aml

From: [redacted]@minterellison.co.nz>
Sent: Monday, 6 December 2021 11:46 am
To: aml
Cc: [redacted]
Subject: MinterEllisonRuddWatts Client Submission on the AML/CFT Consultation [MERW-MERWLIB.FID1043961]
Attachments: MERW Client AML-CFT Consultation Submission.pdf

Good morning,

MinterEllisonRuddWatts has been asked by a client to submit on its behalf to the Ministry of Justice's Consultation on the AML/CFT Act – please find that submission attached.

Please reach out if anything further is required.

Kind regards,

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6 December 2021

BY EMAIL: aml@justice.govt.nz

AML/CFT Consultation Team
Ministry of Justice
SX10088
WELLINGTON

Submission for the Ministry of Justice's Consultation Paper on the Statutory Review of the AML/CFT Act

This submission is in response to the Ministry of Justice (**Ministry**)'s consultation paper on the statutory review of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (**Act**), *Review of the AML/CFT Act – Consultation Document,* dated October 2021 (**Consultation Paper**).

We write this submission on behalf of a client that is headquartered overseas in a major OECD economy, and operates in New Zealand under an exemption from parts of the Act. Our client prefers to make this submission anonymously because it has not, in the time available, been able to get the internal approvals required to do so in its name. They are nonetheless keen to be heard and appreciate the opportunity to be consulted.

Our client's submission relates only to the one topic which is of concern and relevance to our client, which is the continuation of the Ministerial exemption power contained in the Act.

Question 1.14 of the Consultation Paper asks whether the process for Ministerial exemptions in sections 157 to 159 of the Act is still required for the anti-money laundering and countering financing of terrorism (**AML/CFT**) regime to operate effectively.

Our client's submission is that the process for Ministerial exemptions in sections 157 is a crucial element of the AML/CFT regime and should be retained in its current form, or enhanced.

The Act is fundamentally principles-based, and is necessarily drafted broadly in order to capture the wide range of activities that it seeks to regulate. This means that it is not uncommon for there to be technical capture of entities that were not intended to fall under the regime, and that do not present a substantive risk of money laundering or terrorism financing (**ML/TF**).

The bespoke exemptions mechanism allows for these sharp edges of the regime to be softened. Obligations can be modified to ensure they remain proportionate to risk. This aligns with the risk-based approach underlying the regime, allowing compliance obligations to be tailored to an entity's actual risk and circumstances rather than the generalised risk of similar entities. Without this reactivity, compliance with the AML/CFT regime would be prohibitively costly for many entities that seek to offer low-risk services, and so they would ultimately decline to operate in New Zealand.

While the ability to exempt kinds of entities and activities through regulations is also an important component of the regime, it cannot fulfil the necessary role of a bespoke exemptions mechanism. As a practical reality, it is not possible to contemplate all potential situations when drafting regulations. For example, our client came close to an existing exemption in the regulations, but was excluded from that by a quirk of its corporate structure. Further, many individual situations are not suitable for blanket exemptions (partial or whole), whereas a bespoke exemption could tailor conditions and the extent of the exemption to fit.

Our client's experience was that, although seeking a Ministerial exemption was an involved process including written submissions and a meeting with both the Ministry and the Department of Internal Affairs, it was a thorough and productive process that assisted it in developing appropriate measures to comply with its remaining obligations. Essentially, the basis of the application was that our client's New Zealand business was caught by the regime primarily because its particular corporate structure meant it did not fall within the technical requirements of an existing regulatory exemption. Further, our client's New Zealand activities were inherently lower-risk, and fell within the scope of our client's parent's AML/CFT regime under overseas legislation, so that it was subject to comparable Financial Action Task Force (**FATF**)-based requirements.

Receiving the exemption meant that our client was able to continue providing New Zealand-based customers with its services (increasing competition in the New Zealand market and the options available to New Zealanders) without incurring the costs of either a full New Zealand compliance programme or changes to the corporate structure to fall within the existing regulatory exemption. Either of those latter two options may have caused our client to reconsider whether it was profitable to offer its services here. Given the unique features of our client's business, it was in our view unlikely that a class exemption or regulatory exemption would apply. The exemption was tailored to exempt from specific requirements which were disproportionately burdensome, and the exemption has since been renewed.

By ensuring that businesses which pose a low risk of ML/TF can seek relief from various disproportionately onerous compliance obligations in specific circumstances, it helps to ensure that the compliance burden they face is proportionate to the ML/TF risks that they are exposed to. Such a regime reinforces the risk-based understanding of regulation which is advocated by the FATF,[1] and which has been endorsed by the Ministry in the Consultation Paper.[2] If the bespoke exemptions regime were to be removed from the Act, it would lead to the imposition of onerous compliance obligations on some reporting entities which pose limited ML/TF risk, without providing them with a practical avenue to seek relief.

If we were to make a suggestion for enhancement, it would be to empower officials at a sub-ministerial level to grant the exemptions, perhaps with a power to appeal to the Minister. An analogy can be drawn with the Financial Markets Conduct Act 2013 (**FMCA**). Under section 556 of the FMCA, the Financial Markets Authority (**FMA**) itself is empowered to grant exemptions from the substantive parts of the FMCA, various transitional provisions, and the Financial Markets Conduct Regulations 2014. This power is exercised by the FMA itself and, by delegation, senior officials within the FMA.

Accordingly, our submission is that our client's experience was an example of the Ministerial exemptions regime working well, and the regime should be retained or enhanced.

If you would like to discuss further, please do not hesitate to contact us.

Yours faithfully
MinterEllisonRuddWatts

Partner

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[1] See FATF Guidance on Risk-Based Supervision (March 2021) – https://www.fatf-gafi.org/publications/fatfrecommendations/documents/guidance-rba-supervision.html.

[2] See page 4 of the Consultation Paper – https://consultations.justice.govt.nz/policy/aml-cft-review/user_uploads/amlcft-statutory-review-consultation-document.pdf.