

20 December 2022

Director, Policy and Rules
Australian Transaction Reports and Analysis Centre
PO Box 5516
WEST CHATSWOOD NSW 1515

By email: guidance_consultation@austrac.gov.au

Dear Director,

Consultation on proposed guidance on providing financial services to customers that financial institutions assess to be higher risk

1. This submission is made by the Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**). The Committee thanks the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) for the opportunity to comment on the proposed guidance on providing financial services to customers that financial institutions assess to be higher risk issued for consultation on 9 November 2022 (the **Guidance**).
2. The Committee commends AUSTRAC for preparing this detailed and nuanced draft guidance on an issue that is of considerable importance to financial institutions and customers, or prospective customers, that the financial institutions assess to be higher risk.
3. The Committee does not endorse any particular policy position. However, what financial institutions should do about customers that are assessed to be higher risk is an issue with many dimensions. Therefore, a general comment that the Committee makes is that it may be helpful for the Guidance to signpost broader considerations where appropriate, without AUSTRAC expressing a view on them (as they are outside AUSTRAC's legislative remit).
4. For example, the comment on page 4 of the Guidance that "financial institutions are commercial enterprises and may decline to provide designated services to whole sectors for commercial or other reasons" might perhaps make reference also to the broader considerations noted by the Council of Financial Regulators in its advice provided to the Government in August 2022 about potential policy responses to de-banking in Australia.¹ These considerations include financial institutions' broader social responsibilities to ensure that core banking services are reasonably accessible across the community.

¹ <https://www.cfr.gov.au/publications/policy-statements-and-other-reports/2022/potential-policy-responses-to-de-banking-in-australia/pdf/potential-policy-responses-to-de-banking-in-australia.pdf>

5. The Committee endorses the helpful comment to financial institutions on pages 3–4 of the Guidance: that a risk-based approach does not imply a ‘zero failure’ approach to combating financial crime, and the recognition that no reporting entity can reduce the risk of financial crime to zero.
6. The Committee submits that it would be helpful to acknowledge in the discussion on the role of financial institutions (pages 3–12) that the financial institutions’ effectiveness in fulfilling their role is dependent on the ability and willingness of customers and prospective customers to act in the ways recommended in pages 18–21 of the Guidance: i.e. by being open with the financial institutions, and providing the financial institutions with relevant information.
7. On page 9 of the Guidance, where it is noted that a financial institution may—on a case-by-case basis—ask AUSTRAC for confirmation of the enrolment of a reporting entity, it would be helpful to clarify the legal basis for that request and disclosure. The Committee assumes that disclosure will be dependent on the consent of the prospective customer.
8. In the discussion on ending the business relationship with a customer (pages 13–14 of the Guidance), there is no reference to the consequences for individuals (e.g. termination of their individual banking relationship/credit facilities) when a financial institution ends its relationship with a customer with which those individuals are associated. It would be helpful for AUSTRAC to address this issue in the Guidance. We understand there have been instances where a number of individuals—associated with a particular customer to a greater or lesser degree by family ties or other connections—have had their facilities terminated when that customer’s facilities are terminated.
9. The Committee considers that the scenarios set out on pages 14–17 of the Guidance are helpful.
10. In the section of the Guidance dealing with the role of business customers, the Committee submits that it would be helpful to note that, while it is generally in the business customers’ interests to provide more rather than less information to a financial institution, there may sometimes be constraints of commercial confidentiality which may prevent this occurring in practice. This is because some customers’ business processes (including those that are intended or designed to address their anti-money laundering and counter terrorism financing obligations) may have significant commercial value. In that limited context, it may be fitting for the Guidance to acknowledge the role that may be played by a third-party certifier acceptable to the financial institution. That certifier would review and provide confirmation to the financial institutions without providing the institution with all the details of the technology used by the prospective customer.
11. We trust AUSTRAC will find the above comments of interest and members of the Committee would be pleased to make themselves available to discuss them with AUSTRAC at your convenience.

12. Please contact the Chair of the Committee, Pip Bell, at pbell@pmclegal-australia.com if you would like to further engage with the Committee.

Yours faithfully

A handwritten signature in black ink, appearing to read 'P. Argy', with a long, sweeping flourish extending to the right.

Philip Argy
Chairman
Business Law Section