

TO: AUSTRAC via [guidance\\_consultation@austrac.gov.au](mailto:guidance_consultation@austrac.gov.au)

21 December 2022

## **Submission on draft guidance: Providing financial services to customers that financial institutions assess to be higher-risk**

The Eros Association is Australia's industry association for adults-only retail, wholesale, media and entertainment.

We welcome the opportunity to make a submission in response to the draft guidance on financial services for customers that financial institutions assess to be higher risk.

### **Discriminatory decisions**

On page 4, the draft guidance states that anti-money laundering laws are “not intended to override anti- discrimination legislation, such as the *Racial Discrimination Act 1975*.” We recommend that this statement be expanded to include state and territory-based legislation, such as the prohibition against occupation-based discrimination in the Australian Capital Territory and Victoria,<sup>1</sup> and the prohibition against discrimination based on lawful sexual activity in other jurisdictions.

Similarly, on page 4, the draft guidance states that “AUSTRAC recognises that financial institutions are commercial enterprises and may decline to provide designated services to whole sectors for commercial or other reasons.” We recommend that this statement be qualified by including that decisions to decline to provide services cannot be discriminatory. As currently worded, this statement could be interpreted as giving permission for financial institutions to de-bank entire industries, including the adult industry.

Finally, on page 13, the draft guidance states that “Whether you provide financial services to a customer will ultimately be a commercial decision.” We recommend that this statement be deleted for the reasons provided above.

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<sup>1</sup> *Discrimination Act 1991* (ACT) s 7(1)(p); *Equal Opportunity Act 2010* (Vic) s 6(la).

## Declining to provide services

On page 4, the draft guidance states that financial institutions may decline to provide services “where the financial institution does not have the resources to understand how a specific customer type or industry sector operates.” We recommend that this statement be deleted as financial institutions should be making risk assessments before declining services and these assessments should be on an individual customer level not a whole-of-sector approach. We are very concerned that AUSTRAC is guiding financial institutions to decline to provide services without risk assessments, as this is inconsistent with AUSTRAC’s statement on de-banking.<sup>2</sup> We agree with the statement in the submission from Sex Work Law Reform Victoria “that a financial institution lacks the resources to understand how the sex industry operates is unlikely to be a defence against unlawful discrimination.”

Similarly, on page 4, the draft guidance states that “there is no requirement in the AML/CTF Act or Rules to decline to provide designated services to whole industry sectors, notwithstanding a financial institution’s assessment of the business sector’s relative risk.” We recommend that this statement be revised to read “financial institutions should not decline to provide designated services to whole industry sectors, notwithstanding their assessment of the sector’s relative risk, but should instead take an individual customer approach.” We believe this more clearly articulates financial institutions’ obligations.

Finally, on page 4, the draft guidance states that, in assessing the money laundering risks presented by a customer, financial institutions should consider “risks associated with the product or service being provided.” We recommend that this statement be deleted as it suggests particular products or services carry risks but provides no guidance to what this may be, which could lead to a broad approach being taken whereby entire industries like ours could be declined financial services based on assumed risks that our products or services carry.

In our experience, financial institutions often ask for extensive documentation from adult industry businesses, including police checks.<sup>3</sup> We believe that financial institutions should be sensitive to the impact that this may have in perpetuating stigma and discrimination against our industry.

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<sup>2</sup> AUSTRAC, ‘De-banking’ (2021)

<<https://www.austrac.gov.au/news-and-media/media-release/austrac-statement-2021-de-banking>>.

<sup>3</sup> Kayleena Makortoff, ‘Sex Discrimination: Why banks shun works in adult entertainment’, *The Observer* (17 October 2021).

## Sector level data and guidance

We are concerned that there is limited sector level data on the financial risks associated with the sex work industry and adult stores. Unfortunately, AUSTRAC's *Financial Crime Guide: Detecting and Stopping Forced Sexual Servitude in Australia* is problematic and we recommend that the guide be withdrawn pending consultation with industry.<sup>4</sup> In the absence of sector level data, financial institutions may instead rely on this guide, which could lead to blanket approaches to decline services to our industry.

Similarly, there should be better guidance for businesses on how to identify, mitigate and manage money laundering risks. The guidance on pages 11 and 21 is very much geared towards large intercountry financial businesses not Australian adult industry businesses, most of which are small businesses. We strongly recommend that AUSTRAC review the guidance for businesses to take account of small businesses and businesses operating outside the finance sector.

## Lawful sex worker customer scenario

On pages 14 to 15, the draft guidance provides a scenario of a lawful sex worker customer, "K". On page 15, the draft guidance states that the bank applies "transaction monitoring tools to detect large fluctuations in deposits." We recommended that this statement be updated to acknowledge that fluctuations in income can often occur in the sex work industry and that AUSTRAC is only concerned with "unexpected patterns of transactions *that don't seem to have a legitimate purpose.*"<sup>5</sup>

## Goods and services

There are a number of instances where the draft guidance refers exclusively to services but not to goods, for example:

- on page 4, "the methods of delivering the designated service to the customer";
- on page 18, "the types of services you provide to your customers"; and
- on page 22, "the types of customers and services you have".

We recommend that each and any other instance be updated to include "goods" as much of our industry involves the provision of goods, not just services.

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<sup>4</sup> AUSTRAC and Fintel Alliance, *Financial Crime Guide: Detecting and Stopping Forced Sexual Servitude in Australia* (2022).

<sup>5</sup> AUSTRAC, 'Transaction monitoring' (2021)

<<https://www.austrac.gov.au/business/how-comply-and-report-guidance-and-resources/amlctf-programs/transaction-monitoring>>.

## Conclusion

The Eros Association welcomes the opportunity to assist in shaping the draft guidance on financial services for customers that financial institutions assess to be higher risk.

If there is any way we can assist further in this, please don't hesitate to contact.



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