IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2021-485-000573
[2022] NZHC 1340

UNDER	THE JUDICIAL REVIEW PROCEDURE ACT 2016
IN THE MATTER OF	THE RESERVE BANK OF NEW ZEALAND ACT 1989
AND	THE ANTI-MONEY LAUNDERING AND COUNTERING FINANCING OF TERRORISM ACT 2009
BETWEEN	THE INK PATCH MONEY TRANSFER LIMITED First Applicant
AND	SAMOA MONEY TRANSFER LIMITED Second Applicant
AND	SAMOA FINANCE MONEY TRANSFER LIMITED Third Applicant
AND	CLICKEX PACIFIC LIMITED Fourth Applicant
AND	THE RESERVE BANK OF NEW ZEALAND Reserve Bank
AND	THE MINISTER OF FINANCE Second Respondent

Hearing: 11 April 2022

Appearances: M T Lennard for Applicants
H Ebersohn and E Cameron for Respondents

Judgment: 8 June 2022

JUDGMENT OF GENDALL J

Introduction

[1] In this judicial review proceeding the applicants (as private companies operating money remittance services from New Zealand to the Pacific Islands) are essentially seeking declarations that, amongst other things, the Reserve Bank in particular direct trading banks to provide them with bank accounts for remittance purposes. The Reserve Bank position from the outset is that fundamentally it cannot do this.

[2] The applicants claim that, since 1 July 2013, registered banks[1] have acted wrongly first, in refusing to open new bank accounts for companies operating money remittance services such as themselves (money remitters), and secondly, in closing the bank accounts of such companies. The applicants maintain this is because the banks are undertaking blanket de-risking by refusing to take money remitters as customers. They say the trading banks do this because they have a lower risk appetite in relation to such services due to an "overly zealous view" of their obligations under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (the AML/CFT Act).

[3] The first respondent, the Reserve Bank of New Zealand (the Reserve Bank) is responsible for the registration and supervision of registered banks in New Zealand and is the AML/CFT supervisor for registered banks. The applicants claim that though the Reserve Bank has a supervisory and guidance role with respect to trading banks, and knows the impact of de-risking on the applicants and others like them, it has failed to do anything to correct that wrong view outlined in [2] above and to require the trading banks to provide banking services to money remitters, despite its ability to do so.

Background — the parties

[4] The applicants are New Zealand-registered companies.[2] They provide cross-border money remittance services (money remittance), primarily to the Pacific

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1 As provided in s 187 of the Reserve Bank of New Zealand Act 1989, I refer to the registered banks in this proceeding as "the banks", "the trading banks" and "the registered banks".

2 The third applicant withdrew from the proceedings in March 2022.

Islands. The applicants say these money remittance services amount to a substantial part of the Pacific Islands' economies and that these services enable seasonable workers in New Zealand to send their wages home more easily and cost-effectively than trading banks' money transfer services through SWIFT. The applicants maintain that money remittances are a crucial driver for prosperity and development in the Pacific.

[5] Since the introduction of requirements under the AML/CFT Act, the applicants say that trading banks have increasingly stopped accepting money remitters as customers and closed their existing accounts. This is known as "de-risking". The applicants contend this has meant they cannot get bank accounts necessary to conduct their respective businesses. Essentially, the applicants submit that this de-risking is due to an "overly zealous view" held by trading banks of their obligations under the AML/CFT Act, an interpretation which the Reserve Bank has fostered and supported and failed to do anything to correct.

[6] The Reserve Bank[3] is the central bank of New Zealand. It is responsible for the registration of registered banks under s 69 and/or s 76 of the Reserve Bank of New Zealand Act 1989 (the RBNZ Act). It is the relevant AML/CFT supervisor for registered banks, life insurers and non-bank deposit takers under s 130(1) of the AML/CFT Act. The Reserve Bank has a number of powers, including most relevantly the power under s 113 of the RBNZ Act, with the second respondent's consent to issue directions to a bank in certain circumstances, including if the Reserve Bank has reasonable grounds to believe that the business of a bank has not been, or is not being, conducted in a prudent manner. The second respondent, the Minister of Finance is charged with consenting to or otherwise the Reserve Bank's exercise of its powers under s 113.

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[3] The first respondent, the Reserve Bank, is the primary respondent in these proceedings. The second respondent is the Minister of Finance and I will refer to the Minister throughout as "the second respondent".

Applicants' business

[7] The business conducted by the various applicants here primarily involves undertaking inbound and outbound remittance transactions. By way of explanation, outbound remittance transactions for example are undertaken in the following manner:

(a) an outbound remittance transaction is initiated by a customer in New Zealand who holds an account with one of the applicants;

(b) the outbound remittance customer arranges for the contracted sum to be credited to the outbound remittance company's bank account;

(c) the outbound remittance company confirms receipt of that sum and then instructs an overseas remittance company that has a business connection with the outbound remittance company to credit that amount to the customer's designated off-shore account.

[8] The applicants say the outbound remittance company does not charge any commission or fee on outbound remittance transactions, other than through the agreed exchange rate and any remittance cost. They maintain all profit derived from the transaction is for the benefit of the outbound remittance company.

[9] In order to conduct their business, the applicants contend they need a New Zealand bank account. This is necessary for a number of reasons, including being able to pay or receive New Zealand dollars, to accept funds through electronic payment systems, to conduct electronic payroll services, to comply with tax and GST obligations, and to operate in a secure manner (as otherwise large amounts of cash would have to be stored on premises and transported).

The applicants' case

[10] The applicants maintain they cannot get bank accounts because trading banks "de-risk" by refusing to take money remitters as customers. They complain the trading banks are not required under the AML/CFT Act to undertake blanket de-risking but do so because they have an "overly zealous view" of their obligations under the

AML/CFT Act. The applicants say trading banks have wrongly undertaken blanket de-risking as, relying on the Reserve Bank's guidance, they perceive money remittance as a high-risk activity in terms of AML/CFT compliance. The applicants argue the Reserve Bank "fosters and supports" that view of the law, which is wrong, and it has failed to do anything to correct that view and to require the trading banks to provide banking services to money remitters.

[11] The applicants acknowledge the Reserve Bank has a supervisory and guidance role with respect to trading banks, but that it does know the detrimental impact of de-risking on the applicants and others in the sector, which arises directly from an apprehension held by the trading banks that they must be satisfied the applicants' activities with their customers satisfy that applicants' AML/CFT obligations.

[12] The applicants argue this apprehension is wrong at law. The Reserve Bank according to the applicants has reinforced that error of law in its guidance and supervision, it has failed to take steps under s 113 to correct that error of law, and therefore, it has been complicit in that error.

[13] The applicants contend there are provisions under the RBNZ Act empowering the Reserve Bank to correct this wrong perception of the law, to direct trading banks to provide services to money remitters, and, in the event of the failure of the trading banks to do so, to provide banking services to money remitters itself. The Reserve Bank, they maintain, has unlawfully failed to do so.

Grounds of review

[14] The applicants raise seven grounds of review.

[15] The first ground of review is that the respondents failed to exercise their powers to address blanket de-risking. The applicants say that they asked the respondents separately to use their powers under s 113 of the Act to direct the trading banks to provide banking services to companies whose business included money remittance. The respondents declined to do so. The applicants say that in failing to do so the respondents erred in law in misinterpreting their powers under s 113 and

acting inconsistently with the purpose of the Act. The applicants also say that the respondents erred in failing to take into account relevant considerations in this respect.

[16] The second ground of review is that the Reserve Bank has failed to provide banking services to the applicants. The applicants say also that at all material times the Reserve Bank has itself failed or neglected to provide banking services to the applicants when the trading banks failed to do so.

[17] The third ground of review is that the Reserve Bank has failed to exercise its statutory duty to provide guidance. The applicants say that the Reserve Bank has failed to provide adequate or any guidance, codes of practice or feedback to trading banks on the provision of essential banking services to companies engaged in money remittance, or to undertake any other activities necessary for assisting trading banks to do so. The applicants also contend that the Reserve Bank failed in its statutory duty by failing to raise blanket de-risking as a topic for the Co-ordination Committee while a member of that Committee. The applicants say that in so acting the Reserve Bank committed an error of law in misinterpreting its powers and obligations under the AML/CFT Act and failed to take into account relevant considerations.

[18] The fourth ground of review is that the Reserve Bank erred in law in interpreting its role as AML/CFT supervisor too narrowly and/or interpreting the scope of the due diligence required of trading banks in relation to money remittance companies too broadly.

[19] The fifth ground of review is that the second respondent erred in law in forming the view that it is necessary for money remittance companies to obtain and provide to trading banks an audit report or an AML/CFT supervisor's report before trading banks can provide bank accounts.

[20] The sixth ground of review is that the Reserve Bank erred in law by failing to raise blanket de-risking as a topic for the Co-ordination Committee while a member of that Committee.

[21] The seventh ground of review is that the Reserve Bank committed an error of law in wrongly classifying the regulated New Zealand money remittance companies such as the applicants as high AML/CFT risk businesses.

Relief sought

[22] The applicants seek declarations against the Reserve Bank that:

(a) the Reserve Bank has erred in law in classifying New Zealand money remittance companies such as the first to fourth applicants as high AML/CFT risk businesses;

(b) the Reserve Bank has erred in law in advising that it is necessary for money remittance companies, including the first to fourth applicants, to obtain and provide to trading banks an audit report or an AML/CFT supervisor's report, before trading banks can provide bank accounts;

(c) the Reserve Bank has erred in refusing to direct the trading banks under s 113 that they supply essential banking services to the applicants;

(d) the Reserve Bank has erred in law in failing to provide a code of practice in accordance with s 63 forbidding blanket de-risking;

(e) the Reserve Bank has erred in law in failing to supply banking services to the applicants when the trading banks have not done so;

(f) the Reserve Bank has erred in law in failing to raise blanket de-risking as a topic for the Co-ordination Committee; and

(g) costs.

[23] The applicants also seek declarations against the second respondent that:

(a) the second respondent has erred in law in advising that it is necessary for money remittance companies, including the applicants, to obtain

and provide to trading banks an audit report or an AML/CFT supervisor's report, before trading banks can provide bank accounts;

(b) the second respondent has erred in refusing to consent to the Reserve Bank directing the trading banks under s 113 to supply essential banking services to the applicants; and

(c) costs.

Respondents' submissions

[24] The respondents say that as a result of international efforts to combat money laundering and the financing of terrorism, the banking system has become risk-averse when dealing with cross-border fund transfers involving money remittance companies. The respondents admit a real or perceived perception of the lesser capacity of less-developed countries to comply with international AML/CFT standards. The respondents say this is a world-wide phenomenon and is not limited to New Zealand and the Pacific region. The respondents accept that the AML/CFT legislation and similar legislation in foreign jurisdictions can accordingly have unintended consequences that negatively impact services to less-developed regions of the world.

[25] The respondents further accept that some money remitters, such as the applicants, have therefore had difficulty obtaining and maintaining bank accounts. The Reserve Bank says that it is understandable that the applicants would like the Reserve Bank to direct registered banks to provide them with bank accounts. However, the Reserve Bank says it cannot do so.

[26] The Reserve Bank says that the power contained in s 113 of the RBNZ Act to give directions to registered banks is a power that in this context must be exercised for the purpose of promoting and maintaining a sound and efficient financial system, in accordance with s 68 of the Act. The respondents say that decisions by certain registered banks to not provide bank accounts to some money remitters do not affect either the soundness or the efficiency of the financial system.

[27] The respondents say a blanket direction for banks to provide banking services to certain customers without regard to the risk assessment and CDD frameworks under the AML/CFT Act would cut across the AML/CFT Act. They say this could damage New Zealand's international reputation as a reliable and consistent actor in meeting its AML/CFT commitments, which could have flow-on effects on the financial sector. They say this would in fact undermine, rather than promote and maintain, the soundness and efficiency of the financial system.

[28] The respondents reject the applicants' submission that it is at fault for not providing further guidance to registered banks, who are said by the applicants to have an incorrect apprehension of the effect of Schedule Part 6 of the AML/CFT (Class Exemptions) Notice 2018 (the Class Exemptions Notice). The respondents also say that de-risking behaviour is complex, multi-faceted and not solved by such a narrow exemption as contained in the Class Exemptions Notice, and that as such there is no basis to suggest that the provision of further information to registered banks would have any effect on de-risking behaviour.

[29] The respondents also challenge the need to provide any further guidance to the registered banks. The respondents say they have already provided significant guidance to the registered banks and that there is no basis to suggest that a reasonable decision-maker could only have provided further guidance.

Other matters raised by the respondents

[30] Finally, the respondents point to the Pacific Remittance Project (the PRP) commenced by the Reserve Bank in 2019 as addressing issues relating to the increasing isolation of Pacific Island nations from the banking system. The applicants, for their part, however, argue that the PRP is no adequate solution.

[31] The respondents also say it is unclear why the applicants have included the second respondent in these proceedings as the second respondent has not exercised any statutory power or made any decision that is amenable to judicial review.

Judicial review principles

[32] Grice J noted in *New Zealand Forest Owners Association Inc v Wairoa District Council*, the courts have approached judicial review in New Zealand "bearing in mind that it is a supervisory jurisdiction to ensure that powers are exercised in accordance with law."[4] As Cooke J said in *Patterson v District Court, Hutt Valley*:[5]

> … In every judicial review case the Court's role is to review whether a decision is made in accordance with law. In all cases it does so in the same dispassionate way …

[33] In *Coromandel Watchdog of Hauraki (Inc) v Minister of Finance,* Simon France J said judicial review was intended to be a comparatively simple process of "testing that public powers have been exercised after a fair process, and in a manner, which is both lawful and reasonable."[6] The limitations of those powers are then to be ascertained from the statute or other regulation which bestows them, which also gives the extent of the decision-making freedom provided.[7]

Error of law

[34] The applicants bring these proceedings in large part on the basis that the Reserve Bank has erred in law in a number of respects.

[35] The Supreme Court has described an error of law in the following way:[8]

> [26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable — so clearly untenable — as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination".[9]

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4 *New Zealand Forest Owners Association Inc v Wairoa District Council* [2022] NZHC 761 at [19].
5 *Patterson v District Court, Hutt Valley* [2020] NZHC 259 at [16].
6 *Coromandel Watchdog of Hauraki (Inc) v Minister of Finance* [2020] NZHC 1012 at [13], citing *BNZ Investments Ltd v Commissioner of Inland Revenue* HC Te Whanganui-a-Tara | Wellington CIV-2006-485-697, 7 December 2006 at [15].
7 *Patterson v District Court, Hutt Valley*, above n 5, at [14]–[15].
8 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.
9 *Edwards v Bairstow* [1956] AC 14 at 36.

[36] Later, in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*, the Supreme Court accepted that if a decision maker has misunderstood the meaning of a term, "and has thereby misdirected itself, it will have committed an error of law which can be corrected on appeal."[10] However, the Court went on to note, if the decision maker has correctly understood the term for the purposes in question "and has then proceeded to apply that understanding to the facts before it, its conclusion is a matter for the [decision maker] weighing up the relevant facts."[11] The decision maker's conclusion could not be disturbed on appeal, provided it had not overlooked any relevant matter or taken account of an irrelevant matter, unless it was "insupportable even on a correct understanding" of the term.[12]

[37] Case law also puts the test of an error of law as whether the finding was "open" to the authority,[13] or otherwise in terms of unreasonableness. Palmer J in *Hu v Immigration and Protection Tribunal*, highlighting the linkage between error of law and unreasonableness, endorsed in a judicial review context the Supreme Court's reformulation of the *Edwards v Bairstow* test as a "better account of unreasonableness in judicial review than the tautologous words used in *Wednesbury*."[14] There, Palmer J stated:[15]

> Where a decision is so insupportable or untenable that proper application of the law requires a different answer, it is unlawful because it is unreasonable. That may involve the adequacy of the evidential foundation of a decision or the chain of logical reasoning in the application of the law to the facts. Unremarkably, unreasonableness, also termed irrationality, is to be found in the reasoning supporting a public decision.

Unreasonableness

[38] Unreasonableness itself arises only where a decision maker comes to a decision that no reasonable decision maker could have reached, a decision which lies "outside the limits of reason".[16] It is clearly a high threshold to meet.

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10 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [51].
11 At [51].
12 At [51].
13 *Lewis v Wilson and Horton Ltd* [2000] 3 NZLR 546 (CA).
14 *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [2].
15 At [2].
16 *Criminal Bar Association of NZ Inc v Attorney-General* [2013] NZCA 176 at [136].

[39] The question in this case is whether the Reserve Bank's alleged failures were so unreasonable that no reasonable authority could have done anything other than avoid such failures.[17] To make out a ground of unreasonableness the impugned decision must be "unreasonable", "perverse", "absurd" or "so outrageous in its defiance of logic … that no sensible person who had applied [their] mind to the question to be decided could have arrived at it."[18]

Failure to take into account relevant considerations

[40] The applicants also allege a failure on the part of the Bank to take into account relevant considerations.

[41] In *Secretary for Justice v Simes*, the Court of Appeal stated:[19]

> … if the statute conferring the relevant discretion expressly or by implication identifies considerations required to be taken into account by the decision maker as a matter of legal obligation, then regard must be had to those matters.[20]

[42] However, as Cooke J described in *CREEDNZ Inc v Governor-General*, a court will hold a decision invalid on the basis of a failure to take into account relevant considerations "only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation".[21] As Cooke J went on to note:[22]

> … It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision.
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> Questions of degree here can arise … [b]ut it is safe to say that the more general and the more obviously important the consideration, the readier the Court must be to hold that Parliament must have meant it to be taken into account.

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17 The classic case for unreasonableness is *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 228, [1947] 2 All ER 680 (CA).

18 See *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 at 545 and 552; and *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 410.

19 *Secretary for Justice v Simes* [2012] NZCA 459, [2012] NZAR 1044 at [48].

20 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, above n 17, at 682 per Lord Greene MR.

21 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 182–183.

22 At 182–183.

[43] Ultimately, however, as the Court of Appeal in *Secretary for Justice v Simes* emphasised, though decision makers "must approach mandatory relevant considerations with due deliberation and an open mind … the weight to be given to mandatory considerations is a matter for the decision maker."[23]

Background to the AML/CFT Act regime

[44] The purpose of the AML/CFT legislation and regime is described in s 3 of the AML/CFT Act as follows:

> **3 Purpose**
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> (1) The purposes of this Act are—
>
> (a) to detect and deter money laundering and the financing of terrorism; and
>
> (b) to maintain and enhance New Zealand's international reputation by adopting, where appropriate in the New Zealand context, recommendations issued by the Financial Action Task Force; and
>
> (c) to contribute to public confidence in the financial system.
>
> …

[45] The AML/CFT regime is New Zealand's effort to comply with the recommendations of the Financial Action Task Force (the FATF). The FATF is an international agency which combats money laundering and the financing of terrorism. The FATF makes recommendations to guide countries on the most desirable framework to combat threats of money laundering and financing of terrorism with the aim of ensuring a co-ordinated global response to these threats. Countries are expected to follow these recommendations and the FATF monitors compliance. Failure to follow these recommendations can damage a country's international reputation and have flow-on effects on the ability of the financial sector of that country to transact with international financial institutions.

[46] The respondents therefore emphasise the importance of complying with international AML/CFT standards. A weak or deficient AML/CFT regime can cause significant issues for New Zealand's financial sector and the respondents argue that

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[23] *Secretary for Justice v Simes*, above n 19, at [50].

non-compliance with international standards could damage New Zealand's reputation, highlighting it as a weak link in combatting money laundering and terrorism financing internationally and potentially making New Zealand more attractive to money launderers and financers of terrorism. In turn, this could affect the financial sector's ability to transact with international financial institutions, increase costs of doing business internationally, lead to increased due diligence on New Zealand financial institutions, negatively impact access to and the cost of credit, and increase the risk of money laundering and terrorist financing occurring. The respondents say these issues would have significant implications for the soundness and efficiency of New Zealand's financial system.

The scheme and application of the AML/CFT Act

[47] Trading banks and money remitters are both "reporting entities" under the AML/CFT Act.[24] The Reserve Bank is the AML/CFT supervisor for trading banks.[25] The Department of Internal Affairs is the AML/CFT supervisor for money remitters.[26] Reporting entities have a number of requirements and obligations under the AML/CFT Act. A reporting entity must:

(a) carry out an assessment of the risk of money laundering and the financing of terrorism (risk assessment) it may reasonably expect to face in the course of its business;[27]

(b) have an AML/CFT compliance programme;[28]

(c) carry out customer due diligence (CDD) on their customers;[29]

(d) review their risk assessment and AML/CFT programme and have them audited every two years;[30]

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24 Anti-Money Laundering and Countering Financial Terrorism Act 2009 [AML/CFT Act], s 5(1) definition of "reporting entity".
25 Section 5(1) definition of "AML/CFT supervisor"; and s 130(1)(a).
26 Section 5(1) definition of "AML/CFT supervisor"; and s 130(1)(d).
27 Section 58(1).
28 Section 56.
29 Section 11.
30 Section 59.

(e) report to the Commissioner of Police (through the Financial Intelligence Unit) any "suspicious activity" and cash transactions that are $10,000 and over and international wire transfers that are $1,000 and over.[31]

Risk assessment and AML/CFT programme requirements

[48] A compliance programme has certain minimum requirements, which are set out in s 57 of the AML/CFT Act. A compliance programme must include internal procedures, policies and controls to detect, and manage and mitigate the risk of, money laundering and financing of terrorism.[32] In carrying out a risk assessment, a reporting entity must have regard to:[33]

(a) the nature, size and complexity of its business; and

(b) the products and services it offers; and

(c) the methods by which it delivers products and services to its customers; and

(d) the types of customers it deals with; and

(e) the countries it deals with; and

(f) the institutions it deals with; and

(g) any applicable guidance material produced by AML/CFT supervisors or the Commissioner of Police relating to risk assessments; and

(h) any other factors that may be provided for in regulations.

[49] The risk assessment must be in writing and:[34]

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31 Section 40.
32 Section 56(1).
33 Section 58(2).
34 Section 58(3).

(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 the AML/CFT Act and regulations.

CDD (Customer Due Diligence) requirements

[50] CDD is the process by which a reporting entity ensures its customers are who they say they are.[35] As Mr Damian Henry, the Acting Manager of AML/CFT Supervision at the Reserve Bank, says, it is through CDD that a reporting entity obtains confidence that their financial transactions will be legitimate.[36]

[51] The CML/AFT Act includes three levels of CDD — standard, simplified and enhanced — depending on the type of customer, the nature or circumstances of the transaction, and the level of risk involved.[37] Standard CDD requires a reporting entity to obtain certain information in relation to the identity of its customers and to take reasonable steps to ensure the information is correct,[38] as well as to obtain information on the nature and purpose of the proposed business relationship between customer and reporting entity and to decide whether the customer should be subject to enhanced CDD.[39] Simplified CDD generally applies when the customer is something in the nature of a government entity, registered bank or a licensed insurer.[40] Enhanced CDD applies when the customer is a customer from a country with insufficient AML/CFT measures in place or is a trust or other vehicle for holding personal assets or a company with nominee shareholders.[41] The applicants say that enhanced CDD is simply CDD with additional information about the source of the funds or wealth that will be used.

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35 Affidavit of Mr Damian Henry, 25 February 2022, at [15].
36 At [15].
37 At [15].
38 AML/CFT Act, ss 15–16.
39 Section 17.
40 Section 18.
41 Section 22(1)(b).

[52] A reporting entity must carry out ongoing reviews of the information obtained under CDD to ensure that the business relationship, and the transactions relating to that business relationship, are consistent with the reporting entity's knowledge about the customer and the customer's business and risk profile.[42]

[53] The requirements in the AML/CFT Act are minimum standards. Reporting entities may also add additional due diligence requirements as guided by their own risk assessments in deciding whether to accept a new customer or maintain a business relationship. The respondents say the ultimate approach to a given potential customer is a question of commercial judgment by a bank in the context of the risks it faces.

On whom a reporting entity must carry out CDD

[54] A reporting entity must carry out CDD on a customer, the beneficial owner of a customer and a person acting on a customer's behalf.[43]

[55] The applicants describe a "customer" as the person dealing with the reporting entity. In this case, the money remitters would be classified as customers of the trading banks, and the clients of the money remitters would be customers of the money remitters.

[56] The definition of "beneficial owner" in the AML/CFT Act is:[44]

> … the individual who—
>
> (a) has effective control of a customer or person on whose behalf a transaction is conducted; or
>
> (b) owns a prescribed threshold of the customer or person on whose behalf a transaction is conducted

[57] The applicants say there is some uncertainty as to what exactly is meant by the term "person on whose behalf a transaction is conducted" (Powbatic). They accept that the addition of Powbatics to the definition of "beneficial owner" may extend the ambit of people in respect of whom a reporting entity is required to undertake CDD, as the reporting entities regard the phrase as extending the class of people in respect

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42 Section 31.
43 Section 11.
44 Section 5 definition of "beneficial owner".

of whom CDD must be undertaken to include all Powbatics. I address this, as well as the Class Exemptions Notice, next.

Powbatics and the Class Exemptions Notice

[58] The impact of Schedule Part 6 of the Class Exemptions Notice (Schedule Part 6) on the obligations of trading banks is at the heart of this dispute. The separate contentions of the parties are analysed under the third ground of review below. For present purposes to simply provide background context, however, the following is generally agreed.

[59] Schedule Part 6 exempts reporting entities from conducting CDD on beneficial owners of specified managing intermediaries. This partially exempts these reporting entities from the requirement to undertake enhanced CDD on these customers, requiring CDD only on the entity itself and not on the entity's underlying customers.

[60] It is accepted that money remitters are "specified managing intermediaries" in the terms of Schedule Part 6 as they are financial institutions. Without the application of Schedule Part 6, a registered bank would need to complete CDD on the customers of the money remitter when the money remitter wanted to use its bank account to facilitate the transfer of funds for those customers. The money remitter would therefore need to ensure that its bank was aware of the customers on whose behalf transactions are being conducted, that is, Powbatics. The effect of the exemption is that the trading banks are exempt from carrying out any CDD on any beneficial owner of its money remitter customers, as noted including Powbatics.

[61] Neither "Powbatic", nor the full term it stands for, is defined in the AML/CFT Act. Powell J in *Department of Internal Affairs v Qian Duoduo Ltd* noted that since the AML/CFT Act came into force, and as early as 2013, there has been confusion about what "Powbatic" means.[45] In that case, one of the issues was a "genuine uncertainty in the AML/CFT regime with regard to who bears the obligation to complete CDD in transactions where other reporting entities have the direct contact

[45] *Department of Internal Affairs v Qian Duoduo Ltd* [2018] NZHC 1887 at [48] and [50].

with the end customer."[46] As Powell J noted, Te Mana Tātai Hokohoko | Financial Markets Authority in 2013 published an initial consultation paper outlining the practical implications of the definition of "beneficial owner" in the managing intermediaries' context.[47] This paper was later referred to in a 2015 information sheet, which noted, referring to Powbatics as well as the 2013 document:[48]

> The phrase 'person on whose behalf a transaction is conducted' ('Powbatic') is a concept from the Financial Action Task Force (FATF) Recommendations. It is intended to ensure reporting entities can identify who is behind a transaction, when that person is someone other than the person(s) with actual or legal ownership or control of the customer. Paragraph 16 of the FATF Guidance on Transparency and Beneficial Ownership (October 2014) provides that:
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> > *"This element of the FATF definition of beneficial owner focuses on individuals that are central to a transaction being conducted even where the transaction has been deliberately structured to avoid control or ownership of the customer but to retain the benefit of the transaction."*
>
> From this commentary, it is clear the concept of a 'person on whose behalf a transaction is conducted' is not intended to impose obligations on every possible natural person who may receive some benefit from a transaction occurring, but only to people who are 'central to a transaction being conducted'.
>
> In 2013, the Financial Markets Authority (FMA) published an initial consultation paper outlining the practical implications of this definition of 'beneficial owner' in the managing intermediaries' context. This paper highlighted that where there is a chain of financial institutions/schemes involved in providing a service to an underlying client (the customers of a customer and/or the natural persons who are the end customers), an underlying client may be the 'natural person on whose behalf a transaction is conducted' and therefore a 'beneficial owner'. This means that all reporting entities in a chain of managing intermediaries will be obliged to determine whether such beneficial owners (who could be 'central to a transaction') exist and do CDD on those people, despite not meeting the threshold for actual or legal control or ownership.

[62] The applicants recognise that the inclusion of Powbatics into the definition of "customer" could justify the respondent's understanding that trading banks are required to go beyond their immediate CDD obligations in relation to money remitters to look at the money remitters' dealings with the money remitters' clients.

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46 At [46].
47 At [50].
48 Te Mana Tātai Hokohoko | Financial Markets Authority *Class exemptions for managing intermediaries* (Information sheet, July 2015) at 1 (emphasis in original).

[63] However, as the applicants highlight, there are "obvious inefficiencies" with a system whereby one reporting entity looks through a second reporting entity with whom it is transacting and second-guesses the second reporting entity's job in complying with its own CDD obligations, an inefficiency which gets worse the more reporting entities are added into the chain of intermediaries involved in the same transaction. The applicants say Schedule Part 6 responds to and remedies those potential inefficiencies. They point to the comments of Powell J that the class exemption for managing intermediaries "represents an acknowledgment of the inefficiency of this scheme", the primary purpose of which is to "reduce the compliance burden from multiple reporting entities in a chain of transactions having the same CDD obligations".[49] As Powell J went on to state, the exemption therefore ensures that the CDD obligations then fall "on the reporting entity best placed to identify the customers' beneficial owners in any situation."[50]

[64] Thus it is accepted that the effect of the Schedule Part 6 exemption is that the trading banks are exempt from carrying out CDD on any beneficial owner of money remitter customers, that is to say the money remitter's clients. As noted, the parties' contention raises the question as to what this means in terms of the trading banks' practices said to give rise to blanket de-risking. This is covered further below under the third ground of review.

The role, obligations and powers of the Reserve Bank

[65] The Reserve Bank is the central bank for New Zealand. The purpose of its statute, the RBNZ Act, is to promote the prosperity and well-being of New Zealanders, and contribute to a sustainable and productive economy.[51] To achieve this purpose, the Bank is responsible for promoting the maintenance of a sound and efficient financial system.[52] The Bank is responsible for the registration and prudential supervision of banks.[53] The Bank is also the relevant AML/CFT supervisor for

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49 *Department of Internal Affairs v Qian Duoduo Ltd*, above n 45, at [52].
50 At [52].
51 Reserve Bank of New Zealand Act 1989 [RBNZ Act], s 1A.
52 Section 1A.
53 Sections 67–68.

registered banks, life insurers and non-bank deposit takers under s 130(1) of the AML/CFT Act.

[66] The respondents say in their submissions that banking regulation and supervision aims to provide a prudential framework within which banks are required to operate, with which failure to comply could have "substantial and negative real economy effects".[54]

[67] Part 5 of the RBNZ Act accordingly confers on the Bank a number of powers in relation to the registration and prudential supervision of registered banks (then to be exercised in accordance with its purpose for the maintenance of a sound and efficient financial system), including conditions of registration which place regulatory constraints on risk-taking behaviour and encourage sound and prudent practices by banks. Amongst these is the power contained in s 113 to give directions to banks, key to this dispute:

> **113 Bank may give directions**
>
> (1) The Bank may give a registered bank or an associated person of a registered bank a direction, in writing, if it has reasonable grounds to believe that—
>
> (a) the registered bank or associated person is insolvent or is likely to become insolvent; or
>
> (b) the registered bank or associated person is about to suspend payment or is unable to meet its obligations as and when they fall due; or
>
> (c) the affairs of the registered bank or associated person are being conducted in a manner prejudicial to the soundness of the financial system; or
>
> (d) the circumstances of the registered bank or associated person are such as to be prejudicial to the soundness of the financial system; or
>
> (e) the business of the registered bank has not been, or is not being, conducted in a prudent manner; or
>
> (f) any of the following persons has failed to comply with any requirement imposed by or under this Act or regulations made under this Act:
>
> (i) the registered bank:

[54] Affidavit of Mr Scott McKinnon, 24 February 2022, at [7]–[8].

(ii) a director of the registered bank:

(iii) in the case of an overseas incorporated registered bank, its New Zealand chief executive officer; or

(g) any of the following persons has been convicted of an offence against this Act:

(i) the registered bank:

(ii) a director of the registered bank:

(iii) in the case of an overseas incorporated registered bank, its New Zealand chief executive officer; or

(h) the registered bank has failed to comply with a condition of its registration.

(2) The Bank must obtain the consent of the Minister before giving a direction under this section.

…

[68] Mr McKinnon for the Reserve Bank in his affidavit says the power to give directions under this section is an important tool for the Bank. "If things go significantly wrong at a bank," he says, "the direction power under section 113 can be used to require a bank to undertake corrective actions to address the problems."[55] Mr McKinnon notes that the direction power under s 113 "allows the Bank to intervene in a timely way to minimise the impact that problems at a bank may have on the financial system."[56]

[69] In considering whether a registered bank has not carried on its business in a prudent manner, the Reserve Bank must confine its consideration to the following prescribed matters only:[57]

(a) capital in relation to the size and nature of the business or proposed business;

(b) loan concentration or proposed loan concentration and risk exposures or proposed risk exposures;

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55 At [14].
56 At [14].
57 Section 78.

(c) separation of the business or proposed business from other business and from other interests of any person owning or controlling the applicant or registered bank;

(d) internal controls and accounting systems or proposed internal controls and accounting systems;

(e) risk management systems and policies or proposed risk management systems and policies;

(f) arrangements for any business, or functions relating to any business, of the applicant or registered bank to be carried on by any person other than the applicant or the registered bank; and

(g) such other matters as may from time to time be prescribed in regulations.

[70] In 2008, reg 3 of the Reserve Bank of New Zealand (Registration and Supervision of Banks) Regulations 2008 prescribed the last item in the list above to include "the policies, systems, and procedures, or proposed policies, systems, and procedures, to detect and deter money laundering and the financing of terrorism."

[71] In respect to money laundering and the financing of terrorism, the Reserve Bank also has obligations as an AML/CFT supervisor in respect of trading banks under s 131 of the AML/CFT Act. Under that section, in this respect, the Reserve Bank's functions are to:

(a) monitor and assess the level of risk of money laundering and the financing of terrorism across all of the reporting entities that it supervises;

(b) monitor the reporting entities that it supervises for compliance with the AML/CFT Act and regulations, and develop and implement a supervisory programme to this end;

(c) provide guidance to the reporting entities it supervises to assist those entities to comply with the AML/CFT Act and regulations;

(d) investigate the reporting entities it supervises and enforce compliance with the AML/CFT Act and regulations; and

(e) co-operate through the AML/CFT co-ordination committee (or any other mechanism that may be appropriate) with domestic and international counterparts to ensure the consistent, effective, and efficient implementation of the AML/CFT Act.

[72] As an AML/CFT supervisor, the Reserve Bank has "all the powers necessary to carry out its functions" as an AML/CFT supervisor.[58] Under s 132(2)(c), the Reserve Bank has power, specifically, to provide guidance to trading banks by producing guidelines, preparing codes of practice in accordance with s 63, providing feedback on the banks' compliance with its AML/CFT obligations, and undertaking any other activities necessary for assisting banks to understand their AML/CFT obligations, including how best to achieve compliance with them.

[73] More globally, in exercising its powers under the RBNZ Act, it is an objective of the Reserve Bank "to exhibit a sense of social responsibility".[59] The Reserve Bank must also, if it "considers it necessary for the purpose of maintaining the soundness of the financial system", act as the lender of last resort for the financial system.[60] The Reserve Bank has the power to carry on the business of banking, including issuing financial products, entering into agreements necessary or desirable for carrying out its functions and exercising its powers, and carrying on any business or exercising any powers in conjunction with its functions and powers.[61] And as noted, the Reserve Bank may exercise its part 5 powers (including determining whether a bank should be registered or have its registration cancelled, and issuing directions) for the purposes of promoting the maintenance of a sound and efficient financial system.[62]

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58 AML/CFT Act, s 132(1).
59 RBNZ Act, s 169.
60 Section 31.
61 Section 39.
62 Section 68.

AML/CFT Co-ordination Committee

[74] Under ss 149–150 of the AML/CFT Act, the AML/CFT Co-ordination Committee (the Co-ordination Committee) must be established and maintained. The Co-ordination Committee consists of:

(a) a representative from the Ministry of Justice;

(b) a representative from the New Zealand Customs Service;

(c) every AML/CFT supervisor (including, relevantly, the Reserve Bank);

(d) a representative of the Commissioner of Police; and

(e) such other persons as are invited by the Chief Executive of the Ministry of Justice.

[75] The role of the Co-ordination Committee is to ensure that the necessary connections are made between its members "in order to ensure the consistent, effective, and efficient operation of the AML/CFT regulatory system."[63]

[76] Section 152 of the AML/CFT Act lists the functions of the Co-ordination Committee, which are to:

…

(c) facilitate co-operation amongst AML/CFT supervisors and consultation with other agencies in the development of AML/CFT policies and legislation:

(d) facilitate consistent and co-ordinated approaches to the development and dissemination of AML/CFT guidance materials and training initiatives by AML/CFT supervisors and the Commissioner [of Police]:

(e) facilitate good practice and consistent approaches to AML/CFT supervision between the AML/CFT supervisors and the Commissioner [of Police]:

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63 AML/CFT Act, s 151.

(f) provide a forum for examining any operational or policy issues that have implications for the effectiveness or efficiency of the AML/CFT regulatory system.

Whether the Pacific Remittance Project (the PRP) is a "panacea"

[77] It is pertinent at this stage to address one final related issue raised by the parties. That is whether the PRP is a "panacea" to the broader issue on which the applicants are bringing their judicial review.

[78] The Reserve Bank recognises that remittances are a "crucial driver for prosperity and development in the Pacific" and are larger for regions like the South Pacific than official development assistance and foreign direct investment combined.[64] The respondents acknowledge that some money remitters such as the applicants have had difficulty obtaining and maintaining bank accounts due to a real or perceived risk of less-developed countries not being able to comply with international AML/CFT standards, which leads to de-risking.

[79] The Reserve Bank says it is accordingly concerned that Pacific Island nations may be becoming increasingly isolated from the banking system. In 2019, the Reserve Bank, along with the Ministry of Foreign Affairs and Trade (MFAT), commenced the PRP to address this issue. It is an ongoing project as the Reserve Bank says the issue is "immensely complex" and cannot be resolved by New Zealand alone. The work requires extensive consultation and includes liaising with several international partners.[65] Mr Howells, who was engaged in the establishment of the PRP in 2019, describes a number of outcomes which the PRP is designed to achieve. These include of relevance here, increasing the capability of money remitters in implementing risk-based AML/CFT regimes; increasing the likelihood of money remitters retaining their banking services and helping to maintain service provision to the Pacific; and increasing the stability and security of the regional financial system, to provide banks with increased confidence in compliance tools used by money remitters.[66] Mr Howells deposes the PRP has engaged both with banks and money remitters to try to achieve these outcomes.

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64 Affidavit of Mr Darren Howells, 25 February 2022, at [11].
65 At [23] and [25].
66 At [24].

[80] The PRP is scheduled to continue until July 2022, at which point the Reserve Bank and MFAT will discuss the evolution of the project.[67] Mr Howells says the PRP will continue actions until then, such as contributing to the current statutory review of the AML/CTF Act, which will have a number of potential impacts on the PRP,[68] as well as exploring the feasibility and scope of a code of practice designed to provide a liability "safe harbour" for banks who provide banking services to lower-risk Pacific-focused money remitters that are able to adequately demonstrate compliance with AML/CFT obligations.[69]

[81] The applicants contend however that this is not an adequate solution. They say it does not address the root cause of the problem, which is the apprehension of the registered banks that they must supervise their money remitter clients' AML/CFT compliance. At best, they say, it simply makes the money remitter's AML/CFT compliance more easily verified, but that is the job of the AML/CFT supervisors, not the registered banks themselves.

Summary of trading banks' obligations

[82] The applicants essentially maintain that the trading banks are operating under a misapprehension of their AML/CFT obligations and that blanket de-risking followed as a result of this misapprehension and the failure of the Reserve Bank to remedy that misapprehension. It is therefore useful at this stage, having traversed the relevant background, to set out what the applicants contend is a summary of the relevant obligations of the trading banks under the AML/CFT Act in transacting with money remitters when the Class Exemption Notice exemption applies.

[83] According to the applicants, in that event when the trading banks are transacting with money remitters when the Schedule Part 6 exemption applies, the banks must:

(a) undertake CDD on the money remitter, which amounts to:

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67 At [52].
68 At [53].
69 At [55].

(i) obtaining and verifying the money remitter's identity;

(ii) identifying the beneficial owner of the money remitter if that owner has effective control of or owns more than 25 per cent of the money remitter, and undertaking CDD on any such beneficial owner;

(iii) obtaining information on the nature and purpose of the proposed business relationship between the money remitter and the trading bank;

(b) monitor the money remitter's accounts to determine if the transactions align with the nature and purpose of the business relationship;

(c) undertake ongoing CDD; and

(d) report suspicious transactions to the Police.

[84] The applicants allege that the CDD, and the ongoing CDD and account monitoring obligations do not and cannot enable a trading bank to know whether or not customers are likely to be engaged in criminal activity. They argue these obligations are manifestly designed only to help a reporting entity know the customer, to identify if the transaction is consistent with the reporting entity's knowledge about the customer's business and to identify any grounds for reporting a suspicious transaction.

[85] The applicants argue that any understanding of their AML/CFT obligations beyond these, extending to an obligation to supervise money remitters and ensure that the money remitters comply with their AML/CFT obligations in relation to their clients, is a misapprehension of their obligations under the AML/CFT regime. The applicants then say further — this being the basis of the judicial review itself — the Reserve Bank as reporting AML/CFT supervisor for the trading banks has erred in failing to correct this misapprehension, with blanket de-risking resulting.

[86] I now turn to the pleaded grounds of review. It is useful to address first the applicants' third pleaded cause of action as their submissions before me relied significantly on the allegation contained in that cause of action, that the Reserve Bank should have provided more guidance to the trading banks.

Third ground of review — failure to provide guidance

[87] The third ground of review is that the Reserve Bank failed to exercise its statutory duty to provide guidance to trading banks, in particular with respect to companies engaged in money remittance. The applicants argue the Reserve Bank failed to provide adequate or any guidance, codes of practice or feedback to trading banks on the provision of essential banking services to companies engaged in money remittance, or to undertake any other activities necessary for assisting trading banks to do so. They say that in failing to do so, the Reserve Bank misinterpreted its powers and obligations under ss 131(c), 132(2)(c) and/or 152(d) of the AML/CFT Act and failed to take account of relevant considerations.

[88] The basis for the applicants' submission in this respect is that the trading banks have misinterpreted the effect of Schedule Part 6 of the Class Exemptions Notice. The applicants contend Schedule Part 6 exempts trading banks from conducting any CDD in respect of the clients of money remitters, yet trading banks mistakenly consider they "need to see demonstrably effective AML/CFT compliance from customers who are themselves reporting entities under the AML/CFT Act (such as money remitters)".[70] The applicants say that trading banks think they must be satisfied that money remitters' AML/CFT processes comply with the money remitters' obligations before they will open bank accounts for them.

[89] The applicants suggest too that these decisions made by trading banks refusing to provide services to money remitters may be based on the Reserve Bank's 2017 Sector Risk Assessment.[71] That document said that money remitters[72] are "recognised internationally as presenting TF risk and RBNZ reporting entities should be aware of

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70 Affidavit of Mr Howells at [27].

71 Te Pūtea Matua | Reserve Bank of New Zealand *Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT): Sector Risk Assessment for Registered Banks, Non-Bank Deposit Takers and Life Insurers* (April 2017) [the 2017 SRA].

72 Referred to in the document as "money service businesses".

the risks associated with them".[73] The applicants say that when a trading bank takes on a money remitter as a customer, it consequently undertakes, under a mistaken apprehension of its obligations, what is effectively an audit of the money remitter's compliance, thus having to replicate, at no fee, the work already done by the money remitter's AML/CFT supervisor. The applicants say it is therefore unsurprising that trading banks refuse to take on money remitters as customers when this is the amount of work the banks are under the impression they have to undertake each time and on a continuing basis. When done on a wider scale this then results in blanket de-risking.

[90] The applicants allege that the Reserve Bank knows the trading banks operate under such a misapprehension and it has not provided to the trading banks sufficient guidance to dispel this misapprehension.

[91] The Reserve Bank however denies these allegations. It denies that the Reserve Bank has failed to provide adequate guidance in its role as statutory supervisor, and it further denies it had an obligation to do anything more than it did.

[92] In particular, the Reserve Bank says:

(a) There is no error of law on the part of the Reserve Bank. Schedule Part 6 applies only to a narrow obligation to carry out CDD on the beneficial owners of "specified managing intermediaries" and in any case, trading banks must still make an assessment as to whether they ought to accept any written confirmations provided by money remitters that they comply with their AML/CFT obligations.

(b) The difficulties experienced by money remitters in obtaining bank accounts is a complex, multi-faceted issue and it is naïve to think that the Reserve Bank providing further guidance on the Class Exemptions Notice would make any difference.

(c) The question of whether the Reserve Bank should have provided more guidance to the trading banks is one of *Wednesbury* unreasonableness

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[73] At [126].

— that is to say, the failure to provide further guidance needs to be so unreasonable that no reasonable authority could have done anything other than provide further guidance. The Reserve Bank says it has provided significant guidance to the trading banks and that there is no basis on which it could be said that no reasonable authority could have done anything else than provide further guidance.

Error of law — Schedule Part 6 of the Class Exemptions Notice

[93] The accepted effect of Schedule Part 6 was canvassed above. Essentially, the effect of the exemption is that the trading banks are exempt from carrying out CDD on any beneficial owner of its money remitter customers. As to what this may mean in relation to decisions by the trading banks refusing to take on money remitters as customers is a matter on which the parties diverge.

[94] The Reserve Bank argues Schedule Part 6 is narrow in scope. It maintains the registered banks are still required to have internal procedures, policies and controls for detecting money laundering and the financing of terrorism as well as for managing and mitigating the risk of money laundering and financing of terrorism that may arise during the course of their customer relationships with specified managing intermediaries. As the Reserve Bank points out, the exemption is conditional upon a number of matters. These require a money remitter to provide: firstly, provision of written confirmation that it has an AML/CFT programme; secondly, that it has its principal place of business in a jurisdiction with sufficient AML/CFT systems and measures in place; thirdly, that it is supervised for AML/CFT purposes; and fourthly, that it is conducting CDD in accordance with the AML/CFT Act.[74]

[95] The Reserve Bank maintains that, while it is situation-specific, trading banks will sometimes need to verify written statements made by money remitters that they are conducting CDD in accordance with the Act. Although a trading bank is not required to verify the written confirmation, unless there are reasonable grounds for the reporting entity to doubt the adequacy or veracity of the written confirmation, the Reserve Bank says that for many money remitters there will be factors that reasonably

[74] Regulation 3(c) of Part 6 of the Class Exemptions Notice.

give rise to such grounds, meaning the bank will then need to understand for itself that the AML/CFT requirements are being met by the money remitter, including adequate CDD. The Reserve Bank submits that when trading banks seek such verification this is to ensure any money laundering and terrorism financing risks arising from their relationships are being managed and mitigated, in accordance with their obligations to do so.

[96] The High Court has described the public duties under the AML/CFT regime as "onerous".[75] This is particularly so, as I see it, for small operators with less resources such as the applicants, and doubly so again given the international nature of the transfers and involvement of agents on both sides of each of the transactions here. I accept that a money remitter operating out of a small office may find these obligations challenging to implement.

[97] The applicants argue that a trading bank taking it on itself to monitor compliance and detect offending, and subsequently discontinuing a customer relationship if it thinks a customer's behaviour is risky, is unwarranted by the AML/CFT Act and indeed contrary to its clear intent. They say this understanding of the Class Exemptions Notice is wrong in law.

[98] I disagree however. I accept the Reserve Bank's submission advanced before me that, although the applicants may not be happy with the trading banks' assessments or risk appetites, it is up to the individual trading banks themselves to make an assessment as to whether they will accept any written confirmations provided as to AML/CFT compliance. The trading banks are still required, notwithstanding the effect of Schedule Part 6, to have internal procedures, policies and controls for detecting money laundering and the financing of terrorism as well as for managing and mitigating the risk these may arise during the course of their customer relationships. This is clearly apparent from ss 57 and 58 of the AML/CFT Act.

[99] I am satisfied the Reserve Bank is therefore entitled to say in this regard that the Class Exemptions Notice "does not apply wholesale". I accept it is not for the Reserve Bank to substitute its own assessments in this respect for example by

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[75] *E-Trans International Finance Ltd v Kiwibank Ltd* [2016] NZHC 1031 at [159].

providing guidance suggesting that trading banks are able to accept the written confirmations from money remitters without further verification. In my view there may be clear threats and risks in doing so, which may jeopardise the maintenance of a sound and efficient financial system. Rather, notwithstanding the application of the exemption to trading banks in relation to its money remitter customers, the banks are nevertheless still entitled to restrict dealings that they consider in accordance with their internal procedures, policies and controls and based on their required risk assessments, present AML/CFT risk.

[100] Accordingly, I do not accept here that the Reserve Bank has erred in law in its understanding of Schedule Part 6.

Failure to remedy that misapprehension

[101] The applicants say the Reserve Bank has misinterpreted its powers and obligations under ss 131(c), 132(2)(c) and 63 to provide guidance and supervision to the banks with respect to their AML/CFT requirements and obligations and it has thereby failed to remedy the misapprehension that has arisen.

[102] Section 131(c) provides that a function of the AML/CFT supervisor is to provide guidance to reporting entities to assist those entities in complying with the AML/CFT regime. Section 132(c) states that an AML/CFT supervisor may provide guidance to the reporting entities it supervises by producing guidelines as well as preparing codes of practice in accordance with s 63. Section 63 accordingly provides that an AML/CFT supervisor must, if directed to do so by the responsible Minister, prepare a code of practice for the sector of activity of its reporting entities.

[103] The applicants say the Reserve Bank has failed to provide any guidance or codes of practice to the trading banks on the provision of essential banking services to companies engaged in money remittance or that specifically addresses the problem of money remitters being unable to access bank accounts on the basis of blanket policies.

[104] The Reserve Bank, in contrast, says it has provided "more than enough guidance" to satisfy its legal obligations. It submits that the issue of de-risking is not

due to an insufficiency of guidance to the trading banks but rather that de-risking is a complex international issue that New Zealand cannot resolve on its own.

[105] In terms of what guidance the Reserve Bank has provided on this matter to the banking industry, it claims it has provided a "significant" amount. This has included Sector Risk Assessments;[76] a statement (issued in 2015) that indiscriminate closing of money remitters' accounts was inconsistent with the policy underlying the AML/CFT Act;[77] regular on-site inspections, which include inspection reports;[78] and industry gatherings.[79]

[106] As a preliminary point, no issue appears to be taken with the form of the guidance claimed. The statutory provisions in the AML/CFT Act provide options as to the method the Reserve Bank "may" use to provide guidance to the reporting entities it supervises, either through guidelines, codes of practice, feedback, or "any other activities".[80] The word "may" necessarily entails a discretion as to the mechanism the Reserve Bank chooses to use to provide that guidance.

[107] I turn now to those particular pieces of guidance pointed to above. The first is a Sector Risk Assessment prepared in 2017 (the 2017 SRA).[81] Mr Darren Howells was one of the Reserve Bank staff involved in preparing the 2017 SRA. He has stated that the assessment of risk involves a number of money laundering and terrorism financing variables and vulnerabilities before arriving at a rating using a methodology based on a function of likelihood and consequence.[82]

[108] In the 2017 SRA, the money laundering and terrorism financing vulnerabilities associated with alternative money remitters (that is, those outside of the formal or licensed financial sector) were assessed as presenting a high inherent risk of money laundering and financing of terrorism.[83] "Inherent risk" refers to the risk present

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76 As detailed in the affidavit of Mr Henry at [23]–[24].
77 As detailed at [28]–[30].
78 As detailed at [35]–[39].
79 As detailed at [40].
80 Section 132(2)(c).
81 The 2017 SRA, above n 71.
82 At [8].
83 At Appendix 12.

before risk mitigation measures are applied.[84] Nevertheless, the SRA explicitly stated that "Money Service Businesses" (that is, money remitters) present as a specific typology of vulnerability, but this was not necessarily an indication of the industry as a whole.[85] Indeed, in his affidavit Mr Howells stated that different remitters will present different levels of risk and different ML/TF typologies.[86] In line with this, the SRA stated:[87]

> An important consideration with MSBs is their role in supporting vulnerable and hard to reach populations. *Financial exclusion based purely on a category of customer, product or jurisdiction is not in line with the FATF Recommendations. RBNZ supervised entities are expected to apply a RBA [risk-based approach] to MSBs and mitigate the ML/TF risks in a proportionate manner.* The FATF has released a number of guidelines in relation to MSBs.

[109] Evidently, it seems the Reserve Bank expressly advised trading banks that they must not exclude money remitters from banking services purely by reason of their status as a "Money Service Business". Despite MSBs presenting high inherent risk levels, the Reserve Bank nevertheless advised trading banks to mitigate such risks in a proportionate manner and to apply a risk-based approach rather than blanket exclusion or de-risking. I am satisfied this evidence constituted at least some guidance to the banks to avoid wholesale de-risking.

[110] Next, the 2015 statement, in its turn, noted that some money remitters had recently experienced difficulty maintaining access to or had completely lost access to banking services. It went on to say:[88]

> *… the AML/CFT Act doesn't require banks to take a broad-brush approach, closing existing accounts or refusing to open new accounts for an entire category of customers such as money remitters. Nor does the AML/CFT Act prohibit banks from providing services to any customers unless the banks are unable to conduct customer due diligence on those customers. Although the AML/CFT Act requires banks to have adequate and effective procedures in place to manage and mitigate money laundering and terrorism financing risks posed by their customers, that obligation does not require banks to cease to provide services to an entire category of customers*.

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84 Affidavit of Mr Howells at [8].
85 The 2017 SRA, above n 71, at [54] and Appendix 12.
86 Affidavit of Mr Howells at [10].
87 The 2017 SRA, above n 71, at Appendix 12 (emphasis added).
88 Reserve Bank of New Zealand "Statement about banks closing accounts of money remitters" (28 January 2015) <www.rbnz.govt.nz>, as detailed in the affidavit of Mr Henry at [30] (emphasis added).

> The recent New Zealand experience reflects an international trend known as "de-risking". The Reserve Bank recognises that bank's reasons for de-risking are varied, including concerns about profitability and reputational risk, and requirements imposed by international correspondent banks.
>
> Money remitters present varying degrees of risk. The Reserve Bank considers that banks' obligations under the AML/CFT Act require measured risk management *and do not justify blanket de-risking*. With appropriate systems and controls in place, banks should be able to manage and mitigate the money laundering and terrorism financing risks posed by many money remitters. *If banks are de-risking to avoid rather than manage and mitigate those risks, then that would be inconsistent with the intended effect of the AML/CFT Act*.

[111] As is apparent from the above passage, in this statement the Reserve Bank explicitly denounced any blanket de-risking practices. It said de-risking was "not justif[ied]" and that it was "inconsistent with the intended effect of the AML/CFT Act." This statement in my view is illuminating of the Bank's position and probative that it has provided relevant and specific guidance to banks in relation to avoiding blanket de-risking in the precise context of money remitter customers.

[112] The Reserve Bank also says it provides ongoing guidance to banks in the form of regular on-site inspections, which then result in inspection reports provided to the banks which include recommendations on various topics. The reports are designed to ensure that reporting entities comply with the AML/CFT Act and adhere to their AML/CFT programmes, as well as providing an opportunity to communicate the Reserve Bank's expectations of what measures are needed to comply with the Act.[89] Mr Henry says that the Reserve Bank expects recommendations to be taken seriously by reporting entities. Recommendations are followed up at the next on-site inspection (which occurs every two to three years) to determine what actions or steps are taken by the reporting entity in response.[90]

[113] Topics for recommendations include "de-risking", which is sometimes otherwise referred to as "financial inclusion". Mr Henry points to a report provided to one reporting entity that the entity reviews its risk appetite for money remitters. The report went on to advise the reporting entity that a blanket restriction or de-risking programme was "not encouraged or appropriate."[91]

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89 Affidavit of Mr Henry at [35].
90 At [39].
91 At [38].

[114] Mr Henry says that recommendations given "concern matters that the Bank considers good practice for [a reporting entity] to implement in order to maximise the effectiveness of the [reporting entity's] AML/CFT programme."[92] He confirms that de-risking of money remitters is a topic that is "regularly covered" during on-site inspections of reporting entities, particularly the trading banks.[93] When the Reserve Bank has raised the practice of de-risking, Mr Henry says the banks "have been encouraged to follow a case-by-case risk-based approach (rather than a blanket prohibition) on the individual merits when making decisions on whether to open or maintain accounts with customers."[94]

[115] In my view the evidence before this Court of on-site inspection reports also demonstrates that significant guidance is being provided to the trading banks, guidance which specifically refers on a case-by-case risk-based approach to the importance of those banks not employing a blanket de-risking approach.

[116] The Reserve Bank also points to "industry gatherings" as opportunities where it has discussed and given guidance to reporting entities on the issue of de-risking. On 9 November 2020, the Reserve Bank convened and supervised an industry workshop on AML/CFT issues for reporting entities. In its presentation, the Reserve Bank clearly said that the risks present with "Money Transfer Operators", a category which includes money remitters, are "manageable", and that a blanket restriction or de-risking programme was "not encouraged or appropriate".[95] Indeed, as Mr Henry advises in his affidavit, in a speech at that workshop an AML/CFT supervisor at the Bank called on reporting entities to work with the Bank to alleviate any concerns they might have had with money remitters, with a view to reducing de-risking.[96]

[117] I am satisfied this is further evidence of the Reserve Bank (as recently as 2020) providing guidance to trading banks with respect to de-risking and the need to avoid blanket de-risking practices.

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92 At [38].
93 At [36].
94 At [35].
95 As detailed at [40].
96 At [40].

[118] Overall, I am satisfied from all the evidence presented that the Reserve Bank has provided sufficient guidance to discharge its statutory responsibilities. Clearly it has advised trading banks to implement a risk-based approach in relation to the money laundering and terrorism financing risks money remitters present. I repeat, the Reserve Bank has expressly advised trading banks that a blanket approach to de-risking is neither encouraged nor appropriate.

[119] The applicants seek a declaration that the Reserve Bank has erred in law in failing to provide a code of practice in accordance with s 63 which forbids blanket de-risking. Such a declaration in my view is not warranted here. The issue of de-risking is a complex international issue and I accept the Reserve Bank's submission the provision of further guidance, including by way of a code of practice, would not have resolved the question.

Unreasonableness — failure to provide sufficient guidance unreasonable?

[120] As I note above, the level of guidance provided in respect of AML/CFT obligations is up to the reporting supervisor entity as a matter of discretion. In this case, the Reserve Bank was of the view that the guidance it provided to trading banks was sufficient. That was a matter for it to decide. The next question is whether this was unreasonable.

[121] When considering whether the Reserve Bank's view of the guidance it provided as sufficient was unreasonable, the question is whether this decision was so unreasonable that no reasonable authority could ever have reached that decision.

[122] As will be apparent from the foregoing, the ability to provide guidance to banks was a power conferred on the Reserve Bank to be exercised for the maintenance of a sound and efficient financial system in accordance with its statutory purpose. As noted, the Reserve Bank's powers are discretionary. Determining that it had provided sufficient guidance to the trading banks was a matter for the Reserve Bank's own judgment. It considered here that the guidance it provided was sufficient.

[123] In my view this is not a decision that no reasonable authority could ever have come to, or in other words that it was so outrageous and so perverse in its defiance of

logic that no person could ever have decided this way. Considerable latitude should be afforded to the Reserve Bank in this respect, as the expert in wider economic matters. It did not fail to take into account its ability to provide guidance and it exercised its judgment accordingly. This is not a situation where no reasonable authority could have done anything other than provide the guidance the Reserve Bank did provide.

[124] I am therefore not satisfied that the Bank's alleged failure to provide sufficient guidance to trading banks could be seen as unreasonable here.

First ground of review — failure to issue s 113 direction

[125] The first ground of review is that the Reserve Bank and the second respondent failed to exercise their powers under s 113 to direct the trading banks to provide banking services to businesses providing money remittance services.

[126] Section 113 allows the Reserve Bank to issue directions to banks in certain circumstances, such as where it has reasonable grounds to believe the affairs of the bank are being conducted in a manner prejudicial to the soundness of the financial system or the business of a bank is not being conducted in a prudent manner, upon which direction the bank in question must take any action specified in the direction. The applicants say that the Reserve Bank should have issued a direction to the trading banks under s 113 on the basis that the banks were not conducting themselves in a prudent manner in failing to appropriately discharge their AML/CFT functions under the AML/CFT Act.

[127] The Reserve Bank responds under three main heads:

(a) that the direction power must be exercised for the purpose contained in s 68, that is to promote the maintenance of a sound and efficient financial system, and in this case the efficiency or soundness of the financial system was not under threat;

(b) that in any event, the Reserve Bank did not have the power in this case to make a s 113 direction; and

(c) that a s 113 direction would cut across the scheme of the AML/CFT Act.

[128] I accept the Reserve Bank's submission that the s 113 direction power, as a power under pt 5 of the Act, must be exercised for the purpose contained in s 68 of promoting the maintenance of a sound and efficient financial system.

[129] The applicants say a systemic failure of the banks to provide banking services to a certain category of persons qualifies as a risk to the financial system. Their position is that "financial inclusion" is an important factor for addressing inequality. The exclusion of money remitters in this respect is a risk to the financial system — particularly where those persons provide services heavily used by a sector of the population that is already often impoverished, subjected to discrimination, and excluded from access to financial services.

[130] In response, the Reserve Bank suggests that, although it may seem like the banks engage in blanket de-risking, in fact the registered banks do take a risk-based approach. What appears to be blanket de-risking it is suggested is due rather to the commonality of risk factors that money remitters present.[97] This is borne out by the fact that it appears some money remitters do have trading bank accounts, which also means there are existing avenues for remittance to Pacific Island nations other than through the applicants themselves. The Reserve Bank says these tend to be larger or more sophisticated providers, in whom banks may have greater assurance as to the effectiveness of their AML/CFT programmes.

[131] The Reserve Bank acknowledges that AML/CFT issues can impact the efficiency and soundness of the financial system, as where for instance a registered bank does not detect and therefore permits money laundering or the financing of terrorism. However, it suggests this is not a case where the efficiency or soundness of the financial system is under threat but rather that some (but certainly not all) money remitters are simply unable to obtain bank accounts. The direction power under s 113, if anything, is available to the Reserve Bank to address situations contrary to the present, where registered banks are *not* being properly cautious and where they may

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97 At [42].

be conducting their business in an imprudent manner by failing to duly fulfil their AML/CFT obligations. In refusing to provide banking services to money remitters such as the applicants here, I am not satisfied this is such a case. While it is a consequence of the AML/CFT system that some persons may not be able to obtain banking services, it must be accepted that it is a matter Parliament has opted for in legislating expressly to comply with international AML/CFT standards set by the FATF. A direction under s 113 to provide banking services in my view is not necessary in all the circumstances here in order to maintain the efficiency or soundness of the financial system.

[132] Furthermore, the Reserve Bank can make a s 113 direction only if one of the conditions in s 113(1) is met. The applicants say that either s 113(1)(c), (d) or (e) is triggered here, and thus a s 113 direction was in order.

[133] I disagree. I am not satisfied that any of the alleged gateway provisions for a s 113 direction is made out in this case. Section 113(1)(c) relates to the affairs of a registered bank or associated person being conducted in a manner prejudicial to the soundness of the financial system, and s 113(1)(d) relates to the circumstances of the bank or associated person to the same effect. As canvassed earlier, I do not consider the refusal of registered banks to provide certain money remitters with bank accounts is so prejudicial. The refusal to do so will not raise doubts about the banks' ability to meet their obligations or performance in doing so. And in particular, as noted, I accept there are alternative avenues for money remittance to Pacific Island nations and their residents.

[134] Section 113(1)(e) relates to the business of a registered bank not being conducted in a prudent manner. My conclusion on this aspect is clear from the above. The refusal to provide bank accounts to money remitters does not represent registered banks acting imprudently. In fact, there may well be more doubts about a registered bank acting prudently or otherwise if the situation were otherwise and the bank was providing banking services to money remittance businesses even though the AML/CFT risk of such activity had been evaluated as high. Refusing to provide banking services following a risk-based assessment of the money remitters' AML/CFT

risk in fact represents more careful compliance with AML/CFT Act obligations and may very well suggest a greater prudence on the part of the trading bank.

[135] With respect to the Reserve Bank's initial denial of the applicants' request for a direction under s 113, I accept that failure to provide services to an industry class is not sufficiently serious to warrant the use of the direction power and that such a failure on the part of the banks does not amount to imprudently carrying on its business.

[136] Finally, I also accept that if the Reserve Bank was to have issued a direction under s 113 to provide banking services to money remitters, this would have possibly cut across the scheme of the AML/CFT Act and in turn run the risk of harming the soundness and efficiency of the financial system in this way. The AML/CFT regime is a multi-faceted programme designed to detect and counter money laundering and the financing of terrorism. It involves obligations on those best placed to consider the risks and activities of its customers. As I have described above, the Reserve Bank has provided guidance to the banks to the effect that each should undertake a risk-based approach to AML/CFT risks and then assess the risk posed by each customer on a case-by-case basis. On the face of this, I consider a s 113 direction was not also required and may indeed have cut across the scheme of the regime. To use the direction power here to compel trading banks to provide banking services to money remitters in my view would be an improper use of that power.

Involvement of the second respondent

[137] As a final point on this ground, the Reserve Bank submitted it is unclear why the applicants have included the second respondent as a party in these proceedings. The second respondent has not exercised any statutory power or made any decision that is amenable to judicial review.

[138] The Reserve Bank notes that under s 113(2) it must obtain the consent of the Minister of Finance before giving a direction under that section. However, it says the Reserve Bank has considered throughout that it does not have the power to give the direction under s 113 sought by the applicants and consequently it has never sought the Minister's consent. The Reserve Bank therefore submits that until it does seek the

consent of the Minister, the Minister has no function to perform under s 113 and there is no decision that is reviewable. I agree.

Second ground of review — failure to provide banking services

[139] The second ground of review is that the Reserve Bank itself has failed to provide banking services to the applicants.

[140] It is not in dispute that the Reserve Bank has the power to carry on the business of banking and to act as the lender of last resort for the financial system. The applicants say that at all material times the Reserve Bank has failed or neglected to itself provide banking services to the applicants when the trading banks had failed to do so.

[141] Under s 31 of the RBNZ Act, the Reserve Bank must act as the lender of last resort if it considers it necessary for the soundness of the financial system. Under s 39 of that Act, the Reserve Bank has powers to carry on the business of banking, to issue financial products and to carry on any business or exercise any powers "which can be conveniently carried on, or exercised in conjunction with its functions and the exercise of its powers." The applicants say the Reserve Bank erred in law in interpreting its powers under ss 31 and 39 too narrowly.

[142] However, the Reserve Bank says it has never received a completed application to provide the applicants with banking services.[98] Therefore it contends it has made no reviewable decision with respect to whether or not to provide banking services to the applicants.

[143] And, in any case, the Reserve Bank argues that it does not provide ordinary transaction bank accounts but rather exchange settlement accounts, which operate through the Exchange Settlement Account System (ESAS) to enable banks and other approved financial institutions to settle their obligations with each other in central bank funds. These accounts are only provided to large financial institutions, in

[98] Affidavit of Mr Stephen Gordon at [22]–[25].

accordance with the Bank's statutory purposes of promoting and maintaining a sound and efficient financial system.

[144] I accept that s 39 may confer on the Reserve Bank the powers it would need to open bank accounts for money remitters. However, it would only need to do so (and admittedly might then have to do so) if it considered this necessary for the soundness of the financial system. The provision or otherwise of bank accounts to certain businesses engaged in money remittance services does not jeopardise the soundness of the financial system. Indeed, there is a reasonable argument, as I see it, that when the registered banks have done so as part of their AML/CFT compliance protocols, it strengthens it. Of course, the Reserve Bank must, in the exercise of its powers, exhibit a sense of social responsibility, pursuant to s 169. I am satisfied that in not providing banking services itself to money remitters, it is not reneging on its social responsibility. No relief is necessary under this ground.

Fourth ground of review — interpretation of role as AML/CFT supervisor and required due diligence

[145] The fourth ground of review is that the Reserve Bank erred in law in interpreting its role as AML/CFT supervisor too narrowly and/or interpreting the scope of the due diligence required of trading banks in relation to money remittance companies too broadly.

[146] My conclusions on this ground are apparent from the discussion outlined above in relation to the third ground of review. I do not consider the Reserve Bank so erred in its interpretation of either its role as AML/CFT supervisor or the scope of the due diligence required of trading banks in relation to money remitters. The claim must therefore also fail on this ground.

Fifth ground of review — advising the need for an audit or supervisor's report

[147] The fifth ground of review is that the second respondent erred in law in forming the view that either an audit report or AML/CFT supervisor's report was required for them to have a bank account.

[148] This is on the basis that by letter dated 25 May 2020, the second respondent advised the applicants that it was necessary for them to obtain and provide to the registered banks an audit report or AML/CFT supervisor's report before the registered banks could provide bank accounts.

[149] The Reserve Bank says the Minister, as second respondent, did not exercise any statutory power or made any decision that is amenable to judicial review. In the absence of any particulars on the part of the applicants as to the specific power or question at play, which I accept have not been provided here, I accept this is the case. This ground of review is also dismissed.

Sixth ground of review — failure to raise blanket de-risking as a topic for the Co-ordination Committee

[150] The sixth ground of review is that the Reserve Bank erred in law and failed in its statutory duty by failing to raise blanket de-risking as a topic for the Co-ordination Committee while a member of that Committee. The Reserve Bank for its part says there was no obligation to do so.

[151] The applicants in their pleadings have failed to articulate on what statutory basis it is claimed the Reserve Bank was obliged to raise the issue of blanket de-risking to the Co-ordination Committee. As described above, under s 169 of its Act it is an objective of the Reserve Bank to "exhibit a sense of social responsibility" and under s 68 the Reserve Bank is to exercise its powers for the purposes of promoting the maintenance of a sound and efficient financial system.

[152] As I note above, the Committee is in place to ensure a coordinated AML/CFT regulatory regime operates consistently across the three AML/CFT supervisors. Its role is to ensure the operation of that system is therefore "consistent, effective, and efficient".[99] Mr Henry in his evidence states that the Co-ordination Committee over the past five years has largely focused on preparing for New Zealand's latest FATF assessment, which is the work of a number of years.[100] Nevertheless, he also states that, on at least one occasion during this time, the PRP has addressed the Committee,

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99 AML/CFT Act, s 151.
100 Affidavit of Mr Henry at [49].

covering de-risking as part of its presentation.[101] The secretariat of the Committee has also searched the Committee minutes and has advised the Reserve Bank that the issue of de-risking is recorded in minutes of the Committee over the years.[102] It appears neither the secretariat nor the Reserve Bank can provide the exact number of instances. From the evidence before me however, I am prepared to accept it appears to have occurred on several occasions.

[153] I accept the Reserve Bank might have raised the issue of blanket de-risking with the Co-ordination Committee. However, there is nothing in either the AML/CFT Act nor the Reserve Bank's statutory duties that explicitly requires it to have raised the issue with the Committee at any time. I also accept that the Reserve Bank has undertaken significant projects in other respects to address the issue of blanket de-risking itself, notably the PRP, as I have described above. Indeed, it is also arguable blanket de-risking does not fall within the remit of the Committee in any case. While perhaps the Reserve Bank could have done more to raise blanket de-risking as an issue for the attention of the Co-ordination Committee, given the function of the Committee, and in the light of such efforts and circumstances, in my view it is also not unreasonable for the Reserve Bank to have done so only to a limited extent.

Seventh ground of review — classifying money remittance companies as high AML/CFT risk

[154] The seventh and final ground of review is that the Reserve Bank committed an error of law in wrongly classifying the regulated New Zealand money remittance companies such as the applicants as high AML/CFT risk businesses in its "Sector Risk Assessment" document produced in April 2017.

[155] The Reserve Bank says the Sector Risk Assessment is guidance provided under s 132(2) of the AML/CFT Act. It assists reporting entities to prepare and review their individual assessments of the risk of money laundering and the financing of terrorism in accordance with each reporting entity's AML/CFT obligations. Indeed, the report itself notes that it is merely a document to provide guidance. The Reserve Bank says

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101 At [49].
102 At [50].

that ultimately it leaves the decision to each reporting entity to assess the actual money laundering and financing of terrorism vulnerability.

[156] As detailed in Mr Henry's affidavit, the 2017 Sector Risk Assessment did not classify money remitters as high risk "and it was not the intention that it do so."[103] Rather, that Assessment noted that remittances, including through banks, were methods that were used to move criminal proceeds.[104] The Assessment accordingly classified Money Service Businesses (which includes money remitters) as a vulnerability as a typology but not necessarily as an indication of the industry as a whole.[105] Indeed, as Mr Howells stated, different remitters will present different levels of risk and different ML/TF typologies.[106] It is on this basis, that of different levels of AML/CFT risk across different money remittance companies, the Reserve Bank at Appendix 12 of that report advised a risk-based approach to evaluating the AML/CFT risk of different money remitters.

[157] I also note that on the evidence before me, the assessment of money remittance as a high AML/CFT risk activity is in line with international experience and the risk assessments of comparable jurisdictions.[107] According to Mr Howells, who was involved in the preparation of the SRA in question, the SRA is a complicated document which takes "considerable time and effort" to produce and it involved an extensive range of documents being reviewed in reaching the assessment it did.[108] Considerable allowance is also to be afforded to the body to which Parliament has conferred the power and discretion to make this assessment. In the absence of an unreasonable decision, that is an AML/CFT risk assessment which no reasonable body would have reached, the intervention of the court to substitute its view on a basis that an error of law has been committed is appropriately limited.[109]

[158] There is a distinction between classifying money remittance as an activity as high in terms of AML/CFT risk as opposed to money remitters as high-risk businesses

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103 At [24].
104 At [24].
105 The 2017 SRA, above n 71, at [54].
106 Affidavit of Mr Howells at [10].
107 At [8].
108 At [7]–[8].
109 *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 at 757–758.

themselves. I am not sure the Reserve Bank did classify money remitters such as the applicants as high AML/CFT risk businesses. In fact, the advice to conduct an individual risk-based approach to such businesses suggests the reverse. It supports the view as I see it that such a classification does not apply to the money remittance industry wholesale but that each company would have to be assessed on its own merits. In any case, I am not satisfied on the evidence before me such an error of law was made, nor that the assessment was unreasonable.

[159] For these reasons, I consider this ground of review is also not made out.

Summary

[160] For all the reasons outlined above, I have found that none of the grounds of review alleged by the applicants has been made out in this case.

[161] By way of summary with respect to each of the grounds of review alleged in these proceedings, I outline my conclusions as follows:

(a) *First ground of review — failure to issue s 113 direction*:

I am satisfied the Reserve Bank made no error in failing to make a direction under s 113. Such a direction was not necessary in order to maintain the soundness or efficiency of the financial system, none of the gateway provisions for a direction under that section were met in this case, and a direction may have cut across the scheme of the regime.

(b) *Second ground of review — failure to provide banking services*:

I am satisfied the Reserve Bank never received any application to provide the applicants with banking services and that in any case it was not necessary for it to do so for the soundness or efficiency of the financial system or any sense of social responsibility.

(c) *Third ground of review — failure to provide guidance*:

I do not consider the Reserve Bank made any error of law in its understanding of the scope of Schedule Part 6 of the Class Exemptions Notice. I am also satisfied the Reserve Bank provided sufficient guidance to the registered banks to discharge its statutory responsibilities. That guidance, in turn, clearly encouraged banks to implement a risk-based approach to evaluating the money laundering and terrorism financing risks money remitters present and discouraged the practice of blanket de-risking. I am also satisfied the Reserve Bank's alleged failure to provide sufficient advice was not unreasonable, or in other words, that no reasonable authority could have done anything more by way of the provision of further guidance.

(d) *Fourth ground of review — interpretation of role as AML/CFT supervisor and required due diligence*:

As evident from the third ground of review, I do not consider the Reserve Bank made any error of law in its interpretation of its role as AML/CFT supervisor or as to the scope of due diligence required of trading banks in relation to money remitters. In particular, the Reserve Bank was entitled to leave any assessment as to whether or not to accept any written confirmations in relation to AML/CFT compliance — and to refuse to provide banking services according to their internal procedures, policies and controls — to the registered banks themselves.

(e) *Fifth ground of review — advising the need for an audit or supervisor's report*:

In the absence of any particular power or decision pleaded, I accept that the second respondent did not exercise any statutory power or make any decision amenable to judicial review.

(f) *Sixth ground of review — failure to raise blanket de-risking as a topic for the Co-ordination Committee*:

I am satisfied that, while at one level it might be considered the Reserve Bank could have done more to raise blanket de-risking as a topic for the attention of the Co-ordination Committee, there was no obligation on it to do so. I am also satisfied that the Reserve Bank has undertaken other work to address the issue of blanket de-risking, notably through the PRP, and that in any case blanket de-risking was raised before the Committee on a number of occasions.

(g) *Seventh ground of review — classifying money remittance companies as high AML/CFT risk*:

I am satisfied that the 2017 SRA was a guidance document which, on the basis of extensive material and in line with international assessments, classified MSBs as a vulnerability as a typology but not necessarily as an indication of the industry as a whole. Indeed, the Reserve Bank explicitly stated that banks should adopt a risk-based approach to evaluating the AML/CFT risk of money remitters on the basis that different remitters will present different levels of risk and money laundering and the financing of terrorism typologies. I am satisfied that the Reserve Bank made no error of law in this respect.

Conclusion

[162] It will be apparent now that none of the grounds for review raised in these proceedings has been made out. The application for judicial review is therefore dismissed.

Costs

[163] I reserve costs at this stage. The parties are urged to liaise with a view to agreeing costs between themselves if they are in issue. In the event that the parties are unable to agree upon costs between themselves, they may file a memoranda (sequentially) on the question of costs, which are to be passed to me and I will decide the issue of costs based upon the memoranda filed and all the other material before the

Court at that point. I note that each memorandum as to costs from counsel is to be no longer than five pages.

Gendall J

Solicitor:
Crown Law Office, Wellington
Barrister:
Michael Lennard Barrister, Wellington