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**SUBMISSION ON THE ANTI-MONEY LAUNDERING & COUNTERING FINANCING OF TERRORISM AMENDMENT BILL (114-1)**

Thank you for the opportunity to make a submission on the Anti-Money Laundering and Countering Financing of Terrorism Amendment Bill (114-1) (**Bill**). The Bill provides for amendments to the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (**Act**). The *Regulatory Impact Statement: Regulatory Systems (Justice) Amendment Bill package* dated 19 June 2024 (**RIS**) is referred to in this submission.

This submission is made by Cygnus Law Ltd (**Cygnus Law**). Cygnus Law wishes to speak to its submission.

Simon Papa is the director of Cygnus Law. He has over 20 years' experience as a corporate and commercial lawyer. His previous experience includes working as a lawyer at the Financial Markets Authority for 2½ years. Cygnus Law is a commercial law firm that assists a wide range of financial service businesses to comply, contract and transact. Cygnus Law is an AML/CFT reporting entity. In addition, Cygnus Law advises reporting entities on AML/CFT compliance.

This submission is in the following parts:

## 1. INTRODUCTION

1.1 I acknowledge the important role that the AML/CFT regulatory regime plays, both in terms of meeting international expectations and limiting the ability of criminals to launder proceeds of crime and terrorists to seek financing. However, New Zealand's approach to implementation of that regulatory regime has been poor, with significant adverse effects on New Zealand's economy, competition, personal privacy, economic efficiency and on vulnerable members of our society who are unable to access financial services because of the impacts of that regime.

1.2 The Ministry of Justice (**Ministry**), Police (through the Commissioner and Financial Intelligence Unit- **FIU**), and supervisory agencies (DIA, FMA and RBNZ) (**Supervisors**), appear in my view, to have been fairly indifferent to those adverse effects. They have taken few proactive steps to address significant issues with how the regime is designed and implemented. Rather, their primary focus has been on seeking ever more extensive regulation, with little consideration of whether the costs and benefits are aligned. This is highlighted in the reforms proposed in the Bill. There are six measures that add to obligations of reporting entities and only three that are intended to reduce obligations. Even then I consider that the regulatory relief proposed is inadequate. This is on top of the imposition of dozens of new obligations on reporting entities via regulations that are coming into force progressively from 2023 to 2025.

## 2. KEY ISSUES WITH THE OPERATION OF AML/CFT REGULATORY REGIME

### Regime not working effectively

2.1 While acknowledging the importance of seeking to enforce the law and to make it harder for criminals to operate, there simply hasn't been enough focus on making the law work more effectively. That's not just a question of reducing costs for reporting entities. My experience as the recipient of AML/CFT checks, especially where enhanced customer due diligence (**ECDD**) is required, is that the standard of the checks is poor in practice. Many of the innovative, online investment platforms (for example Sharesies and InvestNow) in New Zealand have been subject to supervisor enforcement actions for non-compliance with AML/CFT law. This suggests a level of systemic non-compliance that I attribute, at least in part, to ineffective supervisor support for, and engagement with, reporting entities. I still find a fundamental lack of understanding of what AML/CFT law requires of reporting entities, when they are seeking to set up or expand businesses. In the deluge of information from the FIU and Supervisors, key messages are not getting through.

### Inadequate resourcing

2.2 A reporting entity is required to file a suspicious activity report (**SAR**) and suspicion transaction report (**STR**) to the FIU within 3 working days of having reasonable grounds to support a suspicion. Failure to comply is a criminal offence punishable by up to five years in prison for an individual (and/or a fine of up to $300,000) and a fine of up to $5,000,000 for an entity.

2.3 On 19 December 2024 the FIU issued this email to all reporting entities:

> "Due to staff resourcing and an increased influx of SAR and STR reporting there is a backlog of reports waiting to be validated.
>
> Rest assured we will get to your report it might just take a little longer than normal.
>
> The FIU will have a skeleton staff working over the Christmas/New Year break. If you have any queries, come through the message board, although we may not respond as promptly as usual."

2.4 A key document that is supposed to support awareness of money laundering (**ML**) and terrorism financing (**TF**) risks was originally called the "The Suspicious Activities Report" (wholly different from the SARs reporting entities are required to prepare), which was published by the FIU monthly. This is supposed to provide near-real time information to support reporting entities to assess risks and to monitor for potential ML and TF. In practice, the report has always appeared to be a download of media reports on various AML/CFT matters from around the world, together with a single page of largely meaningless data about the number of SARs and STRs submitted. Information about what the FIU is doing with the information provided by reporting entities has been almost entirely lacking. It is certainly not possible to assess how much of the information provided in SARs & STRs is used in practice and where real risks exist in the New Zealand context. However, from May 2023 to May 2024 the report wasn't published at all. It then re-emerged as a two-monthly "The CASH Report-conversations around suspicious happenings". As at the date of this submission that report has not been published for four months.

2.5 My goal is not to criticise the FIU for staffing shortages. It is to highlight that reporting entities are being held to what are, in my view, almost draconian standards that are unlikely to be necessary in practice, including because of the limited resourcing available to the FIU and Supervisors.

2.6 There seems to be little recognition of the difficulties faced by smaller firms in attempting to implement a regime designed for large financial institutions such as banks. Lip service is paid to attempting to "right size" the requirements.

**Supervisor support lacking**

2.7 Supervisor support for financial service providers to comply with regulation is limited in practice. As I note below, the supervisors issue a blizzard of documents without any control or coherence. So, in many respects, that makes compliance harder especially for smaller businesses that don't have dedicated AML/CFT functions. Also, Supervisors sometimes use guidance as a tool to increase regulatory burden, not to provide practical tools to navigate the web of regulation and to support compliance including by start-ups.

2.8 By way of example, the Supervisors have not provided any coherent guidance on the dozens of new obligations (many complex) coming into force between 2023 to 2025. There isn't a single example of them explaining each of the changes in a coherent way to support the 10,000+ reporting entities to navigate them effectively. The only place you can find a detailed summary of the meaning and effect of most of the changes is on Cygnus Law's website- https://cygnuslaw.nz/2023/07/significant-changes-to-aml-cft-law-coming-into-force-between-2023-and-2025/. I published that out of frustration at the lack of anything equivalent from the Supervisors. Confusing and convoluted supervisor guidance on some (but by no means all) key matters relating to the law changes was published only weeks before the most significant tranche of changes to regulation came into force in on 1 June 2024 and a year after the regulations were made, as follows:

- Beneficial Ownership Guideline (updated 29 April 2024)
- Customer Due Diligence: Companies Guideline (updated 29 April 2024)
- Customer Due Diligence: Limited Partnerships Guideline (new 29 April 2024)
- Customer Due Diligence: Trusts Guideline (updated 10 May 2024)
- Enhanced Customer Due Diligence (updated 29 April 2024)

As I note later in this submission, such new guidance appears without prior notice and without an explanation of what has changed in the guidance. So, again, it can make life harder for reporting entities rather than easier.

2.9 As a response to the likelihood of significant non-compliance with those new obligations the supervisors issued a "Joint statement by AML/CFT Supervisors on our supervisory approach to the new regulations" on 21 May 2024, just 10 days before the regulations were due to come into force. This stated that "the Supervisors envisage taking a broadly educative and constructive approach with Reporting Entities. The focus will be on issuing guidance on compliance expectations and more generally supporting Reporting Entities to comply with the new requirements at the earliest opportunity". While recognising a degree of lenience, it also noted that, "Each Supervisor reserves the right to take enforcement action, consistent with its stated approach to enforcement." This confusing, jury-rigged, approach shouldn't be necessary. The issue of guidance should be notified ahead of time and reporting entities should be given relief from compliance in law for a period after issue of the guidance, so they have time to assess and implement it.

2.10 In October 2024, without warning, the AML/CFT supervisors issued an updated AML/CFT programme guideline (https://www.dia.govt.nz/Updated-AML-CFT-programme-guideline---October-2024). The guide states "It is important that you have read and taken this guideline into account when developing or reviewing your AML/CFT programme." This indicates that the programme did not have to be implemented immediately. However, the law itself provides no such safe harbour and requires reporting entities to "have regard to" such guidance at all times. The Supervisors are taking an *ad hoc* and confusing approach that is detrimental to effective compliance.

**Poorly managed guidance and other documents**

2.11 AML/CFT reporting entities are, by law, required to "have regard to" guidance prepared by the AML/CFT supervisors, including when preparing risk assessments and compliance programmes. In practice, guides and other materials consist of a confetti of PDFs and webpages called:

- guidelines
- fact sheets
- FAQs
- statements
- clarifications
- codes of practice (currently just the Amended Identity Verification Code of Practice 2013)
- an "explanatory note" to the Amended Identity Verification Code of Practice 2013.

2.12 I've included in a schedule to this submission a list of documents issued by the FIU and Supervisors that are relevant to Cygnus Law's AML/CFT risk assessment and programme. There are 59 documents in total. That's not factoring in the eight sets of regulations (and most of those regulations each contain dozens of regulatory measures) and dozens of Ministerial exemptions, or IRD and Law Society guidance (or guidance from other regulatory bodies of professions). Larger reporting entities likely have the adequate resources to navigate this complexity. Smaller reporting have to devote a disproportionate amount of time and effort to do so and some likely don't do so effectively.

2.13 I don't consider provision of guidance to be a service provided by the Supervisors. The AML/CFT regime was designed as the outline of the requirement for a comprehensive risk management programme, to be implemented by reporting entities. So, it is necessarily high level and uses broad concepts that can be difficult to interpret and apply in practice. The regime recognised that, which is why the status of guidance is expressly provided for in the AML/CFT regime. That guidance plays a key role in ensuring that the regime is effectively implemented- the system would not work effectively without it. So, my critique of how guidance and other information is provided by the Police and Supervisors, is not intended to suggest that guidance is not necessary. Rather, I consider that it could and should be

implemented much more effectively. In doing so, that would support improved compliance and better outcomes in terms of reducing compliance costs and criminal and terrorist activity.

2.14 Despite the resources, expertise and role of the FIU and Supervisors, there is a complete absence of an effective document management process for guidance and other FIU & Supervisor documents and information. The system is chaotic. That has a detrimental impact on the 10,000+ reporting entities and the private sector is not providing a solution, which it shouldn't have to in any case. Key issues are:

a The guidance and other documents are provided in various formats and layouts, even documents that have a common purpose, such as sector risk assessments. They often contain mistakes. Student projects often exhibit better attempts at co-ordination and clear expression.

b There is no central register of the documents. The FIU and each Supervisor have a completely different way of making documents and other information available (this should be resolved to some extent when AML/CFT supervision for all reporting entities is consolidated in the DIA). FMA does not even separately list the documents on its website- you have to search for them in its entire "Document library" by keyword and hope you can find what you're looking for.

c There is no way of knowing which documents are current and which aren't. Often the only way to know they are no longer current is that they are no longer available on the FIU or Supervisor's websites.

d There is no system for announcing the publication of new or updated documents. In my experience, it's necessary to use a combination of notification services with the Supervisors (which will, on a selective basis, notify some documents), alerts and general vigilance to identify when new and updated documents are available.

e New and updated documents blip into existence without any prior notice (and, as noted, there is no consistent system for notifying them in any case). This isn't good enough, given that reporting entities are required, by law, to have regard to guidance.

f In most cases there is little or no guidance as to what has changed when updated or replacement versions of documents are issued. For example, in October 2024 the Supervisors issued an updated AML/CFT programme guideline (https://www.dia.govt.nz/Updated-AML-CFT-programme-guideline---October-2024). This updated the October 2022 version. The updated guideline introduced new and expanded guidance in a number of areas. The length of the guideline increased from 20 to 52 pages and the content was comprehensively restructured. No guidance was provided on the changes. That is very poor practice in my view for any regulator and is far from an outlier- this is the norm. The guidance helpfully (for the first time) included a 26 item checklist of requirements for a compliance programme. But, rather than providing that as a single checklist, parts of the checklist are scattered throughout the guideline.

g In many cases documents have been issued with no version control, so it is difficult to identify current versions.

**Costs and benefits not properly considered**

2.15 Treasury's *Expectations for Good Regulatory Practice document* states that:

> "The government expects any regulatory system to be an asset for New Zealanders, not a liability.

> By that we mean a regulatory system should deliver, over time, a stream of benefits or positive outcomes in excess of its costs or negative outcomes. We should not introduce a new regulatory system or system component unless we are satisfied it will deliver net benefits for New Zealanders. Similarly, we should seek to remove or redesign an existing regulatory system or system component if it is no longer delivering obvious net benefits."

2.16 Under the *Impact Analysis Requirements* an impact analysis is a requirement for regulatory proposals. That document states that the requirements:

> "are both a process and an analytical framework that encourages a systematic and evidence-informed approach to policy development. The requirements incorporate the Government Expectations for Good Regulatory Practice."

2.17 In practice, I think that there's a real risk the AML/CFT regime has not delivered net benefits for New Zealanders (while recognising we have no choice but to implement it). Recent reports highlighted that, in the second half of 2024, meth use was at all time high levels. That is not, in my view, necessarily a suggestion that the AML/CFT regime is not effective. It is simply that the AML/CFT regime cannot address the underlying causes of crime or prevent determined criminals from finding ways to find workarounds. This failure is reflected in the wider "war on drugs" which, for over 50 years, has not been able to prevent rampant drug use and associated criminal activity.

2.18 In practice, deregulatory measures are invariably required to meet high thresholds to be implemented and any deregulation is mulled over for years, with the resulting measures often being parsimonious, as I note in this submission with respect to deregulatory measures in the Bill.

2.19 As part of the Ministry's 2021 statutory review of the AML/CFT regime, a Police representative in the opening online presentation stated that their goal is to use the AML/CFT regime to "eliminate crime". That is laudable but unrealistic. However, I suspect that this thinking explains the ever-increasing AML/CFT regulation, with dozens of new obligations introduced in the last two years alone.

2.20 The Ministry has also interpreted the Financial Action Task Force (**FATF**) regime as requiring close to zero risk regardless of the costs that that imposes. The Ministry expressed genuine surprise that many submissions in the 2021 review expressed concern about the costs imposed on businesses. In response, it carried out a brief survey and used that to develop a cost model that it says confirms that the costs of the regime are less than the benefits achieved. However, as is usual with such assessments, the figures were not developed with any rigour, especially the benefit numbers, with no evidence whatsoever provided as to how those benefits were determined. I think it's highly likely that the actual costs imposed are higher than the Ministry's figures indicate. For example, it relies on "specific labour costs". For a small firm like Cygnus Law, there are no "specific costs" as there are no dedicated AML/CFT roles. I think it's likely that the real costs in terms of time spent by many staff on AML/CFT matters, not just dedicated staff, is much higher than estimated. And such cost benefit analyses don't capture other costs such as the effect of frequent hacking of highly sensitive personal information as a result of a regime that requires 10,000+ reporting entities to hold extensive, highly sensitive, personal and financial information about their customers. Nor does it factor in that expectations of regulatory effectiveness are often unrealistic, and that regulatory failure is possible. Overall, benefit data is highly qualitative and subject to high levels of uncertainty.

2.21 I have seen no data that links the AML/CFT regime to benefits to society. As noted, the reports prepared by FIU provide no such data. There is little available information on how reporting entities' SARs and STRs support measures to stop and reduce crime.

2.22 Measures to update the Act and regulations have been drowned in an "everythingism" approach. This was typified in the Ministry's 2021 review of the AML/CFT regime. The consultation paper ran to 133 pages and didn't just address the system as it was but introduced a "wish list" of new measures the Ministry was keen to advance, many of them unrealistic and/or poorly articulated. The result was a final report that ran to 256 pages and was so extensive and detailed that it has taken years to address some of the matters arising. There appears to no me to be no effective process for prioritising efforts and measures to address unnecessary regulations are definitely not prioritised. Many of the amendments in the Bill flowed from that review but the nature and extent of the issues canvassed has resulted in it taking years to get changes made. Issues with the requirement for enhanced customer due diligence on low risk family trusts and address verification have been known about for years and in some cases cause real harm to vulnerable people. Yet the Ministry, FIU and Supervisors have been shown much greater interest in expanding AML/CFT regulation.

## 3. FATF SUPPORTS AML/CFT SIMPLIFICATION

3.1 In February 2025 FATF updated its "The FATF Recommendations" document. This is the basis for all AML/CFT regulation in New Zealand. The updated recommendations introduced a fundamental change by providing:

> "Revisions to FATF's standards related to the risk-based approach to increase focus on proportionality of measures and require countries to allow and encourage simplified measures in lower risk areas."

3.2 This is the first time that FATF has fully recognised a risk-based approach to AML/CFT measures. Recommendation 1 (which implements the risk-based approach) includes the following:

> "countries should apply a risk-based approach (RBA) to ensure that measures to prevent or mitigate money laundering and terrorist financing are proportionate to the risks identified. This approach should be an essential foundation to efficient allocation of resources across the anti-money laundering and countering the financing of terrorism (AML/CFT) regime and the implementation of risk-based measures throughout the FATF Recommendations."

3.3 I don't consider that New Zealand has applied a risk-based approach to the development of AML/CFT regulations, with a close to zero-risk approach being applied (often without evidence to justify why that's appropriate). So, FATF itself is now confirming that that approach is no longer appropriate, if it ever was. Of particular importance is the focus on "lower risk", not low or no risk. This supports a move to greater focus on reducing AML/CFT regulations that don't deliver material benefits. I urge Parliament to take a sceptical approach and require that the Ministry provide cogent evidence that justifies opposition to deregulatory measures. In that regard, I have made a number of proposals to improve the proposed amendments in the Bill, so that they better support reporting entities to comply cost-effectively, without materially increasing risk that reporting entities will fail to identify ML and TF concerns.

## 4. UPDATED BENEFICIAL OWNER DEFINITION (CLAUSE 4(1))

4.1 The following updated definition of "beneficial owner" will replace that in section 5(1) of the Act:

> **beneficial owner—**
>
> (a) means the individual who—
>
> (i) has effective control of a customer or person on whose behalf a transaction is conducted; or
>
> (ii) owns a prescribed threshold of the customer or person on whose behalf a transaction is conducted; and
>
> (b) includes an individual—
>
> (i) with ultimate ownership or control of the customer, whether directly or indirectly; or
>
> (ii) who is a customer of a customer, and on whose behalf the transaction is conducted, but only if the individual meets the requirement set out in **subparagraph (i)**

4.2 This definition plays a pivotal role in the regime, as it determines which individuals in relation to a customer must be subject to customer due diligence (**CDD**) procedures and politically exposed persons (**PEP**) checks. So it is important that the definition is effective for that purpose and, also, that it isn't unduly wide, given the significant effort required to carry out CDD on individuals.

4.3 It is not entirely clear why this amendment is being introduced. Part "(b)" of the updated definition was introduced via Regulation 5AA of the Anti-Money Laundering and Countering Financing of Terrorism (Definitions) Regulations 2011 on 31 July 2023. Part "(a)" of the definition in the Act is not changed by the Bill. The only reason the updated definition is being introduced via the Bill is if there was, in fact, no power to update the definition of "beneficial owner" via regulation. That is concerning as it suggests that the current change to the definition, introduced via Regulation 5AA, has no legal force. However, if this update is to proceed, it is critical in my view that significant shortcomings in the definition are remedied.

4.4 The proposed definition is deeply unsatisfactory. It retains all aspects of the current definition in the Act. However, that definition is widely recognised as being incorrect, as it doesn't accord with the beneficial owner concept as defined by FATF. In particular, it repeats the term "a customer or other person on whose behalf a transaction is conducted" (a "POWBATIC") twice but doesn't identify it as a separate element. The Supervisors themselves effectively redefined "beneficial owner" in previous versions of their Beneficial Ownership Guideline as follows:

> 14. Each time you apply the test of beneficial ownership to a customer you must apply three elements. These elements are:
>
> a) who owns more than 25 percent of the customer[2]
> b) who has effective control of the customer
> c) the persons on whose behalf a transaction is conducted
>
> A beneficial owner is an individual who satisfies any one element, or any combination of the three elements.

4.5 Rather than addressing that shortcoming, regulation 5AA made matters worse, by introducing further concepts that are incomprehensible to anyone who doesn't have a deep understanding of the regime (and even then it is not fully effective- see below). It appears that is in part because the regulatory change (via regulation 5AA) could not directly amend the existing definition. However, since a change to the Act is being proposed, I cannot see any sound basis to compound the existing issues. Rather, the definition should be revised entirely, to make it workable and understandable. For example, Australia and UK use simpler formulations, which accord with the FATF concept of "beneficial owner":

Australia

***beneficial owner:***

(1) *of a person who is a reporting entity*, means an individual who owns or controls (directly or indirectly) the reporting entity;

(2) *of a person who is a customer of a reporting entity*, means an individual who ultimately owns or controls (directly or indirectly) the customer;

(3) In this definition: *control* includes control as a result of, or by means of, trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights, and includes exercising control through the capacity to determine decisions about financial and operating policies; and

(4) In this definition: *owns* means ownership (either directly or indirectly) of 25% or more of a person.

*Note: The definition 'control test' does not apply to this definition.*

UK

(7) In these Regulations, "beneficial owner", in relation to a legal entity or legal arrangement which does not fall within regulation 5 or paragraphs (1), (3) or (6) of this regulation, means—

(a) any individual who benefits from the property of the entity or arrangement;

(b) where the individuals who benefit from the entity or arrangement have yet to be determined, the class of persons in whose main interest the entity or arrangement is set up or operates;

(c) any individual who exercises control over the property of the entity or arrangement.

4.6 When regulation 5AA was introduced the stated purpose was to use part "(b)" to disapply the concept of POWBATIC in part "(a)". My view is that it is still necessary to consider whether there may be a POWBATIC, and to recognise it as a separate consideration (as the Supervisors have done in guidance) because:

a The term POWBATIC is used in the FATF definition and is still incorporated in the beneficial owner definition. It would make no sense to retain that term if it is not intended to apply.

b Regulation 5AA(b) does not state that it excludes all types of POWBATIC. Instead, it excludes only one type of POWBATIC, being a customer of the reporting entity's customer (who is not captured by regulation 5AA(a)).

## 5. UPDATED TRUST AND COMPANY SERVICE PROVIDER DEFINITION (CLAUSE 4(3))

5.1 The updated definition of trust or company service provider (**TCSP**) excludes the following as a TCSP:

> "a person that is a financial institution if the only activity described in paragraphs (a)(i) to (vi) of the definition of designated non-financial business or profession carried out by the financial institution is managing client funds (other than sums paid as fees for professional services provided by the business or profession), accounts, securities, or other assets"

5.2 However, a financial institution that is a provider of a MVTS (currently captured by the activity "transferring money or value for, or on behalf of, a customer") may, for services for some customers, be captured by some of the DNFBP activity categories, specifically:

> "engaging in …—
>
> … [(a)(vi)(D)] a transaction on behalf of any person in relation to the buying, transferring, or selling of a business or legal person (for example, a company) and any other legal arrangement; or …
>
> … [(a)(vi)(E)] a transaction on behalf of a customer in relation to creating, operating, and managing a legal person (for example, a company) and any other legal arrangement…."

"Transaction" is defined in the Act to include "any … transfer of funds (in any denominated currency), whether … in cash; or … by cheque, payment order, or other instrument; or … by electronic or other non-physical means….". This closely aligns with the definition of MVTS and the activities of MVTS providers.

5.3 Accordingly, I submit that the exception in the definition of TCSP should be updated as follows:

> "a person that is a financial institution if the only activities described in paragraphs (a)(i) to (vi) of the definition of designated non-financial business or profession carried out by the financial institution are one or more of the activities described in paragraphs (a)(v), (a)(vi)(D) or (a)(vi)(E)" of that definition."

## 6. INTRODUCTION OF MONEY OR VALUE TRANSFER SERVICE DEFINITION (CLAUSE 4(4))

6.1 The Act and aligned law, Financial Service Providers (Registration and Dispute Resolution) Act 2008 (**FSP Act**), were both implemented to meet FATF requirements. The proposed definition of money or value transfer service (**MVTS**) is based on the FATF definition of MVTS.

6.2 The MVTS definition includes "or by electronic or other non-physical means, or in other stores of value". This indicates that they are cognate concepts but they aren't. The FATF definition uses the term "cash, cheques, other monetary instruments or stores of value". "electronic or other non-physical means" is a reference to how the payment is made (i.e. a means of payment) not a store of value. While trying for consistency by borrowing a term ("electronic or other non-physical means") from another part of the Act, consistency has not been achieved, rather the opposite. "Cash" is defined in the Act as "physical currency: bearer-negotiable instruments".

6.3 Based on those considerations part "(a)(i)" of the definition should be updated as follows:

> "accepts funds or value, whether in cash, in other stores of value or in other form, and including by electronic or other non-physical means; and"

6.4 "stores of value" is not used in the Act, FSP Act or any other legislation. Accordingly, it should be defined in the Act.

6.5 The term "clearing network" is from the FATF definition and is not used anywhere else in the Act or FSP Act, or in any other New Zealand legislation. The Act is used by 10,000+ reporting entities. So, it is important that use of such jargon is minimised. Most people are unlikely to understand what the term "clearing network" means. "Clearing network" should be defined in the Act.

6.6 The nesting of the term "operator of the money or value transfer service" within the definition of "money or value transfer service" doesn't make sense. The term "operator of the money or value transfer service" should be changed to "service provider" or "provider of the service".

6.7 The part of the definition at part "(a)(i)" uses quite different terminology from part "(a)(ii)". "(a)(ii)" should be updated as follows:

> "pays a corresponding sum (whether or not representing the whole of the funds or value accepted) in cash, in other stores of value or other form to a beneficiary by means of a communication, message, or transfer (including by electronic or other non-physical means), or through a clearing network to which the service provider belongs"

The additional changes should be self-explanatory.

6.8 One category of "financial activity" in the definition of "financial institution" in section 5(1) of the Act is "transferring money or value for, or on behalf of, a customer". That is clearly intended to capture MTVS providers. Now that MVTS is defined in the Act, it follows that that activity should be updated to be consistent with that definition. Otherwise, it won't be clear whether that activity is the same as the activity carried out by a MVTS, which has been an uncertainty regarding that activity to date. Accordingly, I submit that the term "transferring money or value for, or on behalf of, a customer" in the definition of "financial institution" be replaced with "provider of a money or value transfer service for, or on behalf of, a customer".

## 7. CHANGE TO TRUST DUE DILIGENCE REQUIREMENTS (CLAUSE 9)

7.1 Currently, reporting entities are required to carry out enhanced customer due diligence (**ECDD**) on all customers that are trusts or other vehicles for holding personal assets. That includes confirming and verifying source of wealth (**SoW**) and/or source of funds (**SoF**) for all trust customers. The Bill proposes to change that, as follows:

> (4) However, a reporting entity is not required to comply with subsection (1)(b) if the customer or person is a trust described in section 22(1)(a)(i) or (b)(i) and the reporting entity is satisfied that any risks have been mitigated by conducting—
>
> (a) standard customer due diligence under sections 15 and 16; and
>
> (b) enhanced customer due diligence under sections 23 and 25.

The effect of this very convoluted change is that a reporting entity won't have to verify, but will still have to collect, SoW or SoF information on a trust (or other vehicle for holding personal assets) customer, if "the reporting entity is satisfied that any risks can be mitigated by conducting" customer due diligence checks without verifying SoW or SoF information.

7.2 The RIS explains the basis for this change as:

> "There are a large number of small family trusts in New Zealand that present a low risk of money laundering or terrorist financing. However, current legislative provisions must be applied in a uniform way – as if they all present the same level of risk.
>
> The 2022 Statutory Review found that obligations on businesses to conduct enhanced due diligence are too burdensome."

That is correct. FATF has never required that ECDD be conducted on trusts as a matter of course. This measure makes even less sense, given that the RIS itself recognises that "there are a large number of small family trusts in New Zealand that present a low risk of money laundering or terrorist financing". However, even with overwhelming evidence that ECDD by default is not required, this reform only goes part way to unwinding this unnecessary measure. In particular, it still requires that SoW or SoF information be collected. This is almost always highly intrusive and, if done in accordance with the Act, often requires quite a large amount of information to be collected. Accordingly, I submit that the requirement for ECDD by default on low risk trusts be removed entirely. This is consistent with the Act's approach to most other vehicles for carrying out activities including companies. The *National Risk Assessment* identifies that a real risk is that companies are used as vehicles to commit crimes yet there is no default requirement for ECDD on companies and other corporate entities.

7.3 The RIS states that:

> "The proposed amendment will provide relief for businesses for some low-risk trusts and allow them to more efficiently on-board these customers".

And:

> "The proposed change will make current enhanced customer due diligence provisions more effective by ensuring these are applied only to higher risk customers that are trusts. The approach encourages a more nuanced risk understanding of trusts in New Zealand. It will require the AML/CFT supervisors to issue some guidance to accompany this change which would provide businesses with more assurance on how this requirement will function in practice…"

However, the amendment does not refer to "low-risk trusts" or "higher risk customers". The standard in the amendment is "the reporting entity is satisfied that any risks can be mitigated". So this standard is largely meaningless as it provides no obvious link to the underlying concept it is supposed to support. The RIS states that this lack of substance will be addressed through guidance. I don't consider it acceptable that the law is continually updated with very high-level concepts that have no inherent meaning on an assumption that the Supervisors will "clarify" (i.e. make) the law via guidance. The law is supposed to be knowable; this is a core aspect of the rule of law. This approach gives undue power to the State to determine the law and does nothing to enhance certainty in the law.

7.4 I submit that this amendment be updated to provide certainty and to reflect that there is no sound basis to require routine ECDD on low risk trusts. So I propose the following replacement amendment:

> "After section 22(6), insert:
>
> > 22(7) However, a reporting entity is not required to comply with subsection (1)(a)(i) in relation to a customer that is a trust, if the reporting entity is satisfied that the customer presents a low risk of money laundering or terrorist financing based on a risk rating determined in accordance with 12AC of the Anti-Money Laundering and Countering Financing of Terrorism (Requirements and Compliance) Regulations 2011."

## 8. UPDATED REQUIREMENT FOR POLITICALLY EXPOSED PERSONS (CLAUSE 10)

8.1 The Bill will replace the requirement to "take reasonable steps to determine whether the customer or any beneficial owner is a politically exposed person" with a requirement to "have an appropriate risk management system to determine whether a customer or beneficial owner is a politically exposed person." This is justified in the RIS on the basis that ""reasonable steps" with regards to the obligation to establish if the beneficial owner of a customer is a PEP is not clear". However, replacing one vague concept ("reasonable") with another ("appropriate risk management system") does not add clarity and likely reduces it.

8.2 The RIS says that "We anticipate this change will be supported with guidance from the AML/CFT supervisors". This is not good enough in my view. "Risk management system" is not defined or used in any other part of the Act or regulations. This introduces an entirely new concept that does not have any fixed meaning. Proposing that this lack of clarity will be addressed via guidance is not an acceptable way to develop law. If the intention is to introduce clarity then the detail should be introduced via regulation and, only then, should this measure be given effect. In any case, I don't accept the premise that "reasonable steps" is worse. As with the definition of "beneficial owner", this proposed amendment is a low energy attempt to deal with a problem. There appears to have been no effective policy

process behind this measure. I submit that this amendment is not passed or, if it is, it only takes effect after prescribed details for "risk management systems" are introduced via regulation.

## 9. AML/CFT COMPLIANCE OFFICER AMENDMENTS (CLAUSE 14)

9.1 I support the amendment to the compliance officer provisions in section 56 of the Act.

## 10. UPDATED REQUIREMENT FOR RISK ASSESSMENTS (CLAUSE 15)

10.1 The Bill proposes replacing a reporting entity's current obligation to "have regard to … any applicable guidance material produced by AML/CFT supervisors or the Commissioner relating to risk assessments" with an obligation for a reporting entity to "undertake its risk assessment in accordance with any applicable guidance material relating to risk assessments that AML/CFT supervisors or the Commissioner produces".

10.2 I don't consider that is appropriate. It, in effect, gives guidance the status of binding law. I don't consider that is an appropriate approach to law making, as it undermines a fundamental tenet of the rule of law that statutes should not give undue discretion to the State (including its agencies) to engage in broad lawmaking. My concern is compounded by the issues I've noted above with respect to the haphazard approach the Supervisors have taken to the preparation and provision of guidance materials.

10.3 The RIS justifies this measure on the following basis:

> "The current gap in the legislation can be exploited by those who do not have regard to national or sector risk assessments. This will compromise the accuracy of their risk understandings and ultimately undermine a risk assessment. There is also no ability for the AML/CFT supervisor to compel a business to consider the national or sector risk assessments, despite them being crucial documents on which to base any risk understanding."

There is not a "gap" in legislation and simply asserting a "gap" is meaningless. The legislation currently requires reporting entities to "have regard" to guidance. The same obligation applies with respect to guidance on compliance programmes and there is no suggestion that that is also a "gap" and that law reform is required.

10.4 The RIS states, without providing any evidence, that "this change will not increase costs to government agencies or industry". This change will inevitably increase costs for industry, as reporting entities will have to carry out significant additional work to incorporate all relevant matters into their risk assessments, even if the reporting entity does not consider it appropriate or relevant. As noted above, the Supervisors use guidance to, in part, effectively seek to increase regulatory obligations. So that is the likely outcome, if the FIU and Supervisors know that reporting entities will be forced to comply with guidance, even if poorly constructed or not aligned with the standards in the Act.

10.5 In any case, the Act imposes minimum standards that already mean that it's very unlikely reporting entities can prepare compliant risk assessments without reference to National and

sector risk assessments prepared by FIU and the Supervisors respectively. Those standards are:

> (3) The risk assessment must be in writing and—
>
> (a) identify the risks faced by the reporting entity in the course of its business; and
>
> (b) describe how the reporting entity will ensure that the assessment remains current; and
>
> (c) enable the reporting entity to determine the level of risk involved in relation to relevant obligations under this Act and regulations.

So, again, there is no "gap" to be filled. And, to the extent there is a gap, simply giving guidance the force of law is not an appropriate response.

10.6 However, if the legislature is minded to pass this change then I submit that the law be updated to place much greater control on how such guidance is produced and managed. At the very least the process should be no less onerous than that required to produce binding codes of practice under the Act. In addition, any new or updated binding guidance should be deemed to only take effect 12 months after its introduction, to give the 10,000+ reporting entities an opportunity to update their risk assessments in accordance with usual review schedules. If more urgent changes are required then these should be permitted via regulations made for that purpose.

Yours sincerely
**Cygnus Law Ltd**

**Simon Papa**
Director

## SCHEDULE

### Police & Supervisor AML/CFT documents relevant to Cygnus Law

| No | Document | Author (version) |
|---|---|---|
| 1 | National Risk Assessment 2024 | NZ Police (released March 2025) |
| 2 | Lawyers and Conveyancers - Complying with the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 | DIA (December 2017) |
| 3 | Designated Non-Financial Businesses and Professions (DNFBPs) and Casinos Sector Risk Assessment | DIA (December 2019) |
| 4 | The Risk Assessment Guideline | Supervisors jointly (May 2018) |
| 5 | The ML/CFT Risk Assessment and Programme: Prompts and Notes for DIA reporting entities | DIA (December 2017) |
| 6 | Countries Assessment Guideline | Supervisors (undated) |
| 7 | Assessing Country Risk Guideline for reporting entities supervised by the Department of Internal Affairs | DIA (June 2021) |
| 8 | Terrorism Financing Risk Summary | DIA (30 July 2024) |
| 9 | Law Firms – Money Laundering and Terrorism Financing Risk Summary | DIA (May 2023) |
| 10 | Territorial scope of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 | Supervisors jointly (November 2019) |
| 11 | Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals | FATF (June 2013) |
| 12 | Interpreting "ordinary course of business" Guideline | Supervisors jointly (updated December 2017) |
| 13 | AML/CFT Programme Guideline | Supervisors jointly (updated October 2024) |
| 14 | Customer Due Diligence: Companies Guideline | Supervisors jointly (April 2024) |
| 15 | Customer Due Diligence: Limited Partnerships Guideline | Supervisors jointly (April 2024) |
| 16 | Customer Due Diligence: Trusts Guideline | Supervisors jointly (May 2024) |
| 17 | Customer due diligence factsheet sole traders & partnerships | Supervisors jointly (October 2022) |
| 18 | Customer due diligence factsheet clubs & societies | Supervisors jointly (July 2019) |
| 19 | Customer due diligence factsheet co-operatives | Supervisors jointly (July 2019) |
| 20 | Customer due diligence factsheet 'acting on behalf of customer' | Supervisors jointly (August 2013) |
| 21 | Clarification of the position the AML/CFT supervisors are taking with respect of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009- interpretation of a trust as a customer | Supervisors jointly (July 2019) |
| 22 | Beneficial Ownership Guideline | Supervisors jointly (April 2024) |
| 23 | Guidance on Beneficial Ownership of Legal Persons | FATF (March 2023) |

| No | Document | Author (version) |
|---|---|---|
| 24 | Enhanced Customer Due Diligence Guideline | Supervisors jointly (April 2024) |
| 25 | Amended Identity Verification Code of Practice | Supervisors jointly (2013) |
| 26 | Explanatory Note: Electronic Identity Verification Guideline | Supervisors jointly (updated July 2021) |
| 27 | Outsourcing your CDD requirements | FMA, DIA (December 2021) |
| 28 | Concealment of Beneficial Ownership (nominee directors, shareholders & general partners) | FATF (July 2018) |
| 29 | Statement on the Kiwi Access Card | Supervisors jointly (undated) |
| 30 | Guidance on Expired Passports as Identification for Customer Due Diligence | Supervisors jointly (undated) |
| 31 | Class Exemption for managing intermediaries information sheet | Minister of Justice (October 2018) |
| 32 | interim advice on due diligence obligations for lawyers receiving mortgage instructions from registered banks | DIA |
| 33 | Guidance: New AML/CFT regulations for money remitters that use agents (NA) | Supervisors jointly (27 March 2024) |
| 34 | Suspicious Activity Reporting Guideline | NZ Police (September 2021) |
| 35 | Guidance Document – Funds Remitted from Countries with Currency Controls | NZ Police (August 2021) |
| 36 | Guidance Document – Fraud | NZ Police (August 2021) |
| 37 | Guidance Document – Cyber Crime and Scams | NZ Police (August 2021) |
| 38 | Guidance Document – Suspicion : Definitions and Guidance | NZ Police (August 2021) |
| 39 | Suspicious Activity Report (various) | NZ Police (issued monthly) |
| 40 | Wire transfers fact sheet | Supervisors jointly (August 2013) |
| 41 | Wire Transfers under the AML/CFT Act | NZ Law Society (October 2018) |
| 42 | Prescribed transactions reporting – Understanding the Regulations | NZ Police (September 2021) |
| 43 | Prescribed transactions reporting – Reporting Obligation Guidance | NZ Police (September 2021) |
| 44 | Guidance Document – Reporting International Funds Transfers | NZ Police (September 2021) |
| 45 | Guidance for the new regulations relating to wire transfers | Supervisors jointly (October 2024) |
| 46 | Guideline: Assessing Country Risk | DIA (June 2021) |
| 47 | User Guide: Annual AML/CFT Report by Designated Non-Financial Businesses and Professions | Supervisors jointly (updated June 2021) |
| 48 | GoAML Reporting Entity – Web User Guide | NZ Police (v1.5 September 2021) |
| 49 | Prescribed Transactions Reports – Introduction to goAML Web Reporting for International Funds Transfers (IFTs) | NZ Police (v2.5 September 2021) |
| 50 | Prescribed Transactions Reporting – Understanding the Regulations | NZ Police (v2.0 September 2021) |
| 51 | Prescribed Transactions Reporting – Reporting Obligation Guidance | NZ Police (v2.0 September 2021) |
| 52 | GoAML Web Reporting – Reference Guide – Suspicious Activity Reports | NZ Police (v2.5 September 2021) |

| No | Document | Author (version) |
|---|---|---|
| 53 | GoAML Web Reporting – Reference Guide – Suspicious Transaction Reports | NZ Police (v2.5 September 2021) |
| 54 | How to determine whether to use the SAR or STR form | NZ Police (v1.6 July 2021) |
| 55 | GoAML – Suspicious Activity Reports – Hints & Tips | NZ Police (v2.0 September 2021) |
| 56 | Go AML – Completing Web Reports – Additional Information | NZ Police (April 2018) |
| 57 | Guideline for audits of risk assessments and AML/CFT programmes | Supervisors jointly (October 2019) |
| 58 | Getting the best outcome from your AML/CFT Audit | FMA (October 2014) |
| 59 | Extension on interim solution for corporate trustee annual report obligations | DIA (June 2023) |