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Consultation on new draft guidance: Providing financial services to customers that financial institutions assess to be higher risk

AUSTRAC

By email: Guidance_Consultation@austrac.gov.au

21 December 2022

Dear AUSTRAC,

Re: Draft Guidance on De-banking – a sex industry perspective

Sex Work Law Reform Victoria Inc. (SWLRV) is a not-for-profit organisation led by sex workers, lobbying for the legal rights of sex workers in Victoria. We strive to create a policy environment in which sex workers and others have fair and equitable access to basic financial services whether for personal or business purposes.

We urge AUSTRAC to remind financial service providers of their legal obligations under state/territory anti-discrimination laws to help address de-banking of occupations deemed high risk, including occupations within the sex industry.

This submission will refer to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) as the AML Act.

We applaud AUSTRAC acknowledging the serious problem of de-banking, its effect on both individuals and ongoing efforts to tackle financial crimes. In particular, we are pleased that:

- the draft guidance refers to AUSTRAC’s strongly worded 2021 statement against de-banking¹;
- unlike AUSTRAC’s 2021 public statement, AUSTRAC’s draft guidance refers to sectors beyond cryptocurrency, explicitly acknowledging that the sex industry and other sectors also experience de-banking;
- the guide singles out s235 of the AML Act, arguably the section of the Act which most enables de-banking to occur;
- the guide includes a case study on sex work, which illustrates how lawfully operating self-employed sex workers actually operate;
- the guide reminds financial institutions that in Australia sex workers can operate legally;
- the guide ‘strongly recommends’ companies provide reasons for rejecting customers;
- the guidance specifically acknowledges that sex workers comprise one of the groups which experience de-banking.

With reference to specific wording in the Draft Guidance, we are also pleased to see AUSTRAC:

- reminds the reader that risk is dynamic (page 4);
- provides practical advice on how financial institutions can take a customer-specific approach (page 4);
- refers to anti-discrimination legislation by reminding readers that s235 of the AML Act is not intended to override anti-discrimination legislation (page 4);
- reminds readers that higher ML/TF risk does not automatically mean that a financial institution must discontinue a business relationship (page 6);
- reiterates the need for financial institutions to consider each customer individually (page 8);
- strongly recommends financial institutions provide the rationale and meaningful reasons for ending a relationship with a customer (page 14).

Why Are Sex Industry Businesses De-banked?

According to statements from financial service providers which engage in de-banking, the AML Act and AUSTRAC are often cited as reasons de-banking occurs. One example is NAB’s public statements explaining why the bank refuses to provide services to all lawful sex industry businesses:

‘It is our assessment that we cannot reasonably manage the risks associated with the industry or inform ourselves as to the various risk attributes of operators. As such our decision, therefore, is not to expose ourselves to risks that cannot be managed.’

¹ AUSTRAC, ‘AUSTRAC statement 2021: de-banking’ (media release), 29 October 2021.

Since 2020, Sex Work Law Reform Victoria has been closely monitoring de-banking of the sex industry. As part of our 2020 investigation, we contacted all Australian Banking Association member banks and over a dozen merchant providers. Most financial service providers openly state on their websites that they de-bank all lawfully operating sex workers and lawfully operating sex industry businesses (such as brothels).³

As the federal regulator of financial service providers enforcing the AML Act, AUSTRAC is ideally placed to provide guidance to financial institutions regarding de-banking. We recognise AUSTRAC has a specific mandate confined to Commonwealth legislation and is not in a position to interpret legislation or provide legal advice.

De-banking Based on Occupation

Financial institutions classify some industries as 'high risk' and this can result in certain types of business customers being de-banked on the basis of their occupation. Such de-banking may be unlawful in the ACT and VIC, as 'profession, trade, occupation or calling' is a protected attribute in anti-discrimination legislation in both jurisdictions.⁴

We urge AUSTRAC to go further in referring to relevant state/territory human rights bodies and the fact that state/territory legislation is one factor financial institutions must consider when making decisions about whether or not to de-bank a customer or occupation group.

The impact of routine de-banking of sex workers is clear when we look at Australian Taxation Office statistics. Our consultation with sex workers suggests that, to avoid de-banking, most sex workers lodge tax returns under occupation codes other than 'sex worker'. Despite five of Australia's jurisdictions having legalised or decriminalised sex work,⁵ only 106 people⁶ lodged a tax return in 2019/2020 using the occupation code 'sex worker'. This is a tiny proportion of the 20,000 plus sex workers in Australia.⁷ Our consultation with sex workers suggests tax avoidance alone cannot explain

² James Frost, 'NAB's sex industry position an outlier', The Australian Financial Review (online 26 October 2020)

<https://www.afr.com/companies/financial-services/nab-s-sex-industry-position-an-outlier-20201022-p567m9>

³ Sex Work Law Reform Victoria, 'Financial Institutions - Which Ones Discriminate?', Sex Work Law Reform Victoria (Web Page) <https://sexworklawreformvictoria.org.au/financial-institutions-which-ones-discriminate/>.

⁴ *Equal Opportunity Act 2010* (Vic) s 6(1a); *Discrimination Act 1991* (ACT) s 7(1)(p).

⁵ ACT and QLD legalise sex work; NSW, NT and VIC decriminalise sex work.

⁶ Australian Tax Office, Taxation statistics 2019–20 Individuals: Average and median taxable income, salary or wages, and total income, by occupation and sex, 2019–20 income year (Table No 15A), cell D2016.

⁷ Antonia Quandara, 'Sex Workers and Sexual Assault in Australia: Prevalence, Risk and Safety' (2008) 8 Australian Centre for the Study of Sexual Assault 1, 3.

these figures, as many sex workers reported declaring income under an occupation other than 'sex worker' as a deliberate strategy to avoid de-banking.⁸

AUSTRAC's Role

As the administrator of the AML Act, AUSTRAC has handed down civil penalties to banks in excess of \$1 billion per bank.⁹ It is understandable that financial institutions would therefore fear AUSTRAC and take seriously AUSTRAC's advice and guidance. AUSTRAC is ideally placed to provide guidance to financial institutions on ways to manage risk while avoiding de-banking of entire sectors. Indeed, as Australian jurisdictions expand and strengthen their anti-discrimination laws, financial institutions which ignore anti-discrimination laws face legal risks and liability from civil action brought by applicants claiming unlawful discrimination. Civil action at the Victorian Civil and Administrative Tribunal has already commenced with a brothel owner claiming unlawful discrimination on the part of NAB.¹⁰

Our Concerns

AUSTRAC's draft guidance focuses narrowly on obligations under the AML Act, ignoring other legal considerations and obligations. This could inadvertently give financial institutions the impression that de-banking is permitted by law.

Several misconceptions influence the activities of AUSTRAC and financial institutions, such as the belief that financial institutions have a 'commercial right' to end a relationship with a customer. Ending a relationship with a customer can be unlawful if this breaches state/territory anti-discrimination laws. AUSTRAC's *Draft Guidance* is the ideal place to address these misconceptions and remind financial institutions of their legal obligations *beyond* the AML Act.

Concern 1 – Page 4

Of particular concern is the wording at the top of page 4, which reads

'AUSTRAC recognises that financial institutions are commercial enterprises and may decline to provide designated services to whole sectors for commercial or other reasons, for example,

⁸ Sex Work Law Reform Victoria, Submission to Banking Code Review, Independent Review of the Banking Code of Practice: Final Report (6 August 2021), section 6.8 <https://bankingcodereview.com.au/wp-content/uploads/2021/08/Submission-Sex-Work-Law-Reform-Victoria.pdf>

⁹ AUSTRAC, 'AUSTRAC and Westpac agree to proposed \$1.3bn penalty' (Media Release, 24 September 2020) <https://www.austrac.gov.au/news-and-media/media-release/austrac-and-westpac-agree-penalty>

¹⁰ *Albon v National Australia Bank* (Victorian Civil and Administrative Tribunal, H288/2022, commenced 26 August 2022).

where the financial institution does not have the resources to understand how a specific customer type or industry sector operates.'

As currently worded, this statement could be interpreted as giving permission for financial institutions to de-bank entire occupations, including occupations in the sex industry. That a financial institution lacks the resources to understand how the sex industry operates is unlikely to be a defence against unlawful discrimination in the provision of goods or services.

Recommendation 1

As the purpose of the *Draft Guidance* is to provide guidance to financial institutions and customers on AUSTRAC's expectations when financial institutions provide services to customers that they assess to be higher risk, we recommend the sentence above be amended and expanded, as follows

AUSTRAC recognises that financial institutions are commercial enterprises which may classify whole sectors as risky. AUSTRAC recommends financial institutions endeavour to understand how specific customer types and industry sectors operate. AUSTRAC also recommends financial institutions seek independent legal advice to better understand their legal obligations under state/territory anti-discrimination laws as well as the Banking Code of Practice. Victoria and the ACT prohibit discrimination on the basis of a customer's 'profession, trade, occupation or calling'. More information can be found at the following websites. AUSTRAC does not administer any of the following:

ACT Human Rights Commission (not affiliated with AUSTRAC)

<https://hrc.act.gov.au/discrimination/profession-trade-occupation-calling/>

Victorian Equal Opportunity and Human Rights Commission (not affiliated with AUSTRAC)

<https://www.humanrights.vic.gov.au/for-individuals/profession-trade-occupation/>

Banking Code of Practice (not administered by AUSTRAC)

<https://www.ausbanking.org.au/banking-code/>

Concern 2 – Page 13

Secondly, the wording at the bottom of page 13 reads

'Whether you provide financial services to a customer will ultimately be a commercial decision.'

This attitude leads to de-banking and is widespread amongst financial institutions. 'Commercial decisions' is a common reason provided by financial institutions when de-banking customers, including entire families.

AUSTRAC's sentence above is false and misleading, as it ignores the following legal obligations which apply to financial institutions:

- federal anti-discrimination laws, including the *Racial Discrimination Act 1975* (Cth);
- state/territory anti-discrimination laws, which prohibit discrimination on the part of financial institutions against customers on the basis of over a dozen protected attributes;
- the *Banking Code of Practice*, which contains accessibility and inclusion provisions to protect vulnerable customers, including Indigenous, elderly and other customers who speak English as a second language.¹¹

In 2021 the Commonwealth Bank de-banked a licensed brothel owner, his wife and his sister, closing all of their personal and business accounts and facilities (over 20 accounts in all), all on the same day. The brothel owner's 84-year-old mother was indirectly impacted, as her power of attorney (the brothel owner's sister) was also declined by the bank. The closure letters stated

The purpose of this letter is to inform you that the Bank [the Commonwealth Bank] has decided to close your accounts due to commercial reasons. [our emphasis]

¹¹ *Banking Code of Practice ch 13-15.*

Case Study: Family loses all accounts due to ‘Commercial Decision’

Stefan* has owned a licensed brothel for decades and been with the Commonwealth Bank for over 20 years, describing himself as a model customer who met his financial obligations. Neither Stefan nor his family members have ever been found guilty or convicted of a crime. Stefan’s sister, Andrea* was furious when she learned she and two of her family members had been de-banked on the same day due to a ‘commercial decision’. Andrea has never worked in the sex industry or any other ‘risky’ industries. She works in healthcare. This is Andrea’s story.

“When I was told by the bank that all my accounts would be closed, I was in shock and confused, I just didn’t know what was going on. When I questioned why, I was told the bank didn’t know why. This was so confusing, my emotions turned to anger, then fury. The bank staff member handed me a letter in my hand which simply said I was de-banked for ‘commercial reasons’. What does this even mean? I haven’t done anything wrong. The bank staff in the branch looked at me blankly, then they turned against me, asking me to leave the building. They treated me just like a criminal. I’m not!

The following year, my anger was reignited when my 84-year-old mother needed my help to act as her power of attorney so she could access her Commonwealth Bank accounts. She has physical disabilities, can’t use technology, and has limited eyesight. The bank still banned me! My mother now has major issues accessing her funds, because I can’t help her, and I’m still told ‘commercial reasons’ are why I’m under a total lifetime ban with the bank. My mother has been left totally inconvenienced, after being with the Commonwealth Bank for 62 years. AUSTRAC, help end this injustice.”

*Names changed.

It would be unlawful for a financial institution to cease providing financial services to a customer on the basis of that customer’s race, gender or religion, even if such a decision was deemed to be a ‘commercial decision’. In Victoria and the ACT, it would also be unlawful for a financial institution to cease providing financial services to a customer on the basis of that customer’s ‘profession, trade, occupation or calling’.

Recommendation 2

Remove the following sentence on page 13

'Whether you provide financial services to a customer will ultimately be a commercial decision.'

Concern 3 – Page 23

The *Related Pages* section of page 23 omits website links to human rights commissions about anti-discrimination laws relevant to financial institutions engaging in de-banking of entire sectors. While such pages are not directly related to the mandate of AUSTRAC, they are published by credible sources, namely state/territory government agencies.

Recommendation 3

Insert the following text and links at the end of the *Related Pages* section on page 23:

AUSTRAC has no connection to the following organisations and Code. AUSTRAC does not administer the Banking Code of Practice.

ACT Human Rights Commission (no affiliation with AUSTRAC)

<https://hrc.act.gov.au/discrimination/profession-trade-occupation-calling/>

Victorian Equal Opportunity and Human Rights Commission (no affiliation with AUSTRAC)

<https://www.humanrights.vic.gov.au/for-individuals/profession-trade-occupation/>

Banking Code of Practice (not administered by AUSTRAC)

<https://www.ausbanking.org.au/banking-code/>

Concern 4 – Page 23

The *Related Legislation* section of page 23 omits reference to the *Banking Code of Practice* and anti-discrimination laws relevant to financial institutions engaging in de-banking of entire sectors. While such legislation is not directly related to the mandate of AUSTRAC, it is relevant to financial institutions which de-bank customers.

Recommendation 4

Insert the following legislation in the *Related Legislation* section on page 23:

Section 6(la) of the Equal Opportunity Act 2010 (Vic) [not administered by AUSTRAC]

Section 7(q) of the Discrimination Act 1991 (ACT) [not administered by AUSTRAC]

Banking Code of Practice [not administered by AUSTRAC]

Section 19(1)(ec) of the Anti-Discrimination Act 1992 (NT) [not administered by AUSTRAC]

Banking Code of Practice [not administered by AUSTRAC]

Sincerely,



Lisa Dallimore

President, Sex Work Law Reform Victoria Inc.