit trafficking in stolen and other goods, fraud, piracy of products, environmental crime, kidnapping, illegal restraint and hostage-taking, insider trading and market manipulation are not fully covered. • Doubts as to coverage of self-laundering and need for prior conviction for the predicate offence. • Scope of "property" is not fully covered, ie, "legal documents or instruments evidencing title to, or interest in, such assets" is missing. • Effectiveness issue: Whilst the opportunities to pursue the prosecution of ML may be limited, no charges have been laid and the offence provisions have not been tested.
2. ML offense—mental element and corporate liability	**PC**	• There is no statutory or case law providing for the intentional element of the offence of ML to be inferred from objective factual circumstances. • The maximum penalty of ML is not exceeding 12 months which is much too low to be dissuasive. It is also not proportionate to the other serious offences in Tonga. • Lack of effective, proportionate and dissuasive civil or administrative sanctions.
3. Confiscation and provisional measures	**PC**	• ML is not a serious offence by definition. Therefore under the MLPC Act the confiscation of the proceeds of a money laundering offence cannot be made. • Confiscation of property that constitutes instrumentalities intended for use in the commission of ML/TF or other predicate offences and property of corresponding value are not covered. • Lack of clarity of definitions of important terms – "tainted property", "proceeds of crime" and

[25] These factors are only required to be set out when the rating is less than Compliant.

Forty Recommendations	Rating	Summary of factors underlying rating[25]
		"realizable property – may undermine effectiveness. • Agencies do not have a well developed awareness of the confiscation provisions of the MLPC Act. Implementation has been weak. The resources and technical capacity necessary for the effective implementation of the system are lacking. • There has been no practical application of the confiscation provisions in the MLPC Act.
Preventive measures		
4. Secrecy laws consistent with the Recommendations	**PC**	• Laws do not prohibit collection of information by competent authorities but there are insufficient provisions under which the information can be shared between competent authorities either domestically or internationally. • The absence of clear legislation and/or controls on information sharing between financial institutions to meet the requirements of Recommendations 7, 9 and SR VII.
5. Customer due diligence	**NC**	• CDD measures and verification requirements set out in guidelines which are only enforceable for a small minority of FIs/cash dealers • Legal status of arrangements where third parties are acting for customers is not required to be verified. • Beneficial owners are not required to be identified. • There is no requirement to obtain information about the intended purpose and nature of the business relationship • Ongoing due diligence on the business relation is not required • Enhanced due diligence for higher risk customers is not required • Simplified reduced CDD measures may be applied to financial institutions that are subject to very limited oversight • Simplified/ reduced CDD may apply when a suspicious ML/TF or other higher risk scenarios exist • Risk based application of CDD is not covered in existing legislation • Timing of verification of identity - treatment of exceptional circumstances not covered in MLPC Act • There is no requirement to have existing customers subject to CDD
6. Politically exposed persons	**PC**	• Requirements are set out in other enforceable means which are only enforceable for a small minority of FIs/cash dealers, albeit the larger financial institutions.

Forty Recommendations	Rating	Summary of factors underlying rating[25]
		• Deficiencies noted within the financial institutions' AML/CFT policies and manuals provided
7. Correspondent banking	**PC**	• Requirements are set out in other enforceable means which are only enforceable for a small minority of FIs/cash dealers, albeit the larger financial institutions
8. New technologies & non face-to-face business	**PC**	• Requirements are set out in other enforceable means which are only enforceable for a small minority of FIs/cash dealers, albeit the larger financial institutions Not all financial institutions clearly outline in their AML/CFT manuals the policies and procedures concerning technological products and non-face to face customers.
9. Third parties and introducers	**NC**	• Neither the MLPC Act, nor other enforceable means applicable to all entities, cover: o obtaining the necessary information concerning elements of the CDD process; o Taking steps to ensure that copies of identification data and relevant documentation will be made available o Taking steps to ensure that the 3rd party is regulated, supervised and has measures in place to comply with CDD requirements, o Taking into consideration if the countries in which the 3rd party is based have implemented the FATAF recommendations o Where the ultimate responsibility for customer identification rests
10. Record-keeping	**NC**	• Records only need to be kept for transactions over $10,000 or totalling more the $25,000 over a four week period. • The MLPC Act does not stipulate that the record retention should be regardless of whether the account or business relationship has been terminated. • The MLPC Act does not require that the records should be sufficient to reconstruct the transaction • Record keeping requirements do not extend to business correspondence and do not allow for retention for five years from termination of the relationship or account (rather from the transaction) • The MLPC Act does not allow for records to be available to the competent authority on a timely basis
11. Unusual transactions	**NC**	• There are no specific obligations for financial institutions to monitor all complex, unusual large transactions, transactions with no visible economic purposes, to further examine these situations and to set out these findings in writing and to retain these findings for 5 years; the monitoring obligation is only

Forty Recommendations	Rating	Summary of factors underlying rating[25]
		implied and indirect, and it does not cover the full range of monitoring situations as stipulated in Recommendation 11. • The limited requirements to comply with this Recommendation are set out in the form of guidelines, which are considered not to be enforceable for most entities. • The effectiveness of the requirements remains limited. Only banks have adopted some measures. These measures are limited and not verified by supervisory examination. Other financial institutions and cash dealers do not yet implement these requirements.
12. DNFBP–R.5, 6, 8–11	**NC**	• CDD obligations do not apply to the DNFBP sector • No AML/CFT system or regime for DNFBPs has been developed and implemented
13. Suspicious transaction reporting	**PC**	• Reporting requirement narrower than required under R13, as a reporting entity must suspect that information that it has concerning a transaction "may be relevant to the investigation or prosecution of a person for a serious offence" • Cascading effect from Recommendation 1 where not all predicate offences are covered. • Low reporting levels from some sectors. • Absence in the current law for financial institutions to report transactions they suspect are related to attempted transactions of a suspicious nature and suspicious transactions thought to be related to tax matters. • Not all financial institutions and cash dealers are effectively captured and monitored for the STR requirements.
14. Protection & no tipping-off	**PC**	• Offence of tipping off provides for a defence
15. Internal controls, compliance & audit	**PC**	• Employee screening not covered in the MLPC Act • Many requirements set out in guidance which is only enforceable for a small proportion of all financial institutions and cash dealers. • The internal audit and compliance functions have only been tested/applied to core financial institutions.
16. DNFBP–R.13–15 & 21	**NC**	• DNFBPs are not covered under any appropriate AML/CFT legislation. • No AML/CFT system or regime for DNFBPs has yet to be developed and implemented
17. Sanctions	**PC**	• Sanctions are limited in scope and proportionality over all financial institutions and cash dealers in Tonga • There are no civil or administrative sanctions in the

Forty Recommendations	Rating	Summary of factors underlying rating[25]
		current legislation that are applicable to all financial institutions and cash dealers in Tonga • The ability to sanction directors and employees of all financial institutes and cash dealers in Tonga is limited
18. Shell banks	**PC**	• Laws do not explicitly prohibit establishment of shell banks, however, the licensing requirements and policies under the Financial Institutions Act indirectly preclude the licensing of a shell bank in Tonga. • The relevant AML Guideline does not specifically deal with shell banks. • There is no enforceable requirement for banks to establish that their respondent banks are not undertaking business with shell banks
19. Other forms of reporting	**NC**	• The feasibility and utility of receiving threshold transaction reports has not been considered
20. Other DNFBP & secure transaction techniques	**NC**	• No consideration has been given to extending FATF Recommendations to other designated non-financial businesses and professions
21. Special attention for higher risk countries	**NC**	• There is no requirement for all reporting parties to give special attention and conduct appropriate counter-measures to business relationships and transactions with persons (including legal persons and other financial institutions) from or in countries which do not or insufficiently apply the FATF Recommendations. Lack of any requirement to apply counter-measures against jurisdictions which insufficiently meet the FATF Recommendations. • Lack of effective implementation of current, limited requirements in the non-bank sector.
22. Foreign branches & subsidiaries	**NA**	• This Recommendation is considered to be non-applicable as no Tongan financial institutions have foreign branches or subsidiaries.
23. Regulation, supervision and monitoring	**PC**	• There has been no supervisory activity with respect to financial institutions and cash dealers that are not licensed by the NRBT • Prudential statements issued to financial institutions subject to the core principles do not cover risk management process to identify, measure, monitor and control material risks such as would be found in an operation risk prudential statement. • There is a significant informal remitter market segment that is not licensed • Other financial institutions (credit unions, money lenders, insurance companies and intermediaries and money remitters) in Tonga are not adequately regulated and licensed.

Forty Recommendations	Rating	Summary of factors underlying rating[25]
24. DNFBP—regulation, supervision and monitoring	**NC**	• In the absence of any AML/CFT requirements, DNFBPs are not subject to effective systems for monitoring and supervision for AML/CFT.
25. Guidelines & Feedback	**NC**	• No feedback is provided from the TRA to financial institutions and cash dealers, on outcomes of STRs submitted, statistics on disclosures and ML/TF typologies • Failure to issue guidelines to all financial institutions and cash dealers under the MLPC Act. • No guidelines have been issued for DNFBPs as none of them are subject to AML/CFT requirements
Institutional and other measures		
26. The FIU	**PC**	• TRA's functions under the section 11 of the MLPC Act do not explicitly include analysis of STRs. Lack of timely access to financial, administrative and law enforcement information severely limiting ability of TRA to provide effective analysis of STRs. • The TRA does not have the ability to complete effective analysis of STRs received. • While the larger, supervised financial institutions are required to report STRs, a large proportion of FIs and cash dealers are not in practice required to report STRs. The limited number of reporting entities significantly reduces the effectiveness of the TRA as an FIU. • Lack of guidance to reporting entities others than those directly supervised by the NRBT. The TRA's Guidelines have not in practice been circulated or applied to approximately 259 reporting entities (credit unions and money lenders). • No periodic reports, including on ML/TF trends and typologies • Lack of power under MLPC Act to share information with foreign counterparts. • Additional resources and additional training of TRA staff required.
27. Law enforcement authorities	**PC**	• Lack of investigations undertaken • Low level of ML/TF related knowledge amongst police staff not directly working for the TCU • The TCU lacks the resources to undertake its own investigations, and meet its foreign obligations • Lack of awareness training on ML/TF or Proceeds of Crime to general Police staff
28. Powers of competent authorities	**LC**	• The provisions under the MLPC Act have not yet been tested
29. Supervisors	**PC**	• The powers within the MLPC Act to monitor all the

Forty Recommendations	Rating	Summary of factors underlying rating[25]
		financial institutions and cash dealers caught by the Act are limited in scope.
30. Resources, integrity, and training	**PC**	• Tongan authorities have acknowledged that there is a lack of resources and expertise in most of the relevant agencies which may be contributing to a lack of detection of ML and proceeds of crime action. • The resources and technical capacity necessary for the effective implementation of the confiscation system are lacking. • Current staffing resources allocated to the TRA are considered inadequate to meet its functions both as an FIU and as AML/CFT supervisor. • The TCU lacks the resources to undertake its own investigations, and meet its foreign obligations. • Tonga has an extensive coastline, and insufficient resources to ensure prevent illegal passage of persons and property. • There are no plans to increase resources of the TRA/NRBT when amendments to the MLPC Act that capture DNFBPs are implemented. • The MLCI has no capacity to address unlicensed business (informal remitter segment)
31. National co-operation	**LC**	• No formal policies, mandates, or regular information sharing presently across LEAs to provide an informed intelligence response
32. Statistics	**LC**	• Lack of statistics regarding informal international co-operation • Some uncertainty as to completeness/accuracy of statistics for formal international cooperation.
33. Legal persons–beneficial owners	**PC**	• Measures are not in place to ensure that there is sufficient, adequate or timely information held on the beneficial ownership and control of legal persons. • Information submitted to the Registrar pertains to legal ownership and not beneficial ownership and is not verified. • No measures in place to ensure that bearer shares are not misused for money laundering.
34. Legal arrangements – beneficial owners	**NC**	• Tonga has not met the burden on it to satisfy the evaluators that it meets the criteria for this Recommendation
International Cooperation		
35. Conventions	**PC**	• Tonga has not acceded to the Palermo Convention. • Relevant articles of the Vienna Convention have been largely implemented, but with some technical deficiencies.

Forty Recommendations	Rating	Summary of factors underlying rating[25]
		• A lack of practical application of offences and confiscation provisions. • Shortcomings exist in implementation of the Terrorist Financing Convention.
36. Mutual legal assistance (MLA)	**PC**	• It is unclear whether ML offences are covered by definition under the MACM Act. • According to the MACM Act, the provisions for the enforcement of the foreign restraining and confiscation orders are the same as that provided in the MLPC Act. But there are deficiencies in the MLPC Act as described in section 2.3.
37. Dual criminality	**LC**	• Dual criminality is provided under the MACM Act. The conduct test is adopted in the MACM Act, however, it has never been tested. • There is specific provision for dual criminality under the Extradition Act. But there is no case law suggesting that it has any impediment to rendering assistance to a requesting party.
38. MLA on confiscation and freezing	**PC**	• It is unclear whether ML offences are covered by definition under the MACM Act. • According to the MACM Act, the provisions for the enforcement of the foreign restraining and confiscation orders are the same as that provided in the MLPC Act. But there are deficiencies in the MLPC Act as described in section 2.3 of this report. • There is no provision for property of corresponding value.
39. Extradition	**NC**	• ML is not an extraditable offence.
40. Other forms of co-operation	**PC**	• TRA cannot share information with foreign FIUs • Given the lack of statistical data, the evaluation team was not able to determine that the mechanisms for international cooperation are fully effective
Nine Special Recommendations		
SR.I Implement UN instruments	**NC**	• Serious shortcomings in implementation of SR II and SR III (UNSCRs 1267 and 1373)
SR.II Criminalize terrorist financing	**NC**	• There is no provision in the TNC Act on the provision or collection of funds (property) for use by a terrorist organization or by an individual terrorist. • Section 6 of the TNC Act requires "the property will be used in connection with an act of terrorism". It connotes the property has to be linked to a specific terrorist act. • Section 7 provides for the offence of providing services to specified entity but no entity has yet been specified by the Attorney General.

Forty Recommendations		Rating	Summary of factors underlying rating[25]
SR.III	Freeze and confiscate terrorist assets	**NC**	• Criminalization of TF is deficient as described in section 2.2. • There are substantial deficiencies in the provisions for confiscation, freezing and seizing of proceeds of crime under the MLPC Act as described in section 2.3 of this report. • Tonga does not have laws and procedures in place to freeze without delay terrorist funds or other assets of person designated by the UN Security Council Resolution 1267 Committee.
SR.IV	Suspicious transaction reporting	**PC**	• Limitations in the TF offence have an impact on the breadth of the STR obligation. • Concerns raised above in Recommendation 13 about the scope and effectiveness of the reporting system apply equally to SR IV
SR.V	International cooperation	**PC**	• R36 and R 38: TF is covered by the MACM Act, however it has never been tested. • Limited scope of TF offences would impede effectiveness of MLA for TF offences • Applying R39: TF is an extraditable offence under the Extradition Act, but it has never been tested. • Applying R40: No legislation permitting provision of international assistance with respect to the financing of terrorism • TRA cannot share information with foreign FIUs
SR.VI	AML/CFT requirements for money/value transfer services	**PC**	• List of agents of MTV business not available to NRBT • Large informal, unregulated money and value transfer sector • Absence of a range of proportionate sanctions proportionate to severity of non-compliance • A broad range of deficiencies identified under other Recommendations are also relevant to the remittance sector • Resource constraints to effective monitoring and outreach
SR.VII	Wire transfer rules	**PC**	• The MLPC Act does not allow for: o inclusion of originator information in wire transfers, o processing of non routine transactions, o maintenance of originator information, or o risk-based procedures for incomplete originator information. • AML Guideline 3 addresses some requirements of SRVII, but effectiveness of compliance monitoring is limited.

Forty Recommendations	Rating	Summary of factors underlying rating[25]
		• Relevant sanctions are not proportional
SR.VIII Non-profit organisations	**NC**	• Tonga has not undertaken a review of the adequacy of existing laws and regulations that relate to non-profit organizations that can be abused for the financing of terrorism. • No outreach has been undertaken with the NPO sector with a view to protecting the sector from TF abuse. • The authorities have not taken effective steps to promote supervision and monitoring of those NPOs which account for a significant portion of the financial resources under the control of the sector. • NPOs are not required to maintain and make available to appropriate authorities, records of domestic and international transactions that are sufficiently detailed to verify that funds have been spent in a manner consistent with the purpose and objectives of the organization. • While legal authority may exist to investigate the affairs of NPOs there are no effective mechanisms in place to ensure domestic cooperation, co-ordination or information sharing. • No contact points have been identified for dealing with international requests for information about NPOs.
SR.IX Cash Border Declaration & Disclosure	**NC**	• There is no mechanism in place to notify travellers of cash reporting requirements. • There is no reporting mechanism in place. • There is no system for tracking cross border currency movement. • Powers to stop or restrain currency and bearer negotiable instruments are not clearly articulated in law. • Sanctions are not effective, proportionate and dissuasive and are not clearly specified in law in relation to ML/TF. • Customs does not have systems in place for analysing or identifying -border information in terms of suspicious cases related to ML/TF in order to notify the TRA • There is no formal information sharing capability with internal and foreign LEA counterparts • Borders are not effectively protected • Insufficient training undertaken on AML/TF related matters and intelligence recording

Table 2. Recommended Action Plan to Improve the AML/CFT System

FATF 40+9 Recommendations	Recommended Action (in order of priority within each section)
1. General	
2. Legal System and Related Institutional Measures	
Criminalization of Money Laundering (R.1, 2, & 32)	• The Evaluation Team recommends that the planned amendments, and some new amendments to the MLPC Act should be passed as soon as possible to clarify several issues, including: o deleting the reference to "rendering assistance" in section 17(b) of the MLPC Act; o broadening the definition of "cash"; o amending the definition of "property" to cover "legal documents or instruments evidencing title to, or interest in, such assets". o adding specific provisions to provide that for the purpose of proving the ML offence it is not necessary to prove which serious (predicate) crime has been committed and, secondly, that nothing in the Act prevents a person that committed an offence that generated proceeds of crime from being convicted of ML in respect of those proceeds of crime; and o substantially increasing the penalty for ML to a maximum of 10 years imprisonment, and the level of fines that may be imposed on natural and legal persons and deleting the exclusion of ML offences from the definition of "serious offence" in the MLPC Act. • Not all of 20 designated categories of predicate offences are currently caught by the definition of "serious offence". These deficiencies should be addressed. • Crown Law and the law enforcement agencies should work closely together to ensure that the law enforcement agencies are well aware of the legal requirements of ML offences to facilitate their investigation.
Criminalization of Terrorist Financing (SR.II & R.32)	• It is recommended that deficiencies in sections 6 – 8 of the TNC Act be rectified as soon as possible. It is also recommended that the TNC Act be reviewed to generally make it more comprehensive. • Crown Law and the law enforcement agencies should work closely together to ensure that the law enforcement agencies are well aware of the legal requirements of TF offences to facilitate their investigation.
Confiscation, freezing, and seizing of proceeds of crime (R.3 & 32)	• Confiscation of tainted property in relation to ML offences is currently excluded by definition of "serious offence". Immediate action shall be taken to rectify this. • The current legislation does not cover "instrumentalities intended for use" in the commission of a serious offence nor "property of corresponding value". Immediate action shall be taken to rectify this. • For the purposes of confiscation under the MLPC Act, there are three different terms used in the Act – "tainted property", "proceeds of crime" and "realizable property". The Tongan authorities should consider streamlining the terms. • Under section 28 of the MLPC Act, the AG has to apply for the confiscation order not later than 6 months after the conviction. The Tongan authorities may consider extending the period or removing it altogether. • When considering whether a confiscation order should be made, the Supreme Court shall have regard to a number of factors, including hardship. There is no case law on the Court's interpretation of

FATF 40+9 Recommendations	Recommended Action (in order of priority within each section)
	"hardship", it is preferable to have the standard limited to "undue hardship". • Before a restraining order is made, the Supreme Court may require the Attorney General to provide an undertaking as to any damages or costs in relation to making the restraining order. The Tongan authorities may consider removing this requirement. • The Tongan authorities may consider removing this requirement to prove that property is subject to the effective control of the defendant when seeking a restraining order against property of a third party. • A warrant from a magistrate under section 51 of the MLPC Act can only be obtained if a summons has been issued, or if it has not been issued, that an application for a summons in respect of the relevant offence will be made within 48 hours. The Tongan authorities may consider removing this requirement. • A production order under section 72 may only be obtained where a person has been charged with or convicted of a serious offence, and the production order cannot require the production of bankers' books. These limitations have substantially reduced the effectiveness of this section. It is recommended that this section is reviewed. • The MLPC Act should be reviewed as a whole to correct some drafting mistakes.
Freezing of funds used for terrorist financing (SR.III & R.32)	• Tonga should: o Immediately enact laws with provisions allowing for the freezing and confiscation of terrorist assets, including provisional measures, and set up effective procedures to implement these laws as part of the overall requirement to criminalize the financing of terrorism; o Implement UN Special Revolutions 1267 and 1373 by enacting the appropriate laws. • Once implemented, Tonga should provide clear guidance to financial institutions and other persons and entities that may hold targeting fund or other assets.
The Financial Intelligence Unit and its functions (R.26, 30 & 32)	• TRA should ensure awareness of and compliance with reporting requirements of STRs by FIs. • Proposed legislative changes to the MLPC Act, to introduce adequate information gathering, analytical and information sharing provisions to enable the TRA to adequately carry out its functions, both domestically and internationally, should be enacted as quickly as possible. • The NRBT should ask all FIs to provide details each month of transactions over $10,000, which are required to be recorded under the MLPC Act. • The TROs should regularly familiarise themselves with published trends and typologies, including those on the APG and FATF websites, and ensure staff employed by FIs are aware of their existence and relevance. Further, the TROs should provide details and understanding to FIs whenever appropriate. • The TRA should publish periodic reports on its activities, including statistics, typologies and trends. • STR analysis undertaken by the TRA does not include access to cross-border currency reports. It is recommended that as soon as these details become available, they are incorporated into reports. • The TRA should take immediate steps to identify and formalise information sharing protocols with Pacific FIUs, in the form of MOUs

FATF 40+9 Recommendations	Recommended Action (in order of priority within each section)
	if necessary, and that consideration be given to making an application to join the Egmont Group, as soon as the necessary legislative amendments are enacted. • STRs that may relate to transactions involving tax evasion should also be referred to the Inland Revenue for their information. • An increased budget should be provided to improve the TRA's analysis tools and staff resources. • It is recommended to formally subject the TRA to appropriate confidentiality requirements by legislation.
Law enforcement, prosecution and other competent authorities (R.27, 28, 30 & 32)	• The should police consider establishing a small (eg two person) Proceeds of Crime Unit within Tonga Police, staffed by an experienced AML specialist and one CID investigator ,who could then be supported below by CID staff as required, to undertake investigations. • Increased ML/POC awareness should be developed among Tonga Police staff, through regular training and outreach by the TCU. • The police should provide feedback to the TRA on STR reports that have been found not to warrant further investigation, to improve the quality of future reports where necessary, and to enable feedback to be provided to FIs where this does not conflict with operational or confidentiality requirements. • The police should allocate additional investigative resources to the TCU, to enable investigative resources to undertake serious crime investigations, including ML investigations and POC actions.
Cross Border Declaration or disclosure (SR IX)	• Customs should increase resources to ensure the borders are adequately protected by the utilisation of an increased air and sea vigilance options, to identify and intercept all vessels trying to obtain illegal entry. • Information sharing protocols should be developed with other LEAs either by legislative changes to the Customs & Excise Act, or formal MOUs between LEAs. • It is recommended the Customs legislation be amended to allow for agreements and sharing of information with overseas agencies. • Customs Officers require training on ML/TF related issues that either do or may impact on the border, including methodology, trends and typologies used by criminals to carry illegal items including cash to Tonga • Customs Officers require training on the full potential of the intelligence system within the new computer system including intelligence principles not able to be taught by the New Zealand firm writing the operating programs.
3. Preventive Measures–Financial Institutions	
Risk of money laundering or terrorist financing	
Customer due diligence, including enhanced or reduced measures (R.5–8)	• Tonga should enact the draft amendments and implement the regulations as soon as possible. This will bring required terms of the CDD requirements within the Act and adopt the content of the current guidelines as regulations so that they are enforceable for all entities covered by the MLPC Act. • The TRA should ensure that all FIs have the appropriate controls and measures in place in the form of AML/CFT policies or manuals, to

FATF 40+9 Recommendations	Recommended Action (in order of priority within each section)
	address the requirements under the legislation regardless of the risk level. Where simplified requirements are applied, the TRA should ensure an appropriate risk assessment was conducted and that the institution's standards or policies are clearly documented. • The TRA should conduct an AML/CFT on-site compliance visit for those FIs and cash dealers licensed by the NRBT which have yet to have their first review. • To reduce capacity pressures, the TRA should consider using general NRBT powers to ensure compliance with the MLPC Act and Guidelines rather than having the TRA undertake detailed examinations including sampling itself. Consideration should be given to introducing specific requirements for auditors to review procedures with respect to higher risk activities such as wire transfers and non face-to-face transactions. • The TRA should consider undertaking an assessment of the potential impact of non-compliance with CDD requirements by the money lenders, informal remitters and credit unions to formally determine to what extent these entities need to adopt appropriate CDD measures. Consideration should be given to awareness raising programs with these entities through group meetings and also general awareness raising with the public in general. • The TRA should consider introducing in the proposed regulations a requirement for FIs to perform CDD measures on existing customers. • The TRA should consider a simpler approach to meeting correspondent banking requirements of Recommendation 7.
Third parties and introduced business (R.9)	• Tonga should review the proposed regulations to the MLPC Act for consistency with Recommendation 9, enact the amendments and implement the regulations as soon as possible so that they are applicable to all financial institutions and cash dealers subject to the MLPC Act.
Financial institution secrecy or confidentiality (R.4)	• Tonga should review the current information sharing legal framework between Tongan competent authorities, as soon as possible. • Tonga should ensure that the proposed MLPC amendments comprehensively capture the information sharing requirements between financial institutions with regards to FATF Recommendations 7 (correspondent banking), 9 (third parties and introducers) and SRVII (wire transfers).
Record keeping and wire transfer rules (R.10 & SR.VII)	• Tonga should review the proposed amendments to the MLPC Act for consistency with the FATF Recommendations, in particular SRVII, enact the amendments and implement the draft Regulations as soon as possible. • The de minimis threshold in the proposed regulations should be lowered to US$1,000. • To reduce capacity pressures, the TRA should consider using general NRBT powers to ensure compliance with the MLPC Act and Guidelines rather itself undertaking detailed examinations including sampling. • The TRA should consider undertaking an assessment of the potential impact of non-compliance with record keeping and wire transfer requirements by the informal remitter sector to formally determine to what extent these entities are non-compliant. Consideration should be given to awareness raising programs with these entities through group meetings and also general awareness raising with the public in general. Current business licensing requirements should be enforced

FATF 40+9 Recommendations	Recommended Action (in order of priority within each section)
	for these entities so that the extent of their operations can be known and appropriate action taken.
Monitoring of transactions and relationships (R.11 & 21)	• The Evaluation Team notes and supports Tonga's intention to make the requirements outlined in the AML Guidelines in relation to unusual transactions enforceable through either amendments to the MLPC Act or proposed Regulations. • Tonga should ensure that the MLPC Regulations are finalized and brought into force as soon as possible, and made available to all relevant stakeholders. • Tonga should also consider developing and implementing legislation that would provide for the competent authorities to apply counter measures against jurisdictions which insufficiently meet the FATF Recommendations.
Suspicious transaction reports and other reporting (R.13, 14, 19, 25, & SR.IV)	• Tonga should review the proposed amendments to the MLPC Act for consistency with the FATF Recommendations, in particular Recommendations 13 and 14, and enact the amendments and implement the regulations as soon as possible. In doing this, Tonga should ensure that the regulations that will address the deficiencies and shortfalls in the MLPC Act concerning suspicious transaction reporting, specifically relating to terrorist activity, attempted transactions and tax matters are carefully reviewed and implemented as soon as possible. • The TRA should arrange regular awareness training workshops to improve understanding of current and proposed legislative requirements amongst relevant Government staff. It is also recommended that the TRA should conduct outreach to all reporting entities under the MLPC Act and provide awareness and guidance on the AML/CFT requirements, specifically suspicious transaction reporting. • Tonga should implement processes that provide regulated institutions with appropriate feedback on STRs submitted, statistics of disclosures and information/guidance on current ML/TF typologies. • Tonga should consider the utility of receiving the Financial Institutions' records of transactions over $10,000. This would provide an additional source of information for the TRA in analysing STRs and add value to reports made to law enforcement.
Internal controls, compliance, audit and foreign branches (R.15 & 22)	• It is recommended that obligations to meet the requirements of FATF Recommendation 15 and 22 be set out in law, regulation or other enforceable means, for example through the enactment of the proposed MLPC Regulations. • Tonga should consider obtaining documentation from the other FIs not licensed by the NRBT through the business licensing process to determine the nature of internal controls and compliance frameworks at those institutions. • Consideration needs to be given as to the approach of the NRBT should an application be made by a Tongan FI to create of a subsidiary or branch outside of Tonga. In this respect it may be prudent to consider the inclusion of a provision in legislation which would deal with such a situation should it occur in the future.
Shell banks (R.18)	• The Evaluation Team notes and supports Tonga's intention to make the requirements outlined in the AML Guidelines in relation to shell banks enforceable through proposed Regulations. Tonga should ensure that the MLPC Regulations are finalised and brought into force as soon as possible, and made available to all relevant stakeholders.

FATF 40+9 Recommendations	Recommended Action (in order of priority within each section)
The supervisory and oversight system–competent authorities and SROs **Role, functions, duties and powers (including sanctions) (R.23, 30, 29, 17, 25, & 32)**	• Tonga should consider extending a similar range of powers that apply to the NRBT in its supervision functions to the MLPC Act so that all FIs and cash dealers are subject to a sufficiently broad range and scope of sanctions and powers. • Sanctions able to be exercised on FIs and cash dealers other than those mentioned above are not proportionate to circumstances and do not include administrative penalties. • Tonga should consider introducing a range of sanctions as contemplated in FATF Recommendation 17 that can be applied to all financial institutions and cash dealers subject to the MLPC Act. • The TRA should provide awareness and training programs for the other regulated institutions currently captured by the MLPC Act and institutions to come under after the planned amendments to the MLPC Act are enacted. This may involve issuing of new and/or Regulations. • The growth and development of the money lender and unofficial remitter sectors is a concern given the resource constraints of the TRA. Tonga should undertake a risk assessment of these growing and unlicensed market segments to determine the appropriate level of regulation and the resources required. • The TRA should consider whether additional resources are required to complete its round of AML/CFT on site examinations of all licensed banks and foreign exchange dealers, as well as other financial institutions not currently actively supervised, to fully assess the effectiveness of the regulatory systems. • There are no plans at this stage to expand the resources of the TRA when amendments to the MLPC Act are passed that bring DNFBPs into the AML/CFT system. The need for additional resources should be reviewed once the amendments are passed.
Money value transfer services (SR.VI)	• Tonga should conduct outreach to and identify the informal remitter market segment through effective licensing and application its Business Licensing Act, where necessary taking action against those not holding a licence. • Tonga should require that existing licensed foreign exchange dealers provide a current list of agents to the NRBT annually.
4.Preventive Measures–Nonfinancial Businesses and Professions	
Customer due diligence and record-keeping (R.12)	• Tonga should ensure that the planned amendments to the MLPC Act comprehensively and appropriately capture DNFBPs as "cash dealers", and subsequently finalize and implement these amendments as soon as possible. • Consideration should be given as to how the DNFBPs will be approached in terms of imposing the AML/CFT legislative requirements on them. The proposed risk assessment has been identified as the first step, however there needs to be clarity on when and who will develop and implement this measure. • In addition, Tongan authorities should: o Determine the mechanics of an effective regulatory and supervisory framework for DNFBPs, designate the AML/CFT supervisory authorities for the different sectors and provide them with appropriate training, guidance and resources; o Prepare sector-specific regulations and/or guidelines for each DNFBP sector; and

FATF 40+9 Recommendations	Recommended Action (in order of priority within each section)
	○ Prior to and following its amendment, conduct outreach for each sector to ensure compliance with the MLPC Act.
Suspicious transaction reporting (R.16)	• Tonga should ensure that planned amendments to the MLPC Act capture DNFBPs as "cash dealers", and subsequently finalize and implement these amendments as soon as possible, so that: ○ DNFBPs are required to report STRs. In doing this, authorities should determine how to deal with the issue of legal professional secrecy; ○ DNFBPs, their directors, officers, and employees are protected from liability for reporting STRs; ○ DNFBPs, their directors, officers, and employees are prohibited from tipping off that an STR has been made; ○ DNFBPs are required to develop programs against ML and TF; and, ○ DNFBPs are required to give special attention to business relationships and transactions with countries that do not or insufficiently apply the FATF Recommendations as required by R.21 (also see detailed comments under Rec. 14, 15 and 21). • Tongan authorities should conduct further outreach within the sectors as to the proposed obligations under the MLPC Act, and conduct training to improve the various sectors' understanding of ML typologies and ability to detect suspicious transactions.
Regulation, supervision, monitoring, and sanctions (R.17, 24, & 25)	• Tonga should ensure that the amendments accurately capture DNFBPs as a cash dealer in the MLPC Act, and subsequently finalize and implement these amendments as soon as possible. • Tonga should also take steps to regulate/supervise/monitor the full range of DNFBPs for AML/CFT purposes as soon as possible
Other designated non-financial businesses and professions (R.20)	• Tonga should consider extending applying R5, 6, 8-11, 13-15, 17 and 20 to other non financial designated businesses such as high value goods, pawnshops, auction houses etc. • The TRA should consider conducting programs amongst the general population and to currently unregulated entities to raise awareness of ML and TF issues and to promote an acceptance of a lower reliance on cash.
5. Legal Persons and Arrangements & Non-profit Organizations	
Legal Persons–Access to beneficial ownership and control information (R.33)	• Tonga should broaden its requirements to ensure that information on the beneficial ownership and control of legal persons is readily available to the competent authorities in a timely manner. Such measures could include a combination of, for example, requiring overseas companies to maintain a share register in Tonga, requiring legal persons to maintain full information on their beneficial ownership and control, requiring such information to be filed in the Companies Registry, or requiring company service providers to obtain and maintain beneficial ownership information.
Legal Arrangements–Access to beneficial ownership and control information (R.34)	• No recommendations possible due to lack of sufficient information
Non-profit organisations (SR.VIII)	• Tonga should: ○ formally designate an agency as the responsible agency for NPOs, not only in respect to registration but for broader AML/CFT matters including as a coordination point for

FATF 40+9 Recommendations	Recommended Action (in order of priority within each section)
	information sharing; o undertake a review the adequacy of its laws and regulations relating to NPOs that can be abused for the financing of terrorism; o provide outreach programs in relation to terrorist financing (and money laundering); and o centralise information on the activities of the NPO sector to facilitate access and sharing in ML/TF cases.
6. National and International Cooperation	
National cooperation and coordination (R.31 & 32)	• Formal MOUs should be established as a matter of urgency, to permit and encourage information sharing among Tonga's LEAs, pending amendment of legislation. • Tonga should establish an intelligence sharing group of senior staff from the TRA, Police, Customs, Immigration, and Fisheries to ensure that adequate responses are provided to issues identified across all of the LEAs. This guarantees an informed pool of information, provides adequate staff with wide-ranging powers when required, and builds confidence in the abilities of each of the stakeholders.
The Conventions and UN Special Resolutions (R.35 & SR.I)	• It is recommended that Tonga accede to the Palermo Convention. • Technical deficiencies in the implementation of the Vienna Convention should be addressed, and the offence and confiscation provisions applied where possible. • Measures should also be taken to implement the TF Convention and the UNSCRs relating to prevention and suppression of TF.
Mutual Legal Assistance (R.36, 37, 38, SR.V & 32)	• With the increase of maximum penalty of ML offences, the uncertainty as to whether ML cases will be covered by the MACM Act would be removed. • Under the current MACM Act, the restraining and confiscation orders are enforced in accordance with the MLPC Act, the deficiencies in the MLPC Act as described in section 2.3 above are relevant. Tonga should consider reviewing the MLPC Act and the MACM Act to ensure such deficiencies and ambiguities are cleared.
Extradition (R. 39, 37, SR.V & R.32)	• Tonga should immediately rectify the issue in relation to ML offences being excluded from the Extradition Act. • Under the current system, the fugitive may consent to extradition, but only after committal. He/she can only waive his right of appeal. Tonga may consider having a system for the fugitive to give consent before committal.
Other Forms of Cooperation (R. 40, SR.V & R.32)	• All relevant enforcement and regulatory authorities should collect sufficient statistics and other evidence to demonstrate that Tonga's mechanisms for international cooperation are fully effective. • The TRA should commence a process of drafting formal MOUs with FIUs in Australia, New Zealand, and other Pacific based locations as a matter of urgency, to freely permit information sharing and to ensure Tonga TRA are able to address requests when they are received.
7. Other Issues	
Resources and statistics (R.30 & 32)	• There are no recommendations for this section.
Other relevant AML/CFT issues	• There are no recommendations for this section.
General framework – structural	• There are no recommendations for this section.

FATF 40+9 Recommendations	Recommended Action (in order of priority within each section)
issues	

Annex 1. Authorities' Response to the Assessment

KINGDOM OF TONGA'S RESPONSE TO THE ASIA-PACIFIC GROUP MUTUAL EVALUATON OF ITS ANTI-MONEY LAUNDERING AND COUNTERING FINANCING OF TERRORISM FRAMEWORK

Asia-Pacific Group on Money Laundering
Annual General Meeting
15 July 2010
Singapore

I BACKGROUND

1 We would like to give a short background to Tonga's endeavour to combat money laundering and terrorist financing. In 2000, Tonga passed a very basic Money laundering and proceeds of Crime Act. Since becoming a full member of the APG in 2005, this is the first time that the Kingdom has been evaluated by an international body, regarding Tonga's AML/CFT framework.

2 Prior to becoming a full member of APG, Tonga had undergone a self-assessment of its compliance status with FATF recommendations and identified gaps in the legislation, particularly our Money Laundering and Proceeds of Crime Act and the Transnational Crimes Act. Out of this self-assessment, Tonga drafted amendments to address these gaps. These amendments were scheduled to be enacted in 2008 however due to national priorities given to national political reform, and the scheduled mutual evaluation for Tonga in 2009, the enactment of the amendments were deferred to await the outcome of the ME.

3 Tonga recognises that its anti-money laundering and counter terrorist financing framework is part of a regional and international network that has to be bound in strength and effectiveness to fight these ever changing challenges from sophisticated commercial criminals.

4 However, as a small developing country, Tonga is also limited by scarce resources, both in capacity and capability. We lack financial resources and human expertise, and we need assistance from those who can provide them.

5 Despite these constraints, Tonga is committed to strengthening its defences against AML/CFT, as best as it can.

6 Once the draft MER is adopted by this plenary, we will then move to finalise our plan of action in order to achieve fuller compliance with FATF's 40 Recommendations and 9 Special Recommendations.

II RESPONSE TO THE MER

A Tonga's Position

7 After receiving and fully considering the recommendations presented in the draft Mutual Evaluation Report, the Cabinet Committee established by the Tongan Government to be responsible for AML/CFT, chaired by our Minister for Finance, resolved that Tonga:

(1) Accepts all the ratings made by the team of experts;

(2) Will not be seeking re-consideration of any of the ratings; and most importantly

(3) Will use the recommendations proposed by the team of experts as a basis to formulate an Action Plan to progress better compliance.

8 It must however be recognised that the road to improved compliance for Tonga will ultimately depend on continuing political commitment, financial resources, and human expertise. Political commitment is of major significance with Tonga undergoing Constitutional and political change of government in November 2010, after 135 years of the current Constitutional and political set-up.

B Developments/Updates

9 The following developments have taken place since the completion of the draft MER:

10 There has been a rise in the commission of predicate offences. We recently completed a successful completion of the first ever importation of methamphetamine valued at around NZD17 million. We have also discovered the first case of human trafficking, and also human smuggling, by foreigners, rather than locals. The prosecution of the accused persons has commenced in our Supreme Court. There is also a rise in the detection of importation or smuggling of counterfeit goods, particularly from Asia, at our borders.

11 With that rise in the commission of predicate offences, there is now more appreciation and political will of the need to address this growth of criminal activity, by not only going after principal offenders but also seizing their funds and assets.

12 Earlier this year the MLCI launched its electronic registration of companies, and all companies are required to re-register. Record keeping may be improved. Only cover companies.

13 In preparation for the national election in November 2010, Government has approved the drafting of legislation requiring all Tongans to have national identity cards. This should assist with the CDD requirements.

14 The National Reserve Bank of Tonga (NRBT) granted licenses to 5 new foreign exchange dealers (money remitters & money changers) since the mutual evaluation in November

2009. The NRBT has been aggressive in approaching unlicensed money remitters and requiring them to apply for a licence.

15 The NRBT has also renewed the licences of the existing 4 licensed foreign exchange dealers and in this process issued probationary licences to 2 foreign exchange dealers. The full licences of these 2 foreign exchange dealers were renewed or restored after full compliance with AML requirements.

16 New licence conditions were imposed on foreign exchange dealers to inform the NRBT of new agents, and provide an updated list of agents when applying for annual renewal of licence.

17 The NRBT/TRA has enhanced its AML/CFT requirements on foreign exchange dealers, money remitters and money changers by undertaking more onsite visits to ensure compliance.

C Action Plan

18 Looking generally at the recommendations and ratings the main areas that we need to address are as follows:

(1) Confirm the Action Plan – following adoption of Tonga's MER by the APG plenary;

(2) Strengthening of legislation;

(a) Enact amendments to the MLPC Act;
(b) Enact regulations under the MLPC Act;
(c) Replace the Transnational Crimes Act to ensure full compliance with international standards to deal with TF and other transnational crimes;
(d) Review other relevant Acts such as:
  (i) To deal with NPOs, (currently partly covered by the Charitable Trust Act)
  (ii) Customs Act. (allow for agreements and sharing of information with overseas agencies);
  (iii) Review penalties of predicate offences to be raised above the 12 months threshold.

(3) Conduct a national risk assessment to determine priority risk areas and level of resources required;

(4) Improve national coordination, networking and information sharing – maintain momentum enhanced by the mutual evaluation exercise in November 2009 by convening more regular meetings/dialogue at the national/government level.

(a) MOUs to be developed for information sharing.

(b) An intelligence sharing group to be set up to facilitate the sharing of information.
(c) Enhance statistics gathering
(d) Enhance the provision of feedback between agencies e.g. Police & TRA
(e) TRA to enhance the provision of feedback to financial institutions on STRs submitted, statistics of disclosures and information/guidance on current ML/TF typologies

(5) Improve AMLCFT training and awareness of all stakeholders.

(a) Improving investigatory capacity;
(b) Improving information analysis;
(c) for training of existing financial institutions, use published trends and typologies from APG & FATF websites and STRs collected from the reporting FIs.

III CONCLUSION

19 In conclusion, Tonga confirms and assures members of its commitment to comply with APG membership requirements and joining the international community in combating money laundering and terrorist financing.

20 Tonga will be seeking assistance from Donors and Providers (DAPs) this afternoon particularly on a risk assessment exercise to establish a risk priority and pragmatic implementation framework.

21 Tonga will be working closely with the Secretariat in drawing up the Strategic Implementation Plan in the next 12 months and look forward to reporting back to the Plenary next year.

Malo ‘aupito.

Annex 2. Details of All Bodies Met During the On-Site Visit

List of ministries, other government authorities or bodies, private sector representatives and others.

1. Accounting firms
2. Banks – domestic and international
3. Association of Banks in Tonga
4. Attorney General
5. Ministry of Foreign Affairs
6. Audit Office
7. Australian High Commission and Australian Federal Police Liaison Officer (Advisor)
8. National Reserve Bank of Tonga (Banking Supervision, Exchange Control)
9. Commissioner of Police and other officials, including Transnational Crime Unit
10. Commissioner of Customs and other officials, Tax, Immigration, Customs
11. AML National Committee (Coordination Agency)
12. Money transfer companies
13. Insurance firms
14. Japanese Embassy
15. Ministry of Labour, Commerce & Industries
16. New Zealand High Commission and NZ Police Liaison Officer
17. Tonga Development Bank
18. Tonga Law Society
19. Tonga Society of Accountants
20. Transaction Reporting Authority (NRBT)

Annex 3. List of All Laws, Regulations, and Other Material Received

1) Constitution of the Kingdom of Tonga (Cap 2)
2) Public Audit Act (Cap 66)
3) Commissioner for Public Relations Act 2001
4) Anti-Corruption Commission Act 2007
5) Money Laundering and Proceeds of Crime Act 2000
6) Anti-Money Laundering Guidelines
7) Money Laundering and Proceeds of Crime Amendments
8) Money Laundering and Proceeds of Crime Regulations 2008
9) Police Act (Cap 35)
10) Transnational Crimes Act
11) Criminal Offences Act (Cap 18)
12) Law Practitioners Act 1989
13) Rules of Professional Conduct for Law Practitioners 2002
14) Business Licenses Act 2002
15) Companies Act 1995
16) National Reserve Bank of Tonga Act (Cap 102)
17) Foreign Exchange Control Act (Cap 103)
18) Pornography Control Act 2002
19) Illicit Drugs Control Act 2003
20) Aircraft Offences Act
21) Customs and Excise Management Act (CEMA)
22) Copyright Act
23) Waste Management Act 2005
24) Forests Act
25) Marine Pollution Prevention Act
26) Protection Against Unfair Competition Act 2002
27) Magistrate's Court Act (Cap 11)
28) Interpretation Act (Cap 1)
29) Appointment of National Reserve Bank to Transaction Reporting Authority
30) TRA Analysis Procedures
31) TRA Analysis Flowchart
32) National Reserve Bank of Tonga Annual Report 07/08
33) TRO Job description
34) TRA Reporting Lines
35) Training List for TRA staff
36) General Police Statistics 2001-2007
37) Cases Reported from TRA
38) TCU General Instructions
39) TCU procedures Money Laundering Cases
40) Ministry of Police Organizational chart
41) Cabinet (Restriction on Removal of Cash from the Kingdom) Order 2006
42) Foreign Exchange Control (Restriction on Removal of Cash) Regulation 2009
43) Customs and Excise Management Regulations 2008
44) Arrival Passenger Declaration Form (Form C23)
45) Financial Institution Act 2004 (FIA)

46) Foreign Exchange Control Regulation 2000
47) STR Procedures
48) Prudential Statement 8- Fit & Proper
49) Offshore Banking Act - Repealed
50) Checklist for licensing Requirement for banks
51) Requirements for licensing foreign exchange dealers
52) Incorporated Societies Act 1984
53) Charitable Trust Act 1993
54) Foreign Investment Act 2002
55) Mutual Assistance in Criminal Matters Act
56) Extradition Act

Copies of Key Laws, Regulations, and Other Measures

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MONEY LAUNDERING AND PROCEEDS OF CRIME ACT 2000

2007 REVISED EDITION

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MONEY LAUNDERING AND PROCEEDS OF CRIME ACT 2000

Arrangement of Sections

Section

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MONEY LAUNDERING AND PROCEEDS OF CRIME ACT

AN ACT TO ENABLE THE UNLAWFUL PROCEEDS OF ALL SERIOUS CRIME INCLUDING DRUG TRAFFICKING TO BE IDENTIFIED, TRACED, FROZEN, SEIZED AND EVENTUALLY CONFISCATED; TO ESTABLISH A TRANSACTION REPORTING AUTHORITY; AND TO REQUIRE FINANCIAL INSTITUTIONS AND CASH DEALERS TO TAKE PRUDENTIAL MEASURES TO HELP COMBAT MONEY LAUNDERING[26]

Commencement [27th February 2001]

PART I - PRELIMINARY

1 Short title

This Act may be called the Money Laundering and Proceeds of Crime Act.

2 Interpretation

(1) In this Act, unless the contrary intention appears —

"**account**" means any facility or arrangement by which a financial institution or cash dealer does any one or more of the following —

(a) accepts deposits of cash;

(b) allows withdrawals of cash or transfers into or out of the account;

(c) pays cheques or payment orders drawn on a financial institution or cash dealer by, or collects cheques or payment orders on behalf of, a person;

(d) supplies a facility or arrangement for a safety deposit box;

"**appeal**" includes proceedings by way of discharging or setting aside a judgment, and an application for a new trial or for a stay of execution;

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[26] Act 28 of 2000

Amended by Act 15 of 2005, commencement 10 January 2006

"**authorised officer**" means a person or class of persons designated by notice in the Gazette by the Attorney General as an authorised officer;

"**cash dealer**" means;

(a) a person who carries on a business of an insurer, an insurance intermediary, a securities dealer or a futures broker;

(b) a person who carries on a business of dealing in bullion, of issuing, selling or redeeming travellers' cheques, money orders or similar instruments, or of collecting, holding and delivering cash as part of a business of providing payroll services;

(c) an operator of a gambling house, casino or lottery; or

(d) a trustee, or manager of a unit trust;

"**cash**" means the coin and paper money of Tonga or of a foreign country that is designated as legal tender and any document which is customarily used and accepted as such;

"**data**" means representations, in any form, of information;

"**defendant**" means a person charged with a serious offence, whether or not he has been convicted of the offence, and includes in the case of proceedings for a restraining order under section 58, a person who is about to be charged with a serious offence;

"**document**" means any record of information, and includes —

(a) anything on which there is writing;

(b) anything on which there are marks, figures, symbols, or perforations having meaning for persons qualified to interpret them;

(c) anything from which sounds, images or writings can be produced, with or without the aid of anything else;

(d) a map, plan, drawing, photograph or similar thing;

(e) any material on which data are recorded or marked and which is capable of being read or understood by a person or a computer system or other device;

"**financial institution**" means any person who carries on a business of —

(a) acceptance of deposits and other repayable funds from the public including for life insurance and investment related insurance;

(b) lending, including consumer credit, mortgage credit, factoring (with or without recourse) and financing of commercial transactions;

(c) financial leasing;

(d) money transmission services;

(e) issuing and administering means of payment (such as credit cards, travellers' cheques and bankers' drafts);

(f) entering into guarantees and commitments;

(g) trading on its own account or on account of customers in money market instruments (such as cheques, bills, certificates of deposit), foreign exchange, financial futures and options, exchange and interest rate instruments, and transferable securities;

(h) underwriting share issues and participation in such issues;

(i) giving advice to undertakings on capital structure, industrial strategy and related questions, and advice and services relating to mergers and the purchase of undertakings;

(j) money-broking;

(k) portfolio management and advice;

(l) safekeeping and administration of securities;

(m) providing credit reference services; or

(n) providing safe custody services;

"**gift**" includes any transfer of property by a person to another person directly or indirectly —

(a) after the commission of a serious offence by the first person;

(b) for a consideration the value of which is significantly less than the value of the property provided by the first person; and

(c) to the extent of the difference between the market value of the property transferred and the consideration provided by the transferee;

"**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 whether present or future and whether vested or contingent;

"**person**" means any natural or legal person;

"**proceedings**" means any procedure conducted by or under the supervision of a Judge, magistrate or judicial officer however described, in relation to any alleged or proven offence or property derived from such offence and including an inquiry, investigation and preliminary or final determination of facts;

"**proceeds of crime**" means any property derived or realised directly or indirectly from a serious offence and includes, on a proportional basis, property into which any property derived or realised directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realised from such property at any time since the offence;

"**property**" means cash and all other real or personal property of every description, whether situated in Tonga or elsewhere and whether tangible or intangible, and includes an interest in any such property;

"**property of or in the possession or control of a person**" includes any gift made by that person;

"**realisable property**" means —

(a) any property held by a defendant;

(b) any property held by a person to whom a defendant has directly or indirectly made a gift caught by this Act;

"**serious offence**" means an offence against a provision of —

(a) any law of Tonga (other than this Act), for which the maximum penalty is imprisonment or other deprivation of liberty for a period of not less than 12 months or more severe penalty;

(b) a law of a foreign State, in relation to acts or omissions which, had they occurred in Tonga, would have constituted an offence for which the maximum penalty is imprisonment or other deprivation of liberty for a period of not less than 12 months, or more severe penalty, including an offence of a purely fiscal character;

"**unit trust**" means any arrangement made for the purpose or having the effect of providing for a person having funds available for investment, facilities for the

participation by the person as a beneficiary under a trust in any profits or income arising from the acquisition, holding, management or disposal of any property pursuant to the trust.

(2) A reference in this Act to the law of —

(a) Tonga;

(b) any foreign State,

includes a written or unwritten law of, or in force in, any part of Tonga or the foreign State.

3 Meaning of charge in relation to a serious offence

Any reference in this Act to a person being charged or about to be charged with a serious offence includes any procedure, however described, in Tonga or elsewhere, by which criminal proceedings may be commenced.

4 Meaning of conviction in relation to a serious offence

For the purposes of this Act, a person shall be taken to be convicted of a serious offence if —

(a) the person is convicted, whether summarily or on indictment, of the offence;

(b) the person is charged with, and found guilty of, the offence but is discharged without any conviction being recorded;

(c) the Supreme Court, with the consent of the convicted person, takes the offence of which the person has not been found guilty into account in passing sentence on the person for another serious offence.

5 Meaning of quashing of convictions

For the purposes of this Act, a person's conviction of a serious offence shall be taken to be quashed —

(a) where section 4(b) applies, if the finding of guilt is quashed or set aside;

(b) where section 4(c) applies, if either —

(i) the person's conviction of the other offence referred to in that section, is quashed or set aside;

(ii) the decision of the Supreme Court to take the offence into account in passing sentence for that other offence is quashed or set aside;

(c) where His Majesty grants the person a pardon in respect of the person's conviction of the offence.

6 Meaning of value of property

(1) Subject to subsections (2) and (3), for the purposes of this Act the value of property (other than cash) in relation to any person holding the property is —

(a) its market value; or

(b) where any other person holds an interest in the property —

(i) the market value of the first mentioned person's beneficial interest in the property; less

(ii) the amount required to discharge any incumbrance (other than a charging order) on the first person's beneficial interest.

(2) Subject to section 8(2), references in this Act to the value of a gift or of any payment or reward, are references to —

(a) the value of the gift, payment or reward to the recipient when the recipient received it, adjusted to take account of any subsequent changes in the value of money; or

(b) where subsection (3) applies, the value there mentioned, whichever is the greater.

(3) Subject to section 8(2), if at the material time the recipient holds —

(a) the property which he received (not being cash); or

(b) property which, in whole or in part, directly or indirectly represents, in the recipient's hands, the property which he received,

the value referred to in subsection (2)(b) is the value to him at the material time of the property mentioned in subsection (2)(a) or, as the case may be, subsection 2(b) so far as it represents the property which he received, but disregarding in either case any charging order.

7 Meaning of dealing with property

For the purposes of this Act, dealing with property held by any person includes —

(a) where the property is a debt owed to that person, making a payment to that person in reduction or full settlement of the amount of the debt;

(b) making or receiving a gift of the property; or

(c) removing the property from Tonga.

8 Meaning of gift caught by this Act

(1) A gift is caught by this Act if —

(a) it was made by the defendant at any time after the commission of the serious offence, or if more than one, the earliest of the offences, to which the proceedings for the time being relate; and

(b) the Supreme Court considers it appropriate in all the circumstances to take the gift into account.

(2) For the purposes of this Act —

(a) the circumstances in which the defendant is to be treated as making a gift include those where he transfers property to another person directly or indirectly, for a consideration the value of which is significantly less than the value of the property or consideration provided by the defendant; and

(b) in those circumstances, the provisions of sections 6(2) and (3) shall apply, as if the defendant had made a gift of such proportionate share in the property as the difference between the values referred to in subsection (2)(a) and the value of the property or consideration provided by the defendant.

9 Meaning of deriving a benefit

A reference to a benefit derived or obtained by or otherwise accruing to a person includes a reference to a benefit derived or obtained by, or otherwise accruing to, another person at the request or direction of the first person.

10 Meaning of benefiting from the proceeds of a serious offence

For the purposes of this Act —

(a) a person has benefited from a serious offence if the person has received any proceeds of that offence;

(b) a person's proceeds of a serious offence are —

(i) any payments or other rewards received by the person at any time in connection with the commission of the offence by that person or another person; and

(ii) any pecuniary advantage derived by the person at any time from the commission of the offence by that person or another person,

whether received or derived before or after the commission of the offence.

PART II - MONEY LAUNDERING

11 Transaction Reporting Authority

(1) The Attorney General, with the approval of the Cabinet, shall appoint a person or persons to be known as the Transaction Reporting Authority.[27]

(2) The Transaction Reporting Authority —

(a) shall receive reports of suspicious transactions from financial institutions and cash dealers pursuant to section 14(1);

(b) shall send any such report to the appropriate law enforcement authorities if the report gives the Transaction Reporting Authority reasonable grounds to suspect that the transaction is suspicious;

(c) may enter the premises of any financial institution or cash dealer during ordinary business hours to inspect any record kept pursuant to section 13(1), and ask any question relating to such record, make notes and take copies of the whole or any part of the record;

(d) shall send to the appropriate law enforcement authorities, any information derived from an inspection carried out pursuant to subsection (2)(c), if it gives the Transaction Reporting Authority reasonable grounds to suspect that a transaction involves proceeds of crime;

(e) may instruct any financial institution or cash dealer to take such steps as may be appropriate to facilitate any investigation anticipated by the Transaction Reporting Authority;

[27] By GS 20/2003 the National Reserve Bank of Tonga was, on 5 July 2001, appointed to be the Transaction Reporting Authority

(f) may compile statistics and records, disseminate information within Tonga or elsewhere, make recommendations arising out of any information received, issue guidelines to financial institutions and advise the Attorney General;

(g) shall create training requirements and provide such training for any financial institution in respect of transaction record-keeping and reporting obligations provided for in sections 13(1) and 14(1);

(h) may consult with any relevant person, institution or organisation for the purpose of exercising its powers or duties under subsections (2) (c), (f) or (g);

(i) shall not conduct any investigation other than for the purpose of ensuring compliance by a financial institution with the provisions of this Part.

12 Financial institutions and cash dealers to verify customer's identity

(1) A financial institution or cash dealer shall take reasonable measures to satisfy itself as to the true identity of any applicant seeking to enter into a business relationship with it or to carry out a transaction or series of transactions with it by requiring the applicant to produce an official record reasonably capable of establishing the true identity of the applicant; when the applicant is a body corporate it shall be required to produce a certificate of incorporation together with the latest annual return to the Registrar of Companies.

(2) Where an applicant requests a financial institution or cash dealer to enter into a continuing business relationship or any other transaction, the institution or cash dealer shall take reasonable measures to establish whether the person is acting on behalf of another person.

(3) If it appears to a financial institution or cash dealer that an applicant requesting it to enter into any transaction, is acting on behalf of another person, the institution or cash dealer shall take reasonable measures to establish the true identity of any person on whose behalf or for whose ultimate benefit the applicant may be acting in the proposed transaction, whether as trustee, nominee, agent or otherwise.

(4) In determining what constitute reasonable measures for the purposes of subsection (1) or (3), regard shall be had to all the circumstances of the case, and in particular —

(a) to whether the applicant is a person based or incorporated in a country in which there are in force provisions applicable to it to prevent the use of the financial system for the purpose of money laundering; and

(b) to custom and practice as may from time to time be current in the relevant field of business.

(5) Nothing in this section shall require the production of any evidence of identity where —

(a) the applicant is itself a financial institution or a cash dealer to which this Act applies; or

(b) there is a transaction or a series of transactions taking place in the course of a business relationship, in respect of which the applicant has already produced satisfactory evidence of identity.

13 Financial institutions and cash dealers to establish and maintain customer records

(1) A financial institution or cash dealer shall establish and maintain —

(a) records of all transactions of $10,000 or more, or any series of transactions occurring in any 4 week period, totalling $25,000 or more or the equivalent in

foreign cash carried out by it, in accordance with the requirements of subsection (3);

(b) where evidence of a person's identity is obtained in accordance with section 12, a record that indicates the nature of the evidence obtained, and which comprises either a copy of the evidence or such information as would enable a copy of it to be obtained.

(2) Customer accounts of a financial institution or cash dealer shall be kept in the true name of the account holder.

(3) Records required under subsection (1)(a) shall contain particulars sufficient to identify —

(a) the name, address and occupation (or, where appropriate, business or principal activity) of each person —

(i) conducting the transaction or series of transactions; or

(ii) if known, on whose behalf the transaction or series of transactions are being conducted;

(b) the method used by the financial institution or cash dealer to verify the identity of each person identified under the preceding paragraph;

(c) the nature and date of the transaction;

(d) the amount involved, and the national monetary unit in which it is denominated;

(e) the type and identifying number of any account with the financial institution or cash dealer involved in the transaction;

(f) if the transaction involves a negotiable instrument other than cash, the name of the drawer of the instrument, the name of the institution on which it was drawn, the name of the payee (if any), the amount and date of the instrument, the number (if any) of the instrument and details of any endorsements appearing on the instrument;

(g) the name and address of the financial institution or cash dealer and of the officer, employee or agent who prepared the record.

(4) Records required under subsection (1) shall be kept by the financial institution for a period of at least 5 years from the date the relevant transaction was completed or upon which action was last taken.

14 Financial institutions and cash dealers to report suspicious transactions

(1) Whenever a financial institution or cash dealer is a party to a transaction and has reasonable grounds to suspect that information that it has concerning the transaction may be relevant to the investigation or prosecution of a person for a serious offence, it shall as soon as possible but no later than 3 working days after forming that suspicion and wherever possible before the transaction is carried out —

(a) take reasonable measures to ascertain the purpose of the transaction, the origin and ultimate destination of the funds involved, and the identity and address of any ultimate beneficiary;

(b) prepare a report of the transaction in accordance with subsection (2);

(c) pass the report to the Transaction Reporting Authority.

(2) A report required by subsection (1) shall —

(a) contain particulars of the matters specified in subsection (1)(a) and in section 12(1);

(b) contain a statement of the grounds on which the financial institution or cash dealer holds the suspicion; and

(c) be signed or otherwise authenticated by the officer, employee or agent of the financial institution or cash dealer who prepared the report.

(3) A financial institution or a cash dealer which has reported a suspicious transaction in accordance with this Part shall, if requested to do so by the Transaction Reporting Authority, give any further information as it has in relation to the transaction.

15 Financial institutions and cash dealers to establish and maintain internal reporting procedures

A financial institution or cash dealer shall establish and maintain internal reporting procedures to —

(a) identify persons to whom an employee is to report any information which comes to the employee's attention in the course of employment and which gives rise to knowledge or suspicion by the employee that another person is engaged in money laundering;

(b) enable any person identified in accordance with paragraph (a) to have reasonable access to information that may be relevant to determining whether sufficient basis exists to report the matter pursuant to section 14(1); and

(c) require the identified person to report the matter pursuant to section 14(1) where he determines that sufficient basis exists.

16 Further preventive measures by financial institutions and cash dealers

A financial institution or cash dealer shall establish and maintain internal procedures to —

(a) make employees aware of domestic laws relating to money laundering, and the procedures and related policies established and maintained by it pursuant to this Act;

(b) provide its employees with appropriate training in the recognition and handling of money laundering transactions.

17 Money laundering offences

A person commits the offence of money laundering if the person —

(a) acquires, possesses or uses property knowing or having reason to believe that it is derived directly or indirectly from the commission of a serious offence;

(b) renders assistance to another person for —

(i) the conversion or transfer of property derived directly or indirectly by the commission of a serious offence, with the aim of concealing or disguising the illicit origin of that property or of aiding any person in the commission of the offence;

(ii) concealing or disguising the true nature, origin, location, disposition, movement or ownership of the property derived directly or indirectly by the commission of a serious offence,

and shall upon conviction be liable to imprisonment for a period not exceeding 12 months or to a fine not exceeding $10,000 or both, and in the case of a body corporate to a fine not exceeding $50,000.

18 Related offences

(1) A person who opens or operates an account with a financial institution or a cash dealer in a false name commits an offence and shall upon conviction be liable to imprisonment for a period not exceeding 2 years or to a fine not exceeding $20,000 or both, and in the case of a body corporate to a fine not exceeding $100,000.

(2)

(a) A financial institution or cash dealer who fails to comply with any requirement of this Part for which no penalty is specified commits an offence and shall upon conviction be liable to imprisonment for a period not exceeding 2 years or to a fine not exceeding $20,000 or both, and in the case of a body corporate, to a fine not exceeding $100,000.

(b) In determining whether a person has complied with any requirement of paragraph (a), the Supreme Court shall have regard to such custom and practice as may from time to time be current in the relevant trade, business, profession or employment, and may take account of any relevant guidance adopted or approved by a public authority exercising public interest supervisory functions in relation to the financial institution or cash dealer, or any other body that regulates or is representative of any trade, business or profession carried on by that person.

(3)

(a) Any person who —

(i) knows or suspects that a report under section 14(1) is being prepared or has been sent to the Transaction Reporting Authority; and

(ii) discloses to another person information or other matter which is likely to prejudice any investigation of an offence or possible offence of money laundering under section 17,

commits an offence and shall upon conviction be liable to imprisonment for a period not exceeding 12 months or to a fine not exceeding $10,000 or both.

(b) In proceedings for an offence against paragraph (a), it shall be a defence that the person did not know or have reasonable grounds to suspect that the disclosure was likely to prejudice any investigation of an offence or possible offence of money laundering under section 17.

19 Seizure and detention of suspicious imports or exports of cash

(1) An authorised officer may seize and, in accordance with this section detain, any property including cash which is being imported into or exported from Tonga, if he has reasonable grounds for suspecting that it is —

(i) derived from a serious offence; or

(ii) intended by any person for use in the commission of a serious offence.

(2) Cash detained under subsection (1) shall not be detained for more than 24 hours after seizure, unless a Judge orders its continued detention for a period not exceeding 3 months from the date of seizure, upon being satisfied that —

(a) there are reasonable grounds for the suspicion referred to in subsection (1)(b); and

(b) its continued detention is justified while —

(i) its origin or derivation is further investigated; or

(ii) consideration is given to the institution in Tonga or elsewhere of criminal proceedings against any person for an offence with which the cash is connected.

(3) A Judge may subsequently order continued detention of the cash if satisfied of the matters mentioned in subsection (2), but the total period of detention shall not exceed 2 years from the date of the order made under that subsection.

(4) Subject to subsection (5), cash detained under this section may be released in whole or in part to the person by or on whose behalf it was imported or exported —

(a) by order of a Judge that its continued detention is no longer justified, upon application by or on behalf of that person and after considering any representations by the Attorney General; or

(b) where there is no court order, by an authorised officer, if satisfied that its continued detention is no longer justified.

(5) No cash detained under this section shall be released where —

(a) an application is made under Part III of this Act for the purpose of —

(i) the confiscation of the whole or any part of the cash; or

(ii) its restraint pending determination of its liability to confiscation; or

(b) proceedings are instituted in Tonga or elsewhere against any person for an offence with which the cash is connected,

until the proceedings relating to the relevant application or the proceedings for the offence as the case may be have been concluded.

20 Transaction Reporting Authority's power to obtain search warrant

(1) The Transaction Reporting Authority or a police officer authorised by the Transaction Reporting Authority, may apply to the Supreme Court for a warrant to enter any premises belonging to or in the possession or control of a financial institution, cash dealer or any officer or employee thereof and to search the premises and remove any document, material or other thing therein for the purposes of the Transaction Reporting Authority, as ordered by the Supreme Court and specified in the warrant.

(2) The Supreme Court shall grant the application if it is satisfied that there are reasonable grounds to believe that —

(a) the financial institution or cash dealer has failed to keep a transaction record, or report a suspicious transaction, as required by this Act;

(b) an officer or employee of a financial institution or cash dealer is committing, has committed or is about to commit an offence of money laundering.

21 Property tracking and monitoring orders

For the purpose of determining whether any property belongs to or is in the possession or under the control of any person, the Supreme Court may, upon the application of the Transaction Reporting Authority, make an order —

(a) that any document relevant to —

(i) identifying, locating or quantifying any such property; or

(ii) identifying or locating any document necessary for the transfer of any such property,

belonging to, or in the possession or control of that person be delivered forthwith to the Transaction Reporting Authority;

(b) that the financial institution or cash dealer forthwith produce to the Transaction Reporting Authority all information obtained about any transaction conducted by or for that person during such period as the Supreme Court directs.

22 Orders to enforce compliance with obligations under this Part

(1) The Supreme Court may, upon application by the Transaction Reporting Authority, and being satisfied that a financial institution or cash dealer has failed to comply with any obligation provided for under sections 12, 13, 14, 15 or 16, make an order against all or any officers or employees of the institution or dealer in such terms as the Supreme Court deems necessary, in order to enforce compliance with such obligation.

(2) Any order granted pursuant to subsection (1) shall contain a caution that should the financial institution or cash dealer fail without reasonable excuse to comply with all or any provisions of the order, such institution, dealer, officer or employee shall pay a financial penalty in the sum and in the manner directed by the Supreme Court.

22A Disclosure of information[28]

For the purposes of section 22B, unless the context otherwise requires —

"**specified entity**" shall mean a person or entity or group specified as such by a resolution of the security council of the United Nations that the Attorney General has with the consent of Cabinet by notice in the Gazette prescribed.

22B Disclosure[29]

(1) A financial institution shall immediately inform the Transaction Reporting Authority of the existence of any property in its possession or control —

(a) that is owned or controlled, directly or indirectly, by or for a specified entity, including property derived or generated from that property; or

(b) for which there are reasonable grounds to suspect is property of a kind mentioned in paragraph (a).

(2) The Transaction Reporting Authority shall inform the Attorney General or any other appropriate authority of a foreign country, of any information it has about any property under subsection (1).

(3) Information may be given under subsection (2) subject to any conditions that the Transaction Reporting Authority determines.

(4) A financial institution shall inform the Transaction Reporting Authority about every dealing that occurs in the course of its activities and for which there are reasonable grounds to suspect is related to the commission of an act of terrorism.

(5) An "**act of terrorism**" means an act which —

[28] Inserted by Act 15 of 2005

[29] Inserted by Act 15 of 2005

(a) may seriously damage a country or an international organisation;

(b) is intended or can reasonably be regarded as having been intended to —

(i) seriously intimidate a population;

(ii) unduly compel a Government or an international organisation to perform or abstain from performing any act; or

(iii) seriously destabilise or destroy the fundamental, political, constitutional, economic or social structures of a country or an international organisation; and

(c) involves or causes —

(i) an attack upon a person's life which causes death;

(ii) an attack upon the physical integrity of a person;

(iii) the kidnapping of a person;

(iv) extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;

(v) the seizure of an aircraft, a ship or other means of public or goods transport;

(vi) the manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons as well as research into, and development of biological and chemical weapons;

(vii) the release of dangerous substances, or causing of fires, explosions or floods, the effect of which is to endanger human life; or

(viii) interference with or disruption of the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life.

22C Exemption[30]

(1) No civil or criminal proceedings may be brought against a person for making a disclosure or report, under section 22B.

(2) Nothing in section 22B shall require a lawyer to disclose a privileged communication, other than information about a financial transaction recorded for a trust account of the lawyer within the meaning of the Law Practitioners Act.[31]

(3) A person who receives information under section 22B shall not disclose the information or its source except —

(a) for the purposes of —

(i) the enforcement of this Act;

(ii) the detection, investigation or prosecution of an offence under this Act; or

[30] Inserted by Act 15 of 2005

[31] Cap. 07.33

(iii) providing assistance under the Mutual Assistance in Criminal Matters Act;[32] or

(b) in accordance with an order of a court.

(4) Any person who contravenes section 22B shall be guilty of an offence and upon conviction shall be liable to imprisonment for a term not exceeding 15 years.

23 Secrecy obligations overridden

The provisions of this Act shall have effect notwithstanding any obligation as to secrecy or other restriction on disclosure of information imposed by law or otherwise.

24 Immunity where suspicious transaction reported

No action, suit or other proceedings shall lie against any financial institution or cash dealer, or any officer, employee or other representative thereof acting in the ordinary course of the person's employment or representation, in relation to any action taken in good faith pursuant to section 14.

25 Immunity where official powers or functions exercised in good faith

No action, suit, or other proceedings shall lie against the Government, or any officer or other authorised person in respect of anything done by or on behalf of the Government, if done with due diligence and in good faith, in the exercise of any power or the performance of any function under this Act or any Rule or order made thereunder.

26 Restitution of restrained property

Where an investigation has been started against a person for a serious offence and property has been restrained under this Act in relation to that offence —

(a) where the person is not charged in Tonga with that serious offence within a period of 6 months after the property has been restrained;

(b) the person is charged in Tonga with that serious offence but is not convicted; or

(c) a conviction for that serious offence is quashed,

on the application of the person against whom the investigation was started, the Supreme Court shall order restitution of the restrained property:

Provided that on the application of the Attorney General the Court may extend the period in paragraph (a) for a further period not exceeding 6 months.

27 Damages

Nothing in this Act affects the right of a person whose property has been restrained to seek the payment of damages, in cases where the action of the Government involved any abuse of process.

[32] Cap. 10.21

PART III - CONFISCATION

DIVISION 1 - CONFISCATION AND PECUNIARY PENALTY ORDERS

28 Application for confiscation order or pecuniary penalty order

(1) Where a person is convicted of a serious offence, the Attorney General may, not later than 6 months after the conviction, apply to the Supreme Court for one or both of the following orders —

(a) a confiscation order against property that is tainted property in respect of the offence;

(b) a pecuniary penalty order against the person in respect of benefits derived by the person from the commission of the offence.

(2) An application under subsection (1) may be made in respect of one or more than one offence.

(3) Where an application under this section is finally determined, no further application for a confiscation order or a pecuniary penalty order may be made in respect of the offence for which the person was convicted without the leave of the Supreme Court. The Supreme Court shall not give such leave unless it is satisfied that —

(a)

(i) the property or benefit to which the new application relates was identified after the previous application was determined; or

(ii) necessary evidence became available after the previous application was determined; and

(b) it is in the interest of justice leave be granted.

29 Notice of Application

(1) Where the Attorney General applies for a confiscation order against property in respect of a conviction of a serious offence —

(a) the Attorney General shall give no less than 14 days written notice of the application to the person convicted and to any other person who the Attorney General has reason to believe may have an interest in the property or who may be affected by the order;

(b) the person convicted and any other person who claims an interest in the property or who may be affected by the order may appear and adduce evidence at the hearing of the application; and

(c) the Supreme Court may, at any time before the final determination of the application, direct the Attorney General to —

(i) give notice of the application to any person who, in the opinion of the Supreme Court, appears to have an interest in the property;

(ii) publish in a newspaper published and circulating in Tonga, a notice of the application.

(2) Where the Attorney General applies for a pecuniary penalty order against a person convicted of a serious offence —

(a) the Attorney General shall give no less then 14 days written notice of the application to the person convicted; and

(b) the person convicted may appear and adduce evidence at the hearing of the application.

30 Amendment of Application

(1) The Supreme Court hearing an application under section 28(1) may, before the final determination of the application, and on the application of the Attorney General, amend the application to include any other property or benefit upon being satisfied that —

(a) the property or benefit was not reasonably capable of identification when the application was made; or

(b) necessary evidence became available only after the application was originally made.

(2) Where the Attorney General applies to amend an application for a confiscation order and the amendment would have the effect of including additional property in the application for confiscation, he shall give no less than 14 days written notice of the application to amend to any person who he has a reason to believe may have an interest in the property the subject of the application for a confiscation order.

(3) Any person who claims an interest in the property to be included in the application of a confiscation order may appear and adduce evidence at the hearing of the application to amend.

(4) Where the Attorney General applies to amend an application for a pecuniary penalty order against a person and the effect of the amendment would be to include an additional benefit in the application he shall give the person no less than 14 days written notice of the application to amend

31 Procedure on Application

(1) Where an application is made to the Supreme Court for a confiscation order or a pecuniary penalty the Supreme Court may have regard to the transcript of any proceedings against the person convicted of the serious offence.

(2) Where an application is made for a confiscation order or a pecuniary penalty order to the Supreme and where the Court has not, when the application is made, passed sentence on the person for the offence, the Court may defer passing sentence until it has determined the application for the order.

32 Procedure for *in rem* confiscation order where person dies or absconds

(1) Where —

(a) an information has been laid alleging the commission of the offence by a person;

(b) a warrant for the arrest of the person has been issued in relation to that information; and

(c) the person named in the warrant has died or absconded,

the Attorney General may apply to the Supreme Court for a confiscation order in respect of any tainted property.

(2) For the purpose of subsection (1), if reasonable attempts to arrest the person pursuant to the warrant have been unsuccessful during the period of 6 months commencing on the day the warrant was issued, the person shall be deemed to have so absconded on the last day of that period.

(3) Where the Attorney General applies under this section for a confiscation order against any tainted property the Court may, before hearing the application —

(a) direct notice of the application to be given to any person who, in the opinion of the Supreme Court, appears to have an interest in the property or who may be affected by the order.

(b) direct notice of the application to be published in a newspaper published and circulating in Tonga.

33 Confiscation where a person dies or absconds

(1) Subject to section 32(3), where an application is made to the Supreme Court under section 32(1) for a confiscation order and the Court is satisfied that —

(a) any property is tainted property in respect of the offence;

(b) proceedings in respect of a serious offence committed in relation to that property were commenced; and

(c) the accused charged with the offence referred to in subsection (b) has died or absconded,

the Supreme Court may order that the property in the order be confiscated.

(2) The provisions of sections 33, 34, 35 and 36 shall apply with such modifications as are necessary to give effect to this section.

34 Confiscation Order on Conviction

(1) Where, upon application by the Attorney General, the Supreme Court is satisfied that property is tainted property in respect of a serious offence of which a person has been convicted, the Supreme Court may order that property be confiscated.

(2) In determining whether property is tainted property the Supreme Court may infer, in the absence of evidence to the contrary —

(a) that the property was used in or in connection with the commission of the offence for which the person was convicted if it was in the person's possession at the time of, or immediately after, the commission of the offence;

(b)

(i) that the property was derived, obtained or realised as a result of the commission of the offence if it was acquired by the person before, during or within a reasonable time after the period of the commission of the offence of which the person was convicted; and

(ii) the Supreme Court is satisfied that the income of that person from sources unrelated to criminal activity of that person cannot reasonably account for the acquisition of that property.

(3) Where the Supreme Court orders that property, other than money, be confiscated, the Supreme Court shall specify in the order the amount that it considers to be the value of the property at the time when the order is made.

(4) In considering whether a confiscation order should be made under subsection (1) the Supreme Court shall have regard to —

(a) the rights and interests, of any person in the property;

(b) the gravity of the offence concerned;

(c) any hardship that may reasonably be expected to be caused to any person by the operation of the order; and

(d) the use that is ordinarily made of the property, or the use to which the property was intended to be put.

(5) Where the Supreme Court makes a confiscation order, the Supreme Court may give such directions as are necessary or convenient for giving effect to the order.

35 Effect of Confiscation Order

(1) Subject to subsection (2), where a Court makes a confiscation order against any property, the property vests absolutely in the Government by virtue of the order.

(2) Where property ordered to be confiscated is registrable property —

(a) the property vests in the Government in equity but does not vest in the Government at law until the applicable registration requirements have been complied with;

(b) the Government is entitled to be registered as owner of the property;

(c) the Attorney General has power on behalf of the Government to do or authorise the doing of anything necessary or convenient to obtain the registration of the Government as owner, including the execution of any instrument to be executed by a person transferring an interest in property of that kind.

(3) Where the Supreme Court makes a confiscation order against property —

(a) the property shall not, except with the leave of the Court and in accordance with any directions of the Court, be disposed of, or otherwise dealt with, by or on behalf of the Government before the relevant appeal date; and

(b) if, after the relevant appeal date, the order has not been discharged, the property may be disposed of and the proceeds applied or otherwise dealt with in accordance with the direction of the Attorney General.

(4) In this section —

"**registrable property**" means property the right to which is passed by registration in accordance with the provisions of the Land Act;

"**relevant appeal date**" used in relation to a confiscation order made in consequence of a person's conviction of a serious offence means —

(a) the date on which the period allowed by rules of court for the lodging of an appeal against a person's conviction or for the lodging of an appeal against the making of a confiscation order expires without an appeal having been lodged, whichever is the later; or

(b) where an appeal against a person's conviction or against the making of a confiscation order is lodged, the date on which the appeal is finally determined.

36 Voidable Transfers

The Supreme Court may —

(a) before making a confiscation order; and

(b) in the case of property in respect of which a restraining order was made, where the order was served in accordance with section 60,

set aside any conveyance or transfer of the property that occurred after the seizure of the property or the service of the restraining order, unless the conveyance or transfer was made for sufficient consideration to a person acting in good faith and without notice.

37 Protection of Third Parties

(1) Where an application is made for a confiscation order against property, a person who claims an interest in the property may apply to the Supreme Court, before the confiscation order is made, for an order under subsection (2).

(2) If a person applies to the Supreme Court for an order under this section in respect of property and the Court is satisfied on a balance of probabilities —

(a) that the person was not involved in the commission of the offence; and

(b) where the person acquired the interest during or after the commission of the offence, that he acquired the interest —

(i) for sufficient consideration; and

(ii) without knowing, and in circumstance such as not to arouse a reasonable suspicion, that the property was, at the time he acquired it, property that was tainted property,

the Supreme Court shall make an order declaring the nature, extent and value of the person's interests at the time the order is made.

(3) Subject to subsection (4), where a confiscation order has already been made, a person who claims an interest in the property may, before the end of the period of 12 months commencing on the day on which the confiscation order is made, apply under this subsection to the Supreme Court for an order under subsection (2).

(4) A person who —

(a) had knowledge of the application for the confiscation order before the order was made; or

(b) appeared at the hearing of that application,

shall not be permitted to make an application under subsection (3), except with leave of the Supreme Court.

(5) A person who makes an application under subsection (1) or (3) shall give no less than 14 days written notice to the Attorney General, who shall be a party to any proceedings in the application.

(6) An applicant or the Attorney General may in accordance with the Court of Appeal Rules, appeal to the Court of Appeal from an order made under subsection (2).

(7) Any person appointed by the Supreme Court under section 68 shall, on application by any person who has obtained an order under subsection (2), and where the period allowed by the Court of Appeal Rules with respect to the making of appeals has expired or any appeal from that order has been determined —

(a) direct that the property or part thereof to which the interest of the applicant relates, be returned to the applicant; or

(b) direct that an amount equal to the value of the interest of the applicant, as declared in the order, be paid to the applicant.

38 Discharge of Confiscation Order and quashing of conviction

(1) Where the Supreme Court makes a confiscation order against property in reliance on a person's conviction of a serious offence and the conviction is quashed by the Court of Appeal, the person may apply to the Supreme Court for the discharge of the order.

(2) Where a confiscation order is discharged under subsection (1), any person claiming to have had an interest in the property immediately before the making of the

confiscation order may apply to the Supreme Court for the transfer of the interest to himself.

(3) A person who makes an application under subsection (2) shall give no less than 14 days notice to the Attorney General and to the person who applied for the discharge of the order and both shall be parties to the proceedings.

(4) On consideration of any application under subsection (2) the Court shall make an order declaring the nature, extent and value of the person's interest in the property the subject of the order and may take any necessary action to effect the transfer or return of the property including any registration of the interest in the property.

39 Payment instead of a Confiscation Order

Where the Supreme Court is satisfied that a confiscation order should be made in respect of the property of a person convicted of a serious offence but the property or any part thereof or interest cannot be made subject to such an order because —

(a) it cannot, with due diligence be located;

(b) it has been transferred to a third party in circumstances which do not give rise to a reasonable inference that the title or interest was transferred for the purpose of avoiding the confiscation of the property;

(c) it is located outside Tonga;

(d) it has been substantially diminished in value or rendered worthless; or

(e) it cannot be separated from other property with which it has been mingled,

the Supreme Court may, instead of ordering the property or part thereof or interest therein to be confiscated, order the person to pay to Government an amount equal to the value of the property, part or interest.

40 Application of procedure for enforcing fines

Where the Supreme Court orders a person to pay an amount under section 39, that amount shall be treated as if it were a fine imposed upon him in respect of a conviction for a serious offence, and the Supreme Court shall —

(a) notwithstanding anything contained in any other Act, impose in default of the payment of that amount, a term of imprisonment —

(i) of up to 1 year, where the amount does not exceed $5,000;

(ii) of up to 3 years, where the amount exceeds $5,000 but does not exceed $15,000;

(iii) of up to 5 years, where the amount exceeds $15,000; and

(b) direct that the term of imprisonment imposed pursuant to paragraph (a) be served consecutively to any other form of imprisonment imposed on that person, or that the person is then serving.

DIVISION 2 - PECUNIARY PENALTY ORDERS

41 Pecuniary Penalty Order on Conviction

(1) Subject to this section, where the Attorney General applies to the Supreme Court for a pecuniary penalty order against a person in respect of that person's conviction for a serious offence the Court shall, if it is satisfied that the person has benefited from that offence, order him to pay to the Government an amount equal to the value of his

benefit from the offence or such lesser amount as the Court certifies in accordance with section 44(2).

(2) The Supreme Court shall assess the value of the benefits derived by a person from the commission of an offence in accordance with sections 42, 43, 44, and 45.

(3) The Supreme Court shall not make a pecuniary penalty order under this section until the period allowed by the Court of Appeal Rules for the lodging of an appeal against conviction has expired or an appeal against conviction has been finally determined, whichever is the later date.

42 Rules of determining benefit and assessing value

(1) Where a person obtains property as the result of, or in connection with the commission of a serious offence, his benefit is the value of the property so obtained.

(2) Where a person derives an advantage as a result of or in connection with the commission of a serious offence, his advantage shall be deemed to be a sum of money equal to the value of the advantage so derived.

(3) In determining whether a person has benefited from the commission of a serious offence or from that offence and other serious offences the Supreme Court shall, unless the contrary is proved, deem —

(a) all property appearing to the Supreme Court to be —

(i) held by the person on the day on which the application is made; and

(ii) held by the person at any time —

(aa) within the period between the day the serious offence, or the earliest serious offence, was committed and the day on which the application is made; or

(bb) within the period of 6 years immediately before the day on which the application is made,

whichever is the longer,

to be property that came into the possession or under the control of the person by reason of the commission of that serious offence or those serious offences of which the person was convicted;

(b) any expenditure by the person since the beginning of the longer period in paragraph (a)(ii) to be expenditure met out of payments received by him as a result of, or in connection with, the commission of that serious offence or those serious offences; and

(c) any property received or deemed to have been received by the person at any time as a result of, or in connection with the commission by him of that serious offence or those serious offences to be property received by him free of any interest of any other person therein.

(4) Where a pecuniary penalty order has been previously made against a person, in assessing the value of any benefit derived by him from the commission of the serious offence, the Supreme Court shall leave out of account any benefits that are shown to have been taken into account in determining the amount to be recovered under the previous order.

(5) If evidence is given at the hearing of the application that the value of the person's property at any time after the commission of the serious offence exceeded the value of the person's property before the commission of the offence, then the Supreme Court shall treat the value of the benefit as being not less than the amount of that

excess, unless the person satisfies the Court that the whole or part of the excess was due to causes unrelated to the commission of the serious offence.

43 Statements relating to benefits from commission of serious offences

(1) Where —

(a) a person has been convicted of a serious offence and the Attorney General tenders to the Supreme Court a statement of any matters relevant to —

(i) determining whether the person has benefited from the offence or from any other serious offence of which he is convicted in the same proceedings or which is taken into account in determining his sentence; or

(ii) an assessment of the value of the person's benefit from the offence or any other serious offence of which he is convicted in the same proceedings or which is taken into account; and

(b) the person accepts any allegation in the statement,

the Supreme Court may, for the purposes of so determining or making that assessment, treat his acceptance as conclusive of the matters to which it relates.

(2) Where —

(a) a statement is tendered under subsection (1)(a); and

(b) the Supreme Court is satisfied that a copy of that statement has been served on the person,

the Supreme Court may require the person to indicate to what extent he accepts each allegation in the statement and, so far as the person does not accept any allegation, to indicate any matters he proposes to rely on to challenge the allegation.

(3) Where the person fails to comply with a requirement under subsection (2), he may be treated for the purposes of this section as having accepted every allegation in the statement other than an allegation in respect of which he complied.

(4) Where —

(a) the person tenders to the Supreme Court a statement as to any matters relevant to determining the amount that might be realised at the time the pecuniary penalty order is made; and

(b) the Attorney General accepts any allegation in the statement,

the Supreme Court may, for the purposes of that determination, treat the acceptance by the Attorney General as conclusive of the matters to which it relates.

(5) An acceptance by a person under this section that he received any benefits from the commission of a serious offence shall be admissible in proceedings for any offence.

44 Amount recovered under Pecuniary Penalty Order

(1) Subject to subsection (2), the amount to be recovered from a person under a pecuniary penalty order shall be the amount which the Supreme Court assesses to be the value of the person's benefit from the serious offence, or if more than one, all the offences in respect of which the order may be made.

(2) Where the Supreme Court is satisfied about any matter relevant for determining the amount which might be realised at the time the pecuniary penalty order is made (whether by acceptance under section 43 or otherwise), the Court shall issue a certificate giving the Court's opinion as to the matters concerned if satisfied that the

amount that might be realised at the time the pecuniary penalty order is made is less than the amount that the Court assesses to be the value of the person's benefit from the offence, or if more than one, all the offences in respect of which the pecuniary penalty order may be made.

45 Variation of Pecuniary Penalty Order

Where the Supreme Court makes a pecuniary penalty order against a person in relation to a serious offence and —

(a) in calculating the amount of the pecuniary penalty order, the Supreme Court took into account a confiscation order of the property or a proposed confiscation order in respect of property; and

(b) an appeal against confiscation or the confiscation order is allowed, or the proceedings from the proposed confiscation order terminate without the proposed confiscation order being made,

the Attorney General may apply to the Supreme Court for a variation of the pecuniary penalty order to include the value of the property not so confiscated and the Court may, if it considers it appropriate to do so, increase the order accordingly.

46 Lifting the corporate veil

(1) In assessing the value of benefits derived by a person from the commission of a serious offence, the Supreme Court may treat as part of the benefits derived by the person any property that, in its opinion is subject to the effective control of the person, whether or not he has —

(a) any legal or equitable interest in the property; or

(b) any right, power or privilege in connection with the property.

(2) Without prejudice to the generality of subsection (1), the Supreme Court may have regard to —

(a) shares in, debentures over or directorships in any company that has an interest, whether direct or indirect, in the property, and for this purpose the Supreme Court may order the investigation and inspection of the books of a named company;

(b) any trust that has any relationship to the property;

(c) any relationship whatsoever between the persons having an interest in the property or in companies of the kind referred to in paragraph (a) or a trust of the kind referred to in paragraph (b), and any other persons.

(3) Where the Supreme Court, for the purposes of making a pecuniary penalty order against a person, treats particular property as the person's property pursuant to subsection (1), the Court may, on application by the Attorney General, make an order declaring that the property is available to satisfy the order.

(4) Where the Supreme Court declares that property is available to satisfy a pecuniary penalty order —

(a) the order may be enforced against the property as if the property were the property of the person against whom the order is made; and

(b) a restraining order may be made in respect of the property as if the property were property of the person against whom the order is made.

(5) Where the Attorney General makes an application for an order under subsection (3) that property is available to satisfy a pecuniary penalty order against a person —

(a) the Attorney General shall give written notice of the application to the person and to any person who the Attorney General has reason to believe may have an interest in the property; and

(b) the person and any person who claims an interest in the property may appear and adduce evidence at the hearing.

47 Enforcement of Pecuniary Penalty Orders

Where the Supreme Court orders a person to pay an amount under a pecuniary penalty order, the provisions of section 39 shall apply with such modifications as the Court may determine.

48 Discharge of Pecuniary Penalty Orders

A pecuniary penalty order shall be discharged —

(a) if the conviction of the serious offence or offences in reliance on which the order was made is or is taken to be quashed and no conviction for the offence or offences is substituted;

(b) if the order is quashed; or

(c) if the order is satisfied by payment of the amount due under the order.

DIVISION 3 - CONTROL OF PROPERTY

49 Powers to search for and seize tainted property

(1) A police officer may —

(a) search a person for tainted property; or

(b) enter upon land or upon or into premises and search the land or premises for tainted property and seize any property found in the course of the search that the police officer believes, on reasonable grounds to be tainted property.

(2) Any search or seizure made under subsection (1) shall only be made —

(a) with the consent of the person or the occupier of the land or premises as the case may be;

(b) under warrant issued under section 51; or

(c) under section 52.

50 Police searches

Where a police officer searches a person under the provisions of this Division, he may search —

(a) the clothing that is being worn by the person; and

(b) any property in, or apparently in, the person's immediate control:

Provided that a female shall only be searched by a female officer unless the search is made by means of any mechanical, electronic or other similar device.

51 Search Warrants in relation to tainted property

(1) Where a police officer has reasonable grounds for suspecting that there is, or may be within the next 72 hours, tainted property of a particular kind —

(a) on a person;

(b) in the clothing that is being worn by a person;

(c) otherwise in a person's immediate control; or

(d) upon land or upon or in any premises,

the police officer may lay before a magistrate an information on oath setting out those grounds and apply for the issue of a warrant to search the person, the land or the premises as the case may be, for tainted property of that kind.

(2) Where an application is made under subsection (1) for a warrant to search a person, land or premises, the magistrate may, subject to subsection (4) issue a warrant authorising a police officer (whether or not named in the warrant) with such assistance and by such force as is necessary and reasonable —

(a) to search the person for tainted property of that kind;

(b) to enter upon the land or in or upon any premises and to search the land or premises for tainted property of that kind; and

(c) to seize property found in the course of the search that the police officer believes on reasonable grounds to be tainted property of that kind.

(3) A warrant may be issued under subsection (2) in relation to tainted property, whether or not an information has been laid in respect of the relevant offence.

(4) Where a summons has not been issued in respect of the relevant offence at the time when the application for the warrant is made, a magistrate shall not issue a warrant under subsection (2) unless he is satisfied that —

(a) an application for a summons in respect of the relevant offence within 48 hours shall be made; and

(b) the property described in the warrant is tainted property.

(5) A warrant issued under this section shall state —

(a) the purpose for which it is issued, including a reference to the nature of the relevant offence;

(b) a description of the kind of property alleged to be tainted;

(c) a time at which the warrant ceases to be in force; and

(d) whether entry is authorised to be made at any time of the day or night or during specified hours.

(6) If during the course of searching under a warrant issued under this section, a police officer finds —

(a) property that the police officer believes on reasonable grounds to be tainted property other than that specified in the warrant; or

(b) any thing the police officer believes on reasonable grounds will afford evidence of the commission of a serious offence,

the police officer may seize that property or thing.

52 Search Warrants may be granted by telephone

(1) Where by reason of urgency a police officer considers it necessary to do so, he may make application by telephone or other means of communication for a search warrant under section 51.

(2) A magistrate, to whom an application for the issue of a warrant is made by telephone or other means of communication, may sign a warrant if he is satisfied of the identity

of the police officer and that it is necessary to do so, and shall inform the police officer of the terms of the warrant so signed. The police officer shall complete a form of warrant in the terms furnished by the magistrate and produce that warrant to the person named therein.

(3) The police officer to whom a warrant is granted by telephone or other means of communication shall, not later than the next working day following the execution of the warrant, give the magistrate a sworn affidavit of the reasons for his application and the form of warrant completed by him.

53 Searches in emergencies

(1) Where a police officer suspects on reasonable grounds that —

(a) particular property is tainted property;

(b) it is necessary to exercise the power of search and seizure in order to prevent the concealment, loss or destruction of the property; and

(c) the circumstances are so urgent that they require immediate exercise of the power without the authority of a warrant or the order of a court,

the police officer may search a person, enter upon land, or upon or into premises and search for and seize any property he suspects is tainted property.

(2) If during the course of a search conducted under this section, a police officer finds any thing he believes on reasonable grounds will afford evidence of the commission of a criminal offence, he may seize that property or thing.

54 Record of Property Seized

A police officer who seizes property under section 51 or 53 shall provide a list of the property seized to the person who appears to be in possession of such property at the time at which it is seized and shall take reasonable care to ensure that the property is preserved.

55 Return of Seized Property

(1) Where property has been seized under section 51 or 53 (otherwise than because it may afford evidence of the commission of an offence), a person who claims an interest in the property may apply to the Supreme Court for an order that the property be returned to that person.

(2) Where a person makes an application under subsection (1) and the Supreme Court is satisfied that —

(a) the person is entitled to possession of the property;

(b) the property is not tainted property; and

(c) the person in respect of whose conviction, charging or proposed charging the seizure of the property was made has no interest in the property,

the Court shall order the return of the property to that person.

56 Search for and Seizure of tainted property in relation to foreign offences

Where a foreign State requests assistance to locate or seize property suspected to be tainted property in respect of an offence within its jurisdiction, and the Attorney General has granted the request for assistance from a foreign State under section 4 of the Mutual

Assistance in Criminal Matters Act, the provisions of sections 49 to 55 apply *mutatis mutandis*.

DIVISION 4 - RESTRAINING ORDERS

57 Application for Restraining Order

(1) The Attorney General may apply to the Supreme Court for a restraining order against any realisable property held by a defendant or specified realisable property held by a person other than the defendant.

(2) An application for a restraining order may be made ex-parte and shall be in writing and accompanied by an affidavit stating —

(a) where the defendant has been convicted of a serious offence, the serious offence for which he was convicted, the date of the conviction, the court before which the conviction was obtained and whether an appeal has been lodged against the conviction;

(b) where the defendant has not been convicted of a serious offence, the serious offence for which he is charged or about to be charged and the grounds for believing that the defendant committed the offence;

(c) a description of the property in respect of which the restraining order is sought;

(d) the name and address of the person who is believed to be in possession of the property;

(e) the grounds for the belief that the property is tainted property in relation to the offence or the grounds for the belief that the defendant derived a benefit directly or indirectly from the commission of the offence;

(f) where the application seeks a restraining order against property of a person other than the defendant, the grounds for the belief that the property is tainted property in relation to the offence and is subject to the effective control of the defendant; and

(g) the grounds for the belief that a confiscation order or a pecuniary penalty order may be or is likely to be made under this Part in respect of the property.

58 Restraining Orders

(1) Subject to this section, where the Attorney General applies to the Court for a restraining order against property and the Supreme Court is satisfied that —

(a) the defendant has been convicted of a serious offence, or has been charged or is about to be charged with a serious offence;

(b) where the defendant has not yet been convicted of a serious offence, there are reasonable grounds for believing that the defendant committed the offence;

(c) there is reasonable cause to believe that the property is tainted property in relation to an offence, or that the defendant derived a benefit directly or indirectly from the commission of the offence;

(d) where the application seeks a restraining order against property of a person other than the defendant, there are reasonable grounds for believing that the property is tainted property in relation to an offence and that the property is subject to the effective control of the defendant; and

(e) there are reasonable grounds for believing that a confiscation order or a pecuniary penalty order is likely to be made under this Part in respect of the property.

(2) A restraining order under subsection (1) may —

(a) prohibit the defendant or any person from disposing of, or otherwise dealing with, the property or such part thereof or interest therein as is specified in the order, except in such manner as may be specified in the order; and

(b) at the request of the Attorney General, where the Supreme Court is satisfied that the circumstances so require —

(i) direct the Attorney General or such other person as the Supreme Court may appoint, to take custody of the property or such part thereof as is specified in the order and to manage or otherwise deal with all or any part of the property in accordance with the directions of the Court; and

(ii) require any person having possession of the property to give possession thereof to the Attorney General or to the person appointed under clause (i) to take custody and control of the property.

(3) A restraining order under subsection (1) may be made subject to such conditions as the Supreme Court thinks fit and, without limiting the generality of this subsection, may make provision for meeting out of the property or a specified part of the property, any or all of the following —

(a) the defendant's reasonable living expenses (including the reasonable living expenses of the defendant's dependants, if any) and reasonable business expenses;

(b) the person's reasonable expenses in defending the criminal charge and any proceedings under this Division; and

(c) any specified debt incurred by the defendant in good faith.

(4) In determining whether there are reasonable grounds for believing property is subject to the effective control of the defendant, the Supreme Court may have regard to the matters referred to in section 46.

(5) Where the Attorney General or other person appointed under subsection (2)(b)(i) is given a direction in relation to any property, he may apply to the Supreme Court for directions on any question respecting the management or preservation of the property under his control.

(6) The Supreme Court may order that any application under section 57 shall be served on any person interested in the application and such person shall have the right to appear at the hearing.

(7) When the application is made under section 57(1) on the basis that a person is about to be charged, any order made by the Supreme Court shall lapse if the person is not charged —

(a) where the offence is an offence against the law of Tonga, within 2 days of the making of the order; and

(b) where the offence is an offence against the law of a foreign State, within 20 days of the making of the order.

59 Undertaking by the Government of Tonga

Before making an order under section 58(1), the Supreme Court may require the Attorney General to give such undertakings on behalf of the Government of Tonga as the Court

considers appropriate with respect to the payment of damages or costs, or both, in relation to the making and execution of the order.

60 Notice of Application for Restraining Order

Before making a restraining order the Supreme Court may require notice to be given to, and may hear, any person who, in its opinion, appears to have an interest in the property, unless the Court is of the opinion that giving such notice before making the order would result in the disappearance, dissipation or reduction in value of the property.

61 Service of Restraining Order

A copy of a restraining order shall be served on a person affected by the order in such manner as the Supreme Court directs or as may be prescribed by rules of court.

62 Registration of Restraining Order

(1) A copy of a restraining order which affects land in Tonga shall be registered with the Registrar of Lands.

(2) A restraining order is of no effect with respect to registered land unless it is registered as a charge under the Land Act.

(3) Where particulars of a restraining order are registered under the Land Act, a person who subsequently deals with the property shall, for the purposes of section 63 be deemed to have notice of the order at the time of the dealing.

63 Contravention of Restraining Order

(1) A person who knowingly contravenes a restraining order by disposing of or otherwise dealing with property that is subject to the restraining order commits an offence and is liable upon conviction to —

(a) a fine of up to $10,000 or imprisonment for a period of up to 1 year or both; or

(b) a fine of up to $50,000 in the case of a body corporate.

(2) Where a restraining order is made against property and the property is disposed of, or otherwise dealt with, in contravention of the restraining order, and the disposition or dealing was for insufficient consideration or in favour of a person who had not acted in good faith and without notice, the Attorney General may apply to the Supreme Court for an order that the disposition or dealing be set aside.

(3) Where the Attorney General makes an application under subsection (2) in relation to a disposition or dealing, the Supreme Court may —

(a) set aside the disposition or dealing as from the day on which the disposition or dealing took place; or

(b) set aside the disposition or dealing from the day of the order under this subsection and declare the respective rights of any persons who acquired interests in the property on or after the day on which the disposition or dealing took place and before the day of the order under this subsection.

64 Duration of Restraining Order

A restraining order remains in force until —

(a) it is discharged, revoked or varied;

(b) 6 months from the date on which it is made or such later time as the Supreme Court may determine; or

(c) a confiscation order or a pecuniary penalty order, as the case may be, is made in respect of property which is the subject of the order.

65 Review of Restraining Orders

(1) A person who has an interest in property in respect of which a restraining order was made may, at any time, apply to the Supreme Court for an order under subsection (4).

(2) An applicant under subsection (1) shall give to the Attorney General at least 3 working days notice in writing of the application.

(3) The Supreme Court may require notice of the application to be given to, and may hear, any person who in the opinion of the Court appears to have an interest in the property.

(4) On an application under subsection (1) the Supreme Court may revoke or vary the order or make the order subject to such conditions as the Court thinks fit. For the purposes of this subsection the Court may —

(a) require the applicant to enter into recognizances;

(b) vary the order to permit the payment of reasonable living expenses of the applicant, including his dependants, if any, and reasonable legal or business expenses of the applicant.

(5) An order under subsection (4) shall only be made if the Supreme Court is satisfied that —

(a) the applicant is the lawful owner of the property or is entitled to lawful possession thereof, and is innocent of any complicity in the commission of a serious offence or of any collusion in relation to such offence; and

(b) the property will no longer be required for the purposes of any investigation or as evidence in any proceedings.

66 Extension of Restraining Orders

(1) The Attorney General may apply to the Supreme Court that made a restraining order for an extension of the period of the operation of the order.

(2) Where the Attorney General makes an application under subsection (1), the Court may extend the operation of a restraining order for a specified period, if it is satisfied that a confiscation order may be made in respect of the property or part thereof or that a pecuniary penalty order may be made against the person.

DIVISION 5 - REALISATION OF PROPERTY

67 Realisation of Property

(1) Where —

(a) a pecuniary penalty order is made;

(b) the order is not subject to appeal; and

(c) the order is not discharged,

the Supreme Court may, on an application by the Attorney General, exercise the powers conferred upon the Court by this section.

(2) The Court may appoint a receiver in respect of realisable property.

(3) The Court may empower a receiver appointed under subsection (2) to take possession of any realisable property subject to such conditions or exceptions as may be specified by the Court.

(4) The Court may order any person having possession of realisable property to give possession of it to any such receiver.

(5) The Court may empower any such receiver to realise any realisable property in such manner as the Court may direct.

(6) The Court may order any person holding an interest in realisable property to make such payment to the receiver in respect of any beneficial interest held by the defendant or, as the case may be, the recipient of a gift caught by this Act as the Court may direct, and the Court may, on the payment being made, by order transfer, grant or extinguish any interest in the property.

(7) The Court shall not, in respect of any property, exercise the powers conferred by subsections (3), (4), (5) or (6), unless a reasonable opportunity has been given for persons holding any interest in the property to make representations to the Court.

68 Application of proceeds of realisation and other sums

(1) Subject to subsection (2), the following property in the hands of a receiver appointed under section 58 or 67, that is to say —

(a) the proceeds of the realisation of any property under section 67; and

(b) any other sums, being property held by the defendant,

shall, after such payments, if any, as the Supreme Court may direct have been made out of those sums, be payable to the Registrar of the Court and be applied on the defendant's behalf towards the satisfaction of the pecuniary penalty order in the manner provided by subsection (3).

(2) If, after the amount payable under the confiscation order has been fully paid, any such sums remain in the hands of such a receiver, the receiver shall distribute those sums —

(a) among such of those persons who held property which has been realised under this Part; and

(b) in such proportions,

as the Court may direct, after giving a reasonable opportunity for those persons to make representations to the Court.

(3) Property received by the Registrar of the Supreme Court on account of an amount payable under a confiscation order shall be applied as follows —

(a) if received by him from a receiver under subsection (1), it shall first be applied in payment of the receiver's remuneration and expenses;

(b) then it shall be applied toward the reimbursement of the expenses incurred by the Government, such amount being paid into General Revenue; and

(c) the balance shall be paid into an interest bearing bank account called the Law Enforcement Fund Account which shall be —

(i) opened and maintained by the Attorney General for the purpose of depositing and paying out funds to be applied for law enforcement and related purposes; and

(ii) subject to annual audit to be carried out by the Auditor General.

69 Exercise of powers over property

(1) The following provisions of this section apply to the powers conferred on the Supreme Court by sections 58, 65, 66 and 67, or on a receiver appointed under section 58(2)(b) or 67(2).

(2) Subject to the following provisions of this section, the powers shall be exercised to make available for satisfying the pecuniary penalty order or, as the case may be, any pecuniary penalty order that may be made in the defendant's case, the value for the time being of realisable property held by any person by the realisation of such property.

(3) In the case of realisable property held by a person to whom the defendant has directly or indirectly made a gift caught by this Act, the powers shall be exercised to realise no more than the value for the time being of the gift.

(4) The powers shall be exercised to allow any person other than the defendant or the recipient of any such gift to retain or recover the value of any property held by him.

(5) In exercising those powers, no account shall be taken of any obligations of the defendant or of the recipient of any such gift which conflicts with the obligation to satisfy the confiscation order.

70 Paramountcy of this Part in bankruptcy or winding up

(1) Where a person who holds realisable property is adjudged bankrupt —

(a) property for the time being subject to a restraining order made before the order adjudging him bankrupt; and

(b) any proceeds of property realised by virtue of section 67(5) or (6) for the time being in the hands of a person appointed under section 58(2)(b) or 67(2),

is excluded from the property of the bankrupt for the purposes of any proceedings to recover property upon bankruptcy.

(2) Where a person has been adjudged bankrupt, the powers conferred on the Supreme Court by sections 58 and 67 or on a person appointed under section 58(2)(b) or 67(2) shall not be exercised in relation to property for the time being comprised in the property of the bankrupt for the purposes of the recovery of property upon bankruptcy.

(3) Where, in the case of a debtor, a receiver stands appointed and any property of the debtor is subject to a restraining order under this Act, the powers conferred on the receiver by virtue of that receivership do not apply to property for the time being subject to such restraining order.

(4) Where a person is adjudged bankrupt and has directly or indirectly made a gift caught by this Part —

(a) no order shall be made in virtue of the bankruptcy in respect of the making of the gift at any time when the person has been charged with a serious offence and the proceedings have not been concluded by the acquittal of the defendant or discontinuance of the proceedings, or when property of the person to whom

the gift was made is subject to a restraining order or a charging order made under a bankruptcy; and

(b) any order made in virtue of any bankruptcy after the conclusion of the proceedings shall take into account any realisation under this Part of property held by the person to whom the gift was made.

71 Winding up of company holding realisable property

(1) Where realisable property is held by a company and an order for the winding up of the company has been made or a resolution has been passed by the company for its voluntary winding up, the functions of the liquidator or any provisional liquidator shall not be exercisable in relation to —

(a) property for the time being subject to a restraining order made before the relevant time; or

(b) any proceeds of property realised by virtue of section 67(5) or (6) for the time being in the hands of a person appointed under section 58(2)(b) or 67(2),

but there shall be payable out of such property any expenses (including the remuneration of the liquidator or provisional liquidator) properly incurred in the winding up in respect of the property.

(2) Where, in the case of a company, such an order has been made or such a resolution has been passed, the powers conferred on the Supreme Court by section 58 or 67 shall not be exercised in relation to any realisable property held by the company in relation to which the functions of the liquidator are exercisable —

(a) that inhibit him from exercising those functions for the purpose of distributing any property held by the company to the company's creditors; or

(b) that prevent the payment out of any property of expenses (including the remuneration of the liquidator or any provisional liquidator) properly incurred in the winding up in respect of the property.

(3) Subsection (2) does not affect the enforcement of a charging order —

(a) made before the relevant time; or

(b) on property which was subject to a restraining order at the relevant time.

(4) Nothing in the Companies Act[33] shall be taken as restricting, or enabling the restriction of, the exercise of the powers conferred on the Supreme Court by section 58 or 67.

(5) In this section —

(a) "company" means any company which may be wound up under the Companies Act,

(b) "liquidator" includes any person appointed to the office of liquidator (whether provisionally or otherwise) under the Companies Act; and

(c) "the relevant time" means —

(i) where no order for the winding up of the company has been made, the time of the passing of the resolution for voluntary winding up;

(ii) where such an order has been made and before the presentation of the petition for the winding up of the company by the Supreme Court such a

[33] Cap. 40.06

resolution had been passed by the company, the time of the passing of the resolution; and

(iii) in any other case where such an order has been made, the time of the making of the order.

DIVISION 6 - PRODUCTION ORDERS AND OTHER INFORMATION GATHERING POWERS

72 Production Orders

(1) Where a person has been charged with or convicted of a serious offence and a police officer has reasonable grounds for suspecting that any person has possession or control of —

(a) a document relevant to identifying, locating or quantifying property of the person charged or convicted, or relevant to identifying or locating a document necessary for the transfer of property of such person; or

(b) a document relevant to identifying, locating or quantifying tainted property in relation to the offence, or relevant to identifying or locating a document necessary for the transfer of tainted property in relation to the offence,

the police officer may apply ex parte and in writing to a Judge in chambers for a production order under subsection (2) against the person suspected of having possession or control of a document referred to in this subsection. The application shall be supported by an affidavit.

(2) The Judge may, if he considers there are reasonable grounds for so doing, make an order that the person produce to a police officer, at a time and place specified in the order, any documents referred to in subsection (1), provided that an order under this subsection shall not require the production of bankers' books.

(3) A police officer to whom documents are produced may —

(a) inspect the documents;

(b) make copies of the documents; or

(c) retain the documents as long as is reasonably necessary for the purposes of this Act.

(4) Where a police officer retains documents produced to him for more than 48 hours, he shall supply a copy of the documents to the person who produced them.

(5) A person ordered to produce documents under this section shall not refuse on the ground that —

(a) the document might tend to incriminate the person or make the person liable to a penalty; or

(b) the production of the document would be in breach of an obligation (whether imposed by enactment or otherwise) of the person not to disclose the existence or contents of the document.

73 Evidential value of information

(1) Where a person produces a document pursuant to an order under this section, the production of the document, or any information, document or things obtained as a direct or indirect consequence of the production of the document, is not admissible against the person in any criminal proceedings except proceedings under section 74.

(2) For the purposes of subsection (1), proceedings on an application for a restraining order, a confiscation order or a pecuniary penalty order are not criminal proceedings.

74 Failure to comply with a production order

Where a person is required by a production order to produce a document to a police officer, the person commits an offence if he —

(a) contravenes the order without reasonable cause; or

(b) produces or makes available a document known by the person to be false or misleading in a material particular and does not so indicate to the police officer or provide to the police officer any correct information of which the person is in possession,

and shall upon conviction be liable to imprisonment of up to 1 year or to a fine not exceeding $10,000 or both, and in the case of a body corporate to a fine not exceeding $50,000.

75 Power to search for and seize documents relevant to locating property

A police officer may —

(a) enter upon land or upon or into premises;

(b) search the land or premises for any document of the type described in section 72(1); and

(c) seize any document found in the course of that search that the police officer believes, on reasonable grounds, to be a relevant document in relation to a serious offence:

provided that the entry, search and seizure is made with the consent of the occupier of the land or the premises; or under warrant issued under section 76.

76 Search Warrant for location of documents relevant to locating property

(1) Where —

(a) a person has been charged or convicted of a serious offence; or

(b) the police officer has reasonable grounds for suspecting that there is, or may be within the next 72 hours, upon any land or upon or in any premises, a document referred to in section 72(1) in relation to the offence,

the police officer may make application supported by information on oath to a magistrate for a search warrant in respect of that land or those premises.

(2) Where an application is made under subsection (1), the magistrate may subject to subsection (4), issue a warrant authorising any police with such assistance and by such force as is necessary and reasonable —

(a) to enter upon the land upon or into any premises and to search the land or premises for documents of that kind; and

(b) to seize documents found in the course of the search that the police officer believes on reasonable grounds to be documents of that kind.

(3) A magistrate shall not issue a warrant under subsection (2) unless he is satisfied that —

(a) a production order has been given in respect of the document and has not been complied with;

(b) a production order in respect of the document would be unlikely to be effective;

(c) the investigation for the purposes of which the search warrant is being sought might be seriously prejudiced if the police officer does not gain immediate access to the document without any notice to any person; or

(d) the document involved cannot be identified or described with sufficient particularity to enable a production order to be obtained.

(4) A warrant issued under this section shall state —

(a) the purpose for which it is issued, including a reference to the nature of the relevant offence;

(b) a description of the kind of documents authorised to be seized;

(c) a time at which the warrant ceases to be in force; and

(d) whether entry is authorised to be made at any time of the day or night or during specified hours.

(5) If during the course of searching under a warrant issued under this section, a police offence finds —

(a) a document of the type described in section 72(1) that the police officer believes on reasonable grounds to relate to the relevant offence, or to another serious offence; or

(b) any thing the police officer believes on reasonable grounds will afford evidence as to the commission of a serious offence,

the police officer may seize that document or thing.

77 Probation orders and search warrants in relation to foreign offences

Where a foreign State requests assistance to locate or seize property suspected to be tainted property in respect of an offence within its jurisdiction, the provisions of sections 70 and 76 apply *mutatis mutandis*, provided that the Attorney General has, under section 4(2) of the Mutual Assistance in Criminal Matters Act, granted the request.

78 Monitoring Orders

(1) A police officer may apply ex parte for a monitoring order (in this section called a monitoring order). The application shall be in writing and supported by an affidavit.

(2) A monitoring order shall —

(a) direct a financial institution to disclose information obtained by the institution about transactions conducted through an account held by a particular person with the institution;

(b) not have retrospective effect; and

(c) only apply for the period specified not exceeding 3 months from the date the order is made.

(3) A Judge shall not make a monitoring order unless he is satisfied that there are reasonable grounds for suspecting that the person in respect of whose account the order is sought —

(a) has committed or has been involved in the commission or is about to commit or be involved in the commission of a serious offence; or

(b) has benefited directly or is about to benefit directly or indirectly from the commission of a serious offence.

(4) A monitoring order shall specify —

(a) the name or names in which the account is believed to be held; and

(b) the class of information that the institution is required to give.

(5) Where a financial institution knowingly —

(a) contravenes the monitoring order without reasonable cause; or

(b) provides false or misleading information under the order,

the institution commits an offence and is liable upon conviction, to a fine not exceeding $100,000.

79 Monitoring Orders not to be disclosed

(1) Where a financial institution is or has been subject to a monitoring order no person shall disclose the existence or operation of the order to any person except —

(a) an officer or agent of the institution for the purpose of complying with the order;

(b) a legal adviser for the purpose of obtaining legal advice or representation in respect of the order; or

(c) a police officer authorised in writing to receive the information.

If the institution fails to comply with this subsection, the institution or person commits an offence and is liable upon conviction, in the case of a natural person, to imprisonment for a period not exceeding 1 year or a fine of up to $10,000 or both, and in the case of the institution a fine up to $50,000.

(2) A person described in subsections (1)(a), (b) or (c) shall not disclose the existence or operation of a monitoring order except to another such person, and may do so only for the purposes of the performance of the person's duties or functions. Any person who fails to comply with this subsection is liable upon conviction to imprisonment for a period not exceeding 1 year or a fine of up to $10,000 or both.

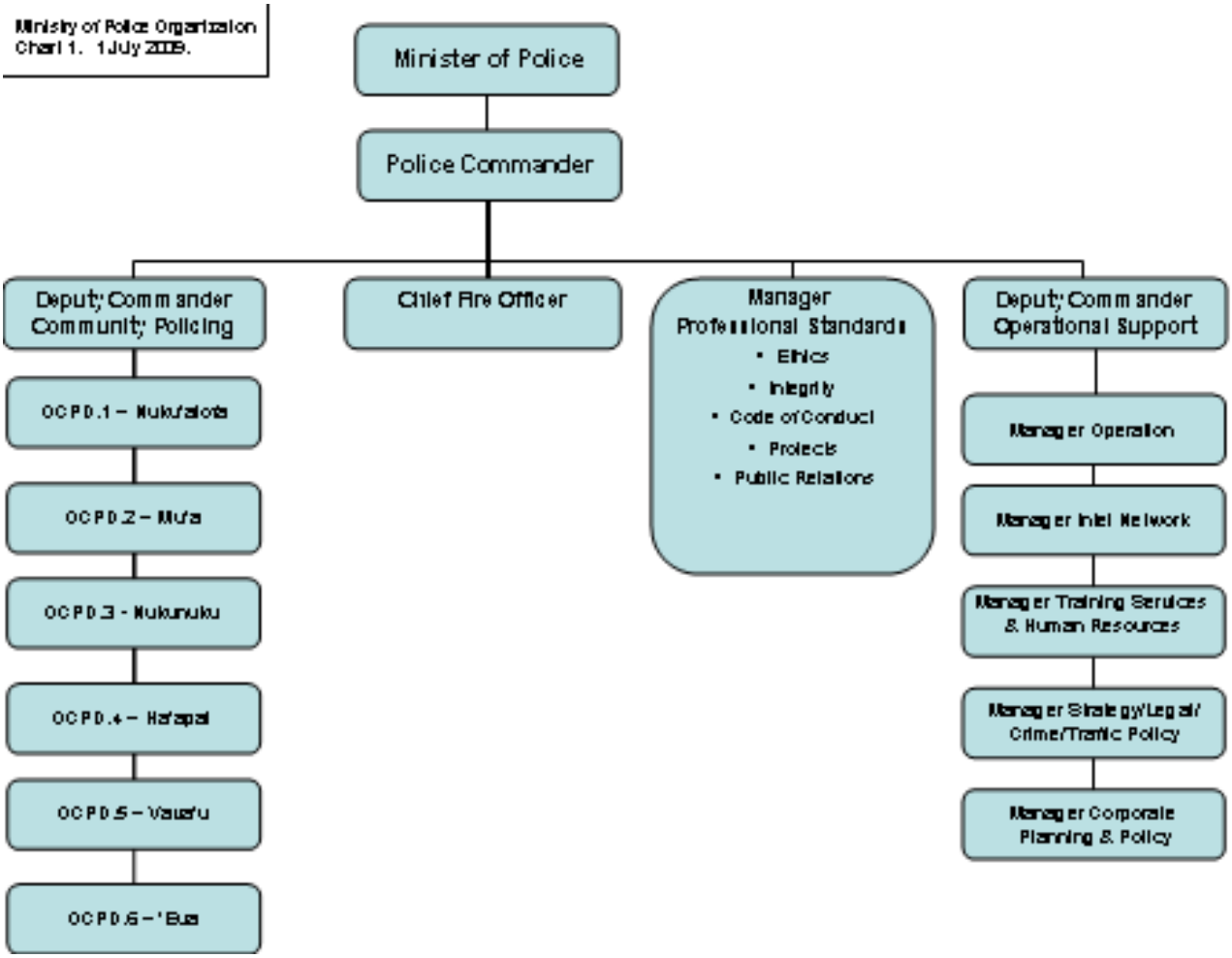
(3) Nothing in this section prevents the disclosure of information concerning a monitoring order for the purposes of or in connection with legal proceedings or in the course of proceedings before a court, provided that nothing in this section shall be construed as requiring a legal adviser to disclose to any court the existence or operation of a monitoring order.

80 Regulations

The Attorney General may, with the consent of Cabinet make Regulations for the effective carrying out of the provisions of this Act.

ANNEX 5

Ministry of Police Organisational Chart



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