16 September 2016

AML/CFT Consultation Team **By email**
Ministry of Justice
WELLINGTON

Email: aml@justice.co.nz

Dear Sir/Madam

RE: "IMPROVING NEW ZEALAND'S ABILITY TO TACKLE MONEY LAUNDERING AND TERRORIST FINANCING"

1. INTRODUCTION

1.1 This is Russell McVeagh's submission on the Ministry of Justice's August 2016 consultation paper "Improving New Zealand's ability to tackle money laundering and terrorist financing" ("**Consultation Paper**"). It represents the views of this firm, and not the views of any of its clients. The focus of this submission is Part 3 (Lawyers), Part 4, and Part 5 of the Consultation Paper.

1.2 All enquiries on this submission may be directed to:

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1.3 We would also be happy to meet with the Ministry to discuss our submission further if that would assist.

2. SUMMARY

2.1 As lawyers for some of New Zealand's largest businesses, Russell McVeagh regards this country's anti-money laundering and countering financing of terrorism ("**AML/CFT**") regime as an essential component that contributes towards maintaining and enhancing confidence in New Zealand's financial system and its international reputation. The AML/CFT regime importantly facilitates the detection and deterrence of money laundering and the financing of terrorism. Russell McVeagh accordingly supports the expansion of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 ("**Act**") to lawyers. As a guiding principle, this submission is informed by our view that it is important that the legislation is as clear and unambiguous as possible, so that it provides lawyers certainty, both in respect of which activities will trigger obligations under the Act, and how those obligations are then to be discharged.

2.2 In summary, Russell McVeagh submits that:

(a) the proposed scope of the Act's application to lawyers is unduly, and perhaps unintentionally, broad;

(b) in general, the appropriate time at which customer due diligence ("**CDD**") is to be done is when the client instructs the lawyer in respect of a transaction to which the Act applies;

(c) an implementation period of two years or more after a Bill is passed is appropriate;

(d) the existing mechanism in the Act is inadequate to protect privilege and should be replaced by incorporation of the concepts of privilege in the Evidence Act 2006; and

(e) the introduction of a single supervisor for all Phase One and Two entities would have significant benefits for New Zealand's AML/CFT regime. If that model is not adopted, the Department of Internal Affairs would be the most appropriate of the current supervisors for lawyers.

3. SCOPE OF REGULATED LEGAL SERVICES

Proposed scope of regulated legal services

3.1 This section addresses the following questions (page 15 of the Consultation Paper):

> *How should the AML/CFT requirements apply to the legal services sector to help ensure that the Act addresses the risks specific to it? For example, which business activities should the requirements apply to?*

3.2 We refer to the proposed scope of services that will be subject to AML/CFT requirements, on page 13 of the Consultation Paper. These are as follows:

(a) acting as a formation agent of legal persons or arrangements;

(b) arranging for a person to act as a nominee director or nominee shareholder or trustee in relation to legal persons or arrangements;

(c) providing a registered office, a business address, a correspondence address, or an administrative address for a company, a partnership, or any other legal person or arrangement;

(d) managing client funds, accounts, securities or other assets;

(e) preparing for or carrying out real estate transactions on behalf of a customer; and

(f) preparing for or carrying out transactions for customers related to creating, operating or managing companies.

3.3 Russell McVeagh agrees that inclusion of the activity identified at paragraph 3.2(d) above is appropriate as drafted and does not have any further

comments on this activity. Our comments on the other activities are set out below.

Application of activities relating to trust and company services (3.2(a) to 3.2(c))

3.4 We have concerns in relation to the first three activities, listed at paragraphs 3.2(a) to 3.2(c) above, which can best be described as "trust and company services".

3.5 It is difficult to reconcile the proposal to capture the types of activities set out in those paragraphs with the identified money laundering and terrorism financing ("**ML/TF**") risks associated with legal services (pages 11 and 12 of the Consultation Paper). In addition, the case studies (page 12 of the Consultation Paper) appear to relate to circumstances in which there was a flow of funds through the relevant lawyer's trust account, which would not normally be present in these scenarios.

3.6 In addition, the lawyer's client in these circumstances will not usually be the company or trust that is created, but the individual or entity that is instructing the creation of that company or trust. At the point at which the company or trust seeks to form a business relationship or conduct an occasional transaction with a financial institution (or other reporting entity - including, potentially, a lawyer) to which the Act applies, it will be subject to CDD. In the case of a trust, this will be enhanced CDD (pursuant to s 22(1)(a)(i)), whereby "information relating to the source of funds or the wealth of the customer" must be obtained (pursuant to s 23(a)), and verified (pursuant to s 24(1)(b)). It is our submission that this is the logical time at which the entity should become subject to the CDD requirements of the Act, and not at the time the entity is formed.

3.7 Against that background, we have two further concerns:

(a) First, in our submission, the term "arrangement" as used in each of paragraphs 3.2(a) to 3.2(c) above has the potential to be unduly, and perhaps unintentionally, broad:

(i) While incorporating terms directly from the FATF Recommendations into the legislation has some attraction, that approach has proved problematic in the context of the existing Act. In a number of circumstances it has proven difficult for reporting entities to obtain certainty about the scope of some of the financial activities listed in the definition of "financial institution", the majority of which were lifted directly from the FATF Recommendations. It is important that entities that are subject to the legislation have a clear understanding of what the relevant terms mean under New Zealand law so that they have certainty about which activities will trigger obligations under the Act.

(ii) We consider that the reference to "arrangement/s" should be deleted in each of the above three activities, or otherwise replaced with a term which provides more certainty about its intended scope. On its face, "arrangements" could conceivably be interpreted as

covering a variety of legal arrangements on which lawyers advise (for example, partnerships, joint ventures, agency relationships, and contractual and non-contractual arrangements). It is not clear if this is intended. If by "arrangements" the Consultation Paper means "trusts", the word "trusts" should be used. It would also be helpful if further guidance on exactly what constitutes acting as a "formation agent" were included in any draft legislation.

(b) Second, in respect of "providing a registered office, business address, a correspondence address, or an administrative address" (paragraph 3.2(c) above):

(i) Lawyers provide addresses at which they receive documents on behalf of their clients in a range of circumstances. These include contractual notices, executed documents during the course of a transaction, or legal documents and correspondence from the courts or other parties during the course of litigation (including when providing an "address for service"). It is not clear whether such activities are intended to be captured or, if they are, why they should be.

(ii) We note that FATF has recognised that, in the context of trust and company service providers, the provision of this particular service is "low risk", as it does not involve the handling of client funds, and therefore a "lighter touch" may be justified.[1] In the context of lawyers, this service also does not involve the handling of client funds, and encompasses such a broad range of day-to-day activities conducted by lawyers, that in our submission extending the Act to cover such activities is not justified.

(iii) It is our submission that the activity described in paragraph 3.2(c) above should be limited to circumstances where the lawyer is providing a registered office.

"Real estate transactions" (3.2(e)) should be limited to the sale and purchase of real property

3.8 The concept of "real estate transactions" has a potentially broad interpretation, including not only transactions relating to the sale and purchase of freehold estates but also various types of transactions relating to leasehold estates, licenses, other occupation rights and mortgages.

3.9 The application of AML/CFT requirements should be restricted to the sale and purchase of real property, consistent with the identified ML/TF risk, the approach of FATF and the approach in overseas jurisdictions:

(a) The identified ML/TF risk (page 12 of the Consultation Paper) is confined to use of lawyers' conveyancing services "when buying or selling property".

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1 Financial Action Task Force *Money Laundering using Trust and Company Service Providers* (October 2010) at [29].

(b) The FATF Recommendations specify the "buying and selling of real estate" (as noted on page 43 of the Consultation Paper), and FATF has noted that the reported risk relates specifically to the sale and purchase of real property.[2]

(c) Regulatory approaches in Australia and the United Kingdom have focused specifically on the purchase and sale of real property.[3] This is logical, given that it is in these circumstances that funds are most likely to flow through a lawyer's trust account. The case studies (page 12 of the Consultation Paper) both appear to relate to this scenario.

3.10 In contrast, it is difficult to see what ML/TF risk exists in relation to ancillary real estate transactions, such as the taking of a mortgage or the registration of a caveat, where there is no flow of funds. It may be that the term "real estate transactions" is only intended to capture the sale and purchase of freehold estates, but this should be clarified.

The intended scope of "preparing for or carrying out transactions for customers related to creating, operating or managing companies" (3.2(f)) is not clear

3.11 FATF and overseas approaches have focused specifically on lawyers who create, operate or manage a relevant entity. FATF's 2013 typology report focuses on situations where lawyers actually undertook transactions on behalf of their client (for example, pursuant to a power of attorney or court order),[4] with the concern being that the legal professional is doing so to provide the activity with "a veneer of legitimacy".[5]

3.12 On its face, the proposed regulated activity would appear to make lawyers subject to the AML/CFT regime not only where they create, operate or manage a company, but also where they provide services (ie, potentially, legal advice) that relate to the creation, operation or management of a company. It is assumed that this was not intended, but it is not clear on the words of the listed activity.

3.13 It is our submission that this activity should be deleted from the list of lawyers' activities to which the AML/CFT regime applies. To the extent that the regime needs to apply to lawyers where they are actually carrying out transactions for customers, this would be adequately captured by the other proposed activities.

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2 Financial Action Task Force *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (June 2013) at 27. Each of the reported techniques relating to real property involve property purchases (at 44 to 53).

3 Attorney-General for Australia's Department *Report on the statutory review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and associated rules and regulations* (29 April 2016) at 32; AUSTRAC *Strategic analysis brief: money laundering through legal practitioners* (2015) at 11; AUSTRAC *Strategic analysis brief: money laundering through real estate* (2015); Money Laundering Regulations 2007 (UK), s 3(9)(a); IBA, ABA and CBLSE *A Lawyer's Guide to Detecting and Preventing Money Laundering* (October 2014) at 25.

4 Financial Action Task Force *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (2013) at 66.

5 Financial Action Task Force *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals* (2013) at 63.

4. TIME OF CONDUCTING CDD

4.1 This section addresses the following question (page 15 of the Consultation Paper):

> *At what stage of the business relationship should checks, assessments and suspicious transaction reports be done?*

4.2 Regardless of the final scope of the application of the AML/CFT regime to lawyers, some, but not all, activities that lawyers provide will be subject to the AML/CFT regime. Russell McVeagh performs a variety of legal services for its clients, from providing legal advice and representing its clients in litigation (which, subject to the observations above, generally should not be subject to the AML/CFT regime), to receiving funds into, and paying funds from, its trust account (which may be subject to the AML/CFT regime).

4.3 It would be inappropriate for lawyers to be required to carry out CDD at the commencement of every business relationship, regardless of the purpose for which that business relationship was formed. This would add a significant compliance burden without any policy justification. Instead, lawyers should only be required to carry out CDD at the point at which they receive instructions from a client in respect of a transaction that is subject to the AML/CFT regime.

4.4 For example, a client that initially instructs a lawyer in respect of "pure" legal advice (and forms a business relationship at that stage), and subsequently instructs the lawyer in relation to the purchase of real estate, should be subject to CDD in connection with the second, but not the first, instruction. This may be the intended effect of s 6 of the Act.

4.5 As a general rule, it would be appropriate that CDD is then carried out before the lawyer acts on the client's instructions. This would be consistent with s 16(2) of the Act, which, in a different context, provides that a reporting entity must carry out verification of identity before conducting an occasional transaction.

4.6 However, in particularly urgent cases, this may result in lawyers not being able to urgently act on a client's instructions. Care should be taken to ensure that the Act does not operate as a barrier to clients acquiring legal services and an exception to a requirement to complete CDD before carrying out a client's instructions would be appropriate in such cases. In no cases should urgent representation of a new client in court proceedings in particular (and the ability of that client to access urgent legal representation where rights are at stake in other circumstances) be compromised by the need to first conduct CDD.

4.7 If the proposals set out at paragraphs 4.2 to 4.6 above are implemented, the question as to how the regime should treat existing clients (ie clients with whom a lawyer had formed a business relationship prior to Phase Two coming into force) is likely to be resolved straightforwardly. The result will be consistent with s 14(c)(i) of the Act as it currently stands, in that a client instructing a lawyer to conduct a transaction that is subject to the AML/CFT regime, where the client has not previously done so, could be equated with a "change in the nature or purpose of the business relationship". However, if an alternative (to our proposals above) as to the circumstances in which CDD is required was adopted, the question of how the AML/CFT regime

applies to existing clients should be subject to careful scrutiny and detailed guidance to ensure that the regime does not have any retrospective effect.

5. IMPLEMENTATION PERIOD

5.1 This section addresses the following question (page 32 of the Consultation Paper):

> *What is the necessary lead-in period for businesses in your sector to implement measures they will need to put in place to meet their AML/CFT obligations?*

5.2 An implementation period of two years or more after a Bill is passed is appropriate.

5.3 We note and agree with the comments at page 32 of the Consultation Paper, to the effect that there is a body of knowledge in the New Zealand market that will enable lawyers (and other Phase Two entities) to implement the regime more quickly than Phase One entities.

5.4 A two year timeframe is approximately half the implementation period that was provided for in Phase One, and would allow:

(a) regulations (if any) to be passed well in advance of the regime coming into force for Phase Two entities;

(b) exemptions (if any) to be applied for by Phase Two entities and, if appropriate, granted before the regime comes into force. Currently there is a significant "backlog" of exemption applications, which is causing uncertainty in the application of the Act in some cases;

(c) guidance on the application of the Act to Phase Two entities to be prepared and published by the AML/CFT supervisor(s) (including any new supervisor) well in advice of the regime coming into force for Phase Two entities;

(d) to the extent they consider it necessary, Phase Two entities to employ and/or train appropriate staff to enable them to meet their obligations under the regime, particularly in the role of AML/CFT compliance officer. We anticipate that there may be significant competition in the market for appropriately qualified candidates;

(e) once the above steps have been taken, for AML/CFT risk assessments and programmes to be prepared by Phase Two entities, and staff training to be implemented, in advance of the regime coming into force. There is a significant amount of preparation that is required to be done to ensure that a Phase Two reporting entity's obligations can be appropriately discharged from the day they come into force.

5.5 One of the reasons we consider an implementation period of two years or more to be appropriate is that the steps that a Phase Two reporting entity will have to take (discussed at paragraph 5.4(d) and (e) above) will, to a material extent, only be able to be completed adequately once the other steps described at paragraph 5.4(a), (b) and (c) have been completed. The experience with Phase One of the AML/CFT reforms was that the complete

regulatory regime (Act, regulations, exemptions and guidance from supervisors) was not fully in place ahead of the date on which Phase One entities were required to comply with the Act. This made it very difficult for some reporting entities to complete steps such as developing their AML/CFT programme in advance of the legislation becoming effective. Accordingly, it is important that sufficient time is provided for in the implementation period so that all the relevant pieces of the regime (and not just the legislation) can be in place well in advance of the changes becoming effective.

6. PRIVILEGE

6.1 This section addresses the following question (page 15 of the Consultation Paper):

> *Is the existing mechanism that protects legal professional privilege appropriate for responding to money laundering and terrorist financing, and for the legal profession to comply with its expected obligations under the Act? If not, what else is required?*

6.2 For the reasons outlined below, we consider that the existing mechanism unduly limits the protection of legal professional privilege. However, this can be easily resolved by aligning the concept of privilege in the Act to the concepts in the Evidence Act 2006.

6.3 The Consultation Paper notes at page 13 that legal professional privilege plays an important role in our legal system and that there is no intention to override it in the implementation of Phase Two. We agree and note that legal professional privilege has, for instance, been described by the High Court of Australia as an "important human right deserving of special protection for that reason".[6]

6.4 In our view, the current protection afforded to privilege under the Act is inadequate. This is principally because:

(a) the Act does not contain **any** appropriate protection for privilege in certain circumstances in which privilege should available; and

(b) to the extent that privilege is protected, the concept of "privileged communication" in the Act is narrower than privileges that should be available.

6.5 We expand on these points below.

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6 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49, (2002) 213 CLR 543 at [86].

The Act does not contain appropriate privilege protection

6.6 The Act includes the following references to legal privilege:

Section reference	Obligation	
40(1) and (2)	A reporting entity must report a transaction to the Commissioner (by way of an "**STR**") if a person conducts or seeks to conduct a transaction through the reporting entity and the reporting entity has reasonable grounds to suspect that the transaction is of the type listed in s 40(1)(b).	"Privileged communication" not required to be disclosed **by a lawyer** (ss 40(3) and 42).
133	An AML/CFT supervisor may, during an on-site inspection, require any employee, officer, or agent of the reporting entity to answer questions relating to its records and documents and to provide any other information that the AML/CFT supervisor may reasonably require for the purpose of the inspection.	"Privileged communication" not required to be disclosed **by a lawyer** (ss 133(5) and 42).

6.7 This can be contrasted with the clear and appropriate position under, for example, the Financial Markets Authority Act 2011, s 56(1) of which provides:

> Every person has the same privileges in relation to providing information and documents to, and answering questions before, the FMA, a member or an employee or a delegate of the FMA, or a person authorised under section 52, as witnesses have in proceedings before a court.

6.8 The effect of s 56(1) is to incorporate into the Financial Markets Authority Act 2011 the privileges that are available under the Evidence Act 2006. For the reasons we now turn to, this is appropriate in all circumstances where questions of privilege may arise under the Act.

The concept of "privileged communication" is unduly narrow

6.9 To the extent that legal professional privilege is protected under the Act, the concept of "privileged communication", as defined in s 42, is used. Under that section, a communication is a privileged communication if:

> (a) it is a confidential communication, whether oral or written, passing between—
>
> (i) a lawyer in his or her professional capacity and another lawyer in that capacity:
>
> (ii) a lawyer in his or her professional capacity and his or her client:
>
> (iii) any person described in subparagraph (i) or (ii) and the agent of the other person described in that subparagraph, or between the agents of both the persons described, either directly or indirectly; and

> (b) it is made or brought into existence for the purpose of obtaining or giving legal advice or assistance; and
>
> (c) it is not made or brought into existence for the purpose of committing or furthering the commission of some illegal or wrongful act.

6.10 The concept of "privileged communication" may not expressly accommodate, for example, the privileges available under ss 56 (preparatory materials privilege, also referred to as "litigation privilege") and 57 (settlement negotiations or mediation privilege, also referred to as "without prejudice privilege") of the Evidence Act 2006.

6.11 Litigation privilege arises in respect of communications or information made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding.[7] Litigation privilege is not limited to communications between lawyers and clients.[8] Along with legal advice privilege, litigation privilege is the second "limb" of legal professional privilege.[9]

6.12 Settlement negotiations or mediation privilege arises in respect of communications between a person who is party to a dispute of a kind for which relief may be given in a civil proceeding, and any other person, if that communication was intended to be confidential and made in connection with an attempt to settle or mediate the dispute.[10] It also arises in respect of documents prepared for that purpose.[11]

6.13 FATF did not anticipate a reduction in the scope of legal professional privilege, such that it only applies to legal advice privilege and not litigation privilege. To the contrary, an interpretation note in the FATF recommendations states:[12]

> 1. Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report suspicious transactions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.
>
> 2. It is for each country to determine the matters that would fall under legal professional privilege or professional secrecy. This would normally cover information lawyers, notaries or other independent legal professionals receive from or obtain through one of their clients: (a) in the course of ascertaining the legal position of their client, or **(b) in performing their task of defending or representing that client in, or concerning judicial, administrative, arbitration or mediation proceedings.**
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> (emphasis added)

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7 Evidence Act 2006, s 56(1).

8 Evidence Act 2006, s 56(2).

9 See *Reid v New Zealand Fire Service Commission* [2010] NZCA 133, (2010) 19 PRNZ 923 at [8].

10 Evidence Act 2006, s 57(1).

11 Evidence Act 2006, s 57(2).

12 Financial Action Task Force *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (2012, updated June 2016) at 85.

6.14 In respect of other comparable jurisdictions, we note that:

(a) In the United Kingdom, legal professional privilege (both legal advice privilege and litigation privilege) continues to apply at common law in relation to its AML/CFT legislation. According to anti-money laundering guidance published by The Law Society (of England and Wales) (referred to at page 14 of the Consultation Paper), a lawyer must not disclose a communication that is subject to legal professional privilege (provided that the crime / fraud exception at common law does not apply).[13] Separately to this, the UK legislation sets out "privileged circumstances" exemptions which exempt lawyers from complying with certain provisions of the legislation, including from disclosing to the National Crime Agency.[14] The UK guidance makes clear that these statutory "privileged circumstances" may extend further than the stricter scope of legal professional privilege.[15] In effect, information in the United Kingdom may be subject to a double layer of protection. If neither the legal professional privilege nor "privileged circumstances" situation applies, the information will still be confidential but will be disclosable under the legislation.[16]

(b) The Australian legislation simply states that that Act "does not affect the law relating to legal professional privilege".[17]

6.15 The most straightforward way of resolving the insufficient protection of privilege in the Act is to update it so that the full range of privileges available to witnesses in Court proceedings (ie under the Evidence Act 2006) are preserved.

6.16 It is noted that the definition of "privileged communication" in the Act is the same as the definition of "privileged communication" contained in its predecessor act, the Financial Transactions Reporting Act 1996.[18] The definition of "privileged communication" in the Financial Transactions Reporting Act 1996 predates the introduction of New Zealand's codified privilege regime in the form of the Evidence Act 2006. It appears that this definition may have been simply "copied across" to the Act when New Zealand's AML/CFT regime was introduced, without updating those concepts, and not taking into account the statutory concepts of privilege which then existed in the Evidence Act 2006.

6.17 Now that New Zealand has a separately codified privilege regime, it makes sense from both a substantive and consistency perspective for the privilege regimes across legislative regimes to be the same. While the Evidence Act 2006 only codified privilege in relation to "proceedings" (as defined in the Evidence Act 2006), New Zealand privilege jurisprudence has progressed consistently with that Act. Consistent privilege concepts will provide

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13 The Law Society of England and Wales *Anti-money laundering: Practice Note (October 2013)* at [6.7].

14 The Law Society of England and Wales *Anti-money laundering: Practice Note (October 2013)* at [6.5].

15 The Law Society of England and Wales *Anti-money laundering: Practice Note (October 2013)* at [6.6].

16 The Law Society of England and Wales *Anti-money laundering: Practice Note (October 2013)* at [6.7].

17 Anti-money Laundering and Counter-Terrorism Financing Act 2006 (Cth), s 242.

18 Financial Transactions Reporting Act 1996, s 19.

certainty and guidance for lawyers when considering their obligations under the Act. There is an established body of case law under the Evidence Act 2006, and lawyers are accustomed to applying the privilege concepts in that legislation to determine whether documents are properly subject to privilege (for example, in the context of discovery in proceedings).

6.18 By contrast, we are not aware of any New Zealand case law on the meaning of "privileged communication" under the Act or the Financial Transactions Reporting Act 1996.[19]

6.19 The definition of "privileged communication" in the Act is the same as the definition of "privileged communication" contained in the Terrorism Suppression Act 2002,[20] which is relevant to the duty to make suspicious property reports.[21] This definition should also be updated for consistency.

7. SUPERVISOR(S)

7.1 This section addresses the following question (page 31 of the Consultation Paper):

> *Do you think any of our existing sector supervisors (the Reserve Bank, the Financial Markets Authority and the Department of Internal Affairs) are appropriate agencies for the supervision of Phase Two businesses? If not, what other agencies do you think should be considered? Please tell us why.*

7.2 In summary:

(a) our strong preference is for a single supervisor model (similar to AUSTRAC) for all Phase One and Two entities, but only if that single supervisor is adequately resourced; and

(b) if the multi-agency supervision model is retained, of the three existing sector supervisors the Department of Internal Affairs is the most appropriate supervisor for lawyers.

Single supervisor model

7.3 As outlined in the Consultation Paper, having a single dedicated government agency supervising all Phase One and Two entities would have significant benefits for New Zealand's AML/CFT regime. In addition to the points noted in the Consultation Paper (such as the benefits of coordinated and consistent supervisory activity), the introduction of a single supervisor model would create an opportunity to address the serious deficiencies with the existing exemptions regime.

7.4 The exemptions process in the context of AML/CFT regulation is particularly important because of the way in which the overall AML/CFT regime has been constructed. The Act itself was originally drafted with an extremely broad application, with the intention that its scope would then be reduced as appropriate by a range of regulations and class and individual exemptions.

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19 However, there is limited case law on the Serious Fraud Office Act 1990, s 24 (legal professional privilege), which contains a similar definition of a privileged communication.

20 Terrorism Suppression Act 2002, s 45.

21 Terrorism Suppression Act 2002, s 43.

7.5 The power to grant exemptions sits with the Minister of Justice (s 157 of the Act), and any exemption application typically requires the involvement of a number of different agencies (Ministry of Justice, one or more AML/CFT supervisors, Parliamentary Counsel Office). In our experience it can take over six months just to receive an initial response to an exemption application, and considerably longer than that (in some cases well over a year) to progress an application to the point where the exemption is actually granted.

7.6 This significant delay in the processing of exemption applications is problematic for all reporting entities, but particularly so in relation to new products or services that an entity may be considering bringing to market. In some cases, a proposed product or service may be caught by the broad application of the Act, and all parties (including the relevant supervisor) are in agreement that an exemption is appropriate in the circumstances. Even where that is the case, it can still take well over a year to obtain the relevant exemption. The lengthy period for the processing of such exemption applications is presenting a barrier to entities being able to introduce new products and services.

7.7 This situation can be contrasted with the exemption regime that exists in relation to the Financial Markets Conduct Act 2013. Under that Act, exemption making powers are granted to the single supervisory agency (the Financial Markets Authority), and even complex exemption applications are regularly processed to completion within two months of the application being submitted. If a single supervisor was responsible for all AML/CFT sectors and reporting entities, that supervisor could be given exemption making powers in a similar way to the Financial Markets Authority. Provided the supervisor was adequately resourced, there is no reason why a similar result in relation to the timing for exemptions could not be achieved.

7.8 We acknowledge the challenges to a single supervisor model that are noted in the Consultation Paper, but make the following comments on those points:

(a) In relation to the comment that a single supervisor model may lead to duplication in some areas, we do not consider this to be a material concern. In fact, the single supervisor model should actually result in significantly less duplication across agencies because in the majority of its operations we would not expect the single supervisor to need to consult with other agencies.

(b) We do agree that establishing a single supervisor would involve a significant establishment cost and a lengthy implementation period. However, given the significant benefits that a single supervisor model could bring, it would be worth investing that time and money upfront to ensure the most appropriate model is in place. In addition, we would expect that a good proportion of the existing resources and infrastructure in place at the current supervisors should be able to be redeployed in some form within a newly created single supervisor, which should reduce both the time and cost of establishing that new agency.

7.9 If the existing multi-agency supervisory model is retained, then it is vital that additional investment is made in the exemption making process. As

discussed above, the current process appears to be under-resourced and is a barrier to the conduct of business.

Multi-agency model

7.10 Of the three existing sector supervisors, the Department of Internal Affairs is the most appropriate supervisor for lawyers. The statutory mandate of the Reserve Bank and the Financial Markets Authority does not extend to the regulation of lawyers:

(a) The Reserve Bank currently supervises registered banks, life insurers and non-bank deposit takers. The primary function of the Reserve Bank is "to formulate and implement monetary policy".[22]

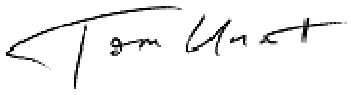
(b) The Financial Markets Authority currently supervises a subset of providers of "financial services" under s 5 of the Financial Service Providers (Registration and Dispute Resolution) Act 2008. The primary function of the Financial Markets Authority is to "promote and facilitate the development of fair, efficient, and transparent financial markets".[23]

7.11 In both cases, the AML/CFT supervisor is also likely to regulate the relevant reporting entities in other aspects of its business/compliance, and in neither case is the AML/CFT regulation of lawyers a natural fit for these supervisors' statutory functions.

7.12 On the other hand, the Department of Internal Affairs has a wide regulatory remit,[24] and is likely to already regulate a range of reporting entities under the Act with which it does not otherwise have a regulatory relationship.

7.13 In our view, adding further supervisors may only complicate the already complex and lengthy process of guidance being published and exemptions being progressed. The current model effectively has five agencies involved in the oversight of the AML/CFT regime - the three supervisors, the Ministry of Justice (which has exemption making powers) and the Police. We do not support the introduction of a further AML/CFT supervisor for the purposes of supervising lawyers.

Yours faithfully
RUSSELL McVEAGH



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22 Reserve Bank of New Zealand Act 1989, s 8.

23 Financial Markets Authority Act 2011, s 8.

24 See, for example, the legislation administered by the Department of Internal Affairs (a list of which, as at November 2011, is accessible here: https://www.dia.govt.nz/About-Internal-Affairs---Our-portfolios---Legislation).