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**Sent:** Friday, 3 December 2021 3:50 pm
**To:** aml
**Subject:** Submission on AML/CFT Statutory Review Consultation 2021
**Attachments:** TCA AML Submission Final (03.12.21).doc

TCA submission attached.

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# SUBMISSION

# to

# The Ministry of Justice

# on

# AML/CFT Statutory Review Consultation 2021

**3 December 2021**

# *Introduction*

This Submission is from Trustee Corporations Association of New Zealand Inc (**TCA**) on the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (**Act**) Statutory Review Consultation Document (**Consultation Document**).

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TCA is a long-established association to which all Trustee Corporations belong. The Members of the TCA are Public Trust and each of the Trustee Corporations authorised under the Trustee Companies Act 1967 to act as Corporate Trustee for financial products – being Trustees Executors Limited, The New Zealand Guardian Trust Company Limited, Public Trust (including its wholly owned subsidiary New Zealand Permanent Trustees Limited Covenant Trustee Services Limited), and Anchorage Trustee Service Limited (**TCA Members**).

TCA maintains relationships with government ministries, regulatory bodies and financial sector groups. TCA sets minimum standards as practice guidelines for the performance of Corporate Trustees – standards for integrity, competence, financial capacity, internal controls, powers and duties, standards for conflict of interest management and for reports from scheme operators.

TCA appreciates this opportunity to submit on the Consultation Document. TCA would be happy to discuss these submissions with the Ministry of Justice.

We consent to our submissions being made public.

# *Submission*

TCA supports of the intent of the Statutory Review of the Act. If the regime operates more effectively, this clearly benefits TCA.

TCA makes the following specific submission points on:

**A.** Statutory Supervisors' Exemption

**B.** Status as trustee or nominee

**C.** Availability of simplified CDD

**D.** Definition of 'Customer'

**E.** Prescribed Transaction Reporting

**F.** Potential personal liability of staff

## A | Statutory Supervisors' Exemption

*Consultation Document 1.14.*

TCA Members act as Statutory Supervisors of retirement villages under Section 38 Retirement Villages Act 2003 (**RV Act**).

The role of a Statutory Supervisor is to provide an important safeguard for the residents of a retirement village.

Statutory Supervisors are licensed by the Financial Markets Authority and are appointed by an operator on registration of a retirement village. The terms of their appointment are recorded under a deed of supervision.

The Statutory supervisor has a number of duties including:

1. acting as an independent stakeholder for deposits and progress payments by residents to village operators
2. monitoring the financial position of the village
3. reporting annually to the Registrar of Retirement Villages and residents on the performance of their duties, and
4. carrying out any other functions specified in the Act or the deed of supervision with the village.

It is in its capacity as the independent stakeholder that Statutory Supervisors are potentially within scope of the Act in respect of refunds of deposits held for intending retirement village residents.

However, in recognition of that role posing a very low risk of money laundering and financing of terrorism, exemptions have been granted to TCA Members acting as Statutory Supervisors

in respect of this role. This is most recently in Part 12 of the Schedule to the Anti-Money Laundering and Countering Financing of Terrorism (Class Exemptions) Notice 2018. That exempts TCA Members from CDD when paying refunds, subject to certain conditions.

The statement of reasons for the exemption records the nature of the role is low risk because:

1. Statutory Supervisors usually only hold the deposit paid by potential retirement village residents, which is ordinarily between $2,500 and $5,000

2. there is a comprehensive regime in place regulating the way a prospective resident may enter into an occupation right agreement

3. Statutory Supervisors do not deal in cash, no moneys are passed through a third party, and, by way of separate identification, an independent lawyer is required to certify that a Statutory Supervisor has advised a prospective resident prior to the signing of an occupation right agreement (this ensures there is minimal risk of funds being transferred into the hands of potential money launderers), and

4. when a deposit is paid by someone other than the intended resident, confirmation of the source of funds is required if the reporting entity considers that enhanced due diligence should apply owing to the level of risk involved.

Beyond the risks outlined in the statement of reasons, it is important to also emphasise the nature of the role is low risk because of the particular demographic of the people for whom TCA perform the supervisory role:

1. this demographic is comprised of elderly persons who are not usually a demographic with a high ML/FT risk

2. due to the age of these persons, intended residents may struggle to understand the requirements of the Act and may not have access to valid forms of identification. Many elderly people do not have a driver's licence or passport

3. many elderly people move to retirement villages because of acute health needs which sometimes necessitates an accelerated placement process. Removal of the exemption would add time and cost to the placement process, putting additional stress on residents during a time of vulnerability.

The statement of reasons, coupled with these aforementioned additional factors, continue to apply and therefore necessitate that the exemption be continued under any revisions to the AML/CFT regime.

## **B** | Status as Trustee or Nominee

*Consultation Document 2.49. - 2.51.*

TCA Members are Trustee Companies pursuant to the Trustee Companies Act 1967. However, TCA Members use nominee companies for holding assets for commercial trusts such as managed investment schemes and securitisation trusts. Nominee companies are used to help separate client money from company money, in accordance with accepted custodial practice. While a nominee company may be used, the client's contractual relationship exists with the Trustee Company, not its nominee. The nominee companies do not employ staff and have no revenue.

It would be appropriate to adopt a new regulatory exemption under the Act because of the common usage of nominee companies by Trustee Companies as a vehicle for separating funds. Such an exemption should exempt nominee directors or shareholders who have a parent reporting entity responsible for discharging obligations under the Act. Such an exemption need not necessitate additional conditions if that parent reporting entity's compliance programme and risk assessment covers the nominee company's services.

## C | Availability of Simplified CDD

*Consultation Document 2.39., 4.56.- 4.57.*

Sections 18(2)(h) and 18(i) of the Act allows for a Reporting Entity to conduct simplified CDD on a statutory supervisor and trustee corporation respectively.

This reflects the low risk of the beneficial ownership of these organisations. The risk is low because:

1. statutory supervisors are subject to the scrutiny of supervisor licensing requirements

2. New Zealand's Trustee Corporations originated in the 19th century and are subject to industry and their own individual Acts of parliament. There are four Trustee Corporations, one of which is a subsidiary of a crown entity. In this respect, the Trustee Corporations have significantly different attributes to other types of Trustee Companies and justify the option of Reporting Entities conducting simplified CDD on them

3. the Financial Markets Authority's Sector Risk Assessment also rates ML/FT risk within this sector as "Low".

We request an amendment to the definitions in sections 18(2)(h) and 18(i). This is because simplified CDD can only be used when a Trustee Corporation "acts for itself". It is likely the intent of this condition is to ensure the trustee's simplified CDD position could not be used to mask those it was acting for in a trustee capacity. However, this risk does not exist in practice due to the interpretation of a trust being a customer. In our view there should be no distinction between where the entity acts for itself or where it acts on behalf of others.

As stated, one of the mentioned Trustee Corporations is a subsidiary of a crown entity. As a result of its status as a subsidiary of a crown entity, it is able to avoid the limitation of how and when the exemption of 'acting for oneself' can apply. In our view there is no material difference to ML/FT risks where a private Trustee Corporation is acting as Trustee compared to where a publicly owned trustee is acting as Trustee. This clear anomaly should be addressed.

Accordingly, we request the following amendments to sections 18(2)(h) and 18(i) of the Act:

1. In regards to section 18(2)(h), the limitation of "when the person acts for itself" should be removed. A statutory supervisor (generally also a trustee) is required by law (ss 156-157 Financial Markets Conduct Act 2013) to hold registered managed investment scheme assets, and to ensure separation from its own assets. The latter is typically done by holding funds through a nominee company.

    a. The following is an example of the problems of the existing arrangements for this low-risk situation. A supervisor will often be required to open bank accounts to hold certain scheme money (e.g. cash or term deposits for KiwiSaver schemes). The

supervisor is the banks customer, consequently the bank is required to undertake CDD on the supervisor. But the bank is unable to undertake simplified CDD on the supervisor due to the fact the supervisor is not acting for itself but rather for scheme members as the scheme trustee. Even with relaxation of this limitation, as the supervisor is acting through its nominee company, the bank will typically be required to undertake CDD on the directors and shareholders of the nominee company, and then any ultimate ownership. This is placing emphasis on identifying ML/FT risks in the wrong areas. Money held in these schemes are the collective holdings of individual investors, not money from the supervisor or its nominee. The point where ML/FT is likely to occur is the deposits and withdrawals from individual investor accounts, not at the collective portfolio level where investments are made by fund managers but held in the name of the supervisor (or via its nominee).

b. Closely related to the above is the application of the Licenced Managing Intermediary Exemption. While this could be an option to avoid the above scenario, as the supervisor (for prudent reasons) uses a nominee, the bank is unable to apply this exemption as the supervisor, not the nominee is a licenced managing intermediary. While amendments to the managing intermediary exemption could address this, a simpler solution would be to amend the existing exemptions where there are known issues.

2. We request the section 18(2)(i) definition be amended as required to give effect to the inclusion of wholly owned nominee companies (to hold client money or property as permitted by section 67(1)(c) of the Trusts Act 2019).

3. Similarly, we request that the section 18(2)(h) exemption be amended as required to include a nominee company controlled by the supervisor or statutory supervisor.

In the case of delegation by a senior manager to junior employees (i.e. persons acting on behalf of the organisation), we recommend regulations be issued to allow employees to be delegated without triggering client due diligence in each singular circumstance.

We recommend such regulation should not only apply to 'large' customers or customers that are subject only to simplified CDD. We recommend regulation also be extended to Managing Intermediaries. This is because some institutions may be smaller in size yet are still required to have numerous authorised signatories.

## **D** | Definition of 'Customer'

*Consultation Document 4.2. - 4.3.*

A 'customer' includes any person with whom reporting entity has a business, professional or commercial relationship that has or is expected to have an element of duration.

This definition of 'customer' in the Act is vague and therefore susceptible to overbroad interpretation. This leads to unnecessary and inefficient duplication of compliance obligations because vagueness necessitates supervisors take a conservative approach.

For example, where a Trustee is involved in forming a trust and also acting as Trustee, it is not clear who the customer is for CDD purposes. The supervisors' guidance is that a trust itself should be the customer despite a trust not having legal personality. However, a more accurate interpretation from the perspective of a Trustee is the settlor is the client of the Trustee, not the settlor.

Known examples such as this should be prescribed for in the regulations. In our view, the underlying principle should be that the reporting entity with the most direct relationship with the customer in respect of a particular account or arrangement is best placed to manage the resulting ML/FT risk and should therefore have the only AML/CFT obligations for that account or arrangement.

## E | Prescribed transaction reporting

*Consultation Document 4.156. - 4.159., 4.162.*

The 'wire transfer' concept is not clearly defined and there is long-standing and understandable confusion, including amongst the supervisors, about what transactions it applies to. As with the customer definition, this has resulting in uncertainty about whether and when elements of transactions conducted by non-bank reporting entities fall within scope.

In our view, the wire transfer rules should be restricted to payments that occur through the regular banking payments system. If it is necessary to capture additional transaction types such as remittance payments these should be prescribed through regulations and not automatically captured.

## F | Potential personal liability of staff

*Consultation Document 3.25.*

We strongly oppose broadening the scope of civil sanctions to include directors, senior managers, and/or employees. Broadening civil sanctions is unlikely to increase the detection or deterrence of money laundering or the financing of terrorism in New Zealand.

However, it may add to the cost of compliance. Companies are already spending significant resources on ensuring compliance. Expanding regulatory penalties may result in further resources directed on compliance by those already complying but is unlikely to improve this amongst those oblivious to intricacies of the Act and wider AML regime.

**Trustee Corporations Association of New Zealand Inc**
**3 December 2021**