

**18 March 2024**

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By email: [Guidance\\_Consultation@austrac.gov.au](mailto:Guidance_Consultation@austrac.gov.au)

Dear Mr Mossop

### **Consultation on draft outsourcing guidance**

1. This submission relates to the draft guidance released by the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) on 26 February 2024 (the **Draft Guidance**) and has been prepared by the Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**).
2. The intended purpose of the Draft Guidance is set out on page 1 as follows:  
*This guidance will help you:*
  - *comply with your AML/CTF obligations when outsourcing*
  - *identify, mitigate and manage money laundering and terrorism financing (ML/TF) risks that could arise from outsourcing*
  - *take steps to ensure providers tailor outsourcing arrangements to your business and its specific ML/TF risks.*
3. The Committee welcomes the publication of guidance for reporting entities on these matters and thanks AUSTRAC for the opportunity to comment on the Draft Guidance.

### **Key Points**

4. The key matters the Committee wishes to raise/make/bring to AUSTRAC's attention about the Draft Guidance are as follows:
  - (a) once it is finalised and issued, it may have a legal effect insofar as it impacts the interpretation of what would constitute taking reasonable precautions and/or exercising due diligence for a reporting entity;

- (b) the Draft Guidance should be confined in its scope to those service providers that are doing something that a reporting entity could potentially do for itself (such as carrying out customer identification procedures or providing a records database); and
- (c) the commentary on the potential liability of a reporting entity for breaches of legislative obligations should take into account the effect of section 236 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (the **AML/CTF Act**).

## **Submissions**

### *Preliminary observation*

- 5. The Committee notes that the Draft Guidance covers a range of quite specific expectations of reporting entities for:
  - (a) the selection of service providers; and
  - (b) the content and administration of outsourcing agreements.

If the Draft Guidance is finalised and published, it may affect what is perceived as taking reasonable precautions, or exercising due diligence, for a reporting entity. In that sense, it may have a legal effect, and the Committee assumes that this is what AUSTRAC intends.

### *Relevance of Draft Guidance to different types of outsourced service providers*

- 6. Page 1 of the Draft Guidance contains the following definition of “outsourcing”:

**Outsourcing** means engaging an external provider to help you meet your AML/CTF obligations, for example:

  - *reporting to AUSTRAC*
  - *developing and maintaining your AML/CTF program*
  - *carrying out an independent review of your AML/CTF program*
  - *carrying out applicable customer identification procedures*
  - *employee due diligence, AML/CTF risk awareness training and transaction monitoring.*
- 7. The Committee considers that this definition covers at least four distinct types of external provider to a reporting entity. For the reasons outlined below, the Committee believes that those four types of providers should be distinguished from each other in the guidance because their respective roles raise policy considerations that are materially different.
- 8. Outsourcing is usually thought of as arising in the situation where an entity (**Principal**) contracts with a third party for the third party to perform an obligation of, or to provide a service to, the Principal. The third party will provide services to the Principal as a contractor but the third party is performing those services on behalf of the Principal, or to enable the Principal to do something that the Principal could and otherwise would do for itself.

9. For example, in its current prudential policy on Outsourcing, CPS 231, at paragraph 10, the Australian Prudential Regulation Authority uses this definition:

*‘Outsourcing’ involves an APRA-regulated institution, or an institution within a group that is not an APRA-regulated institution, entering into an arrangement with another party (including a related body corporate) to perform, on a continuing basis, a **business activity that currently is, or could be, undertaken by the institution itself.***

[emphasis added by the Committee]

10. The Committee considers that there are policy distinctions that need to be more clearly drawn out in the Draft Guidance between:
- (a) a service provider who does something that a reporting entity could do for itself (such as carrying out customer identification procedures or providing a records database) (**Category A**);
  - (b) a service provider who provides a service that is used by the reporting entity’s staff to perform obligations of the reporting entity, such as a licensor of transaction monitoring software that is configured for use by the reporting entity (**Category B**);
  - (c) a person who provides a service that the reporting entity may be unwilling or unable to do itself: for example—conducting the independent review of the reporting entity’s AML/CTF program (which need not necessarily be done by an external provider but must be done by someone who meets the relevant criteria for independence) (**Category C**); and
  - (d) a service provider who provides a service to a reporting entity which is relied on by the reporting entity, but which could not be performed by the reporting entity, such as the giving of external legal advice, assistance with the preparation of the AML/CTF program and/or consulting on risk assessment of a business to assist a reporting entity to create a risk assessment to which its AML/CTF Program can respond (**Category D**).
11. The Committee expects that policies concerning processes for selection of appropriately qualified service providers might reasonably be expected to apply to all the categories of service provider specified above.
12. The Committee considers that policies to be found in the Draft Guidance (at pages 7 to 9) concerning the content of outsourcing agreements and requiring things such as performance targets, ongoing monitoring, reporting and oversight, appear to be suitable only for those service providers that fall within Category A above.
13. The Committee believes that a reporting entity may be the party best placed to evaluate the ongoing effectiveness of services provided by a service provider in Category B because the reporting entity will be using those services in the performance of its obligations under its AML/CTF Program. The Committee considers that it would be prudent for the reporting entity to make some quality-assurance-related inquiries prior to appointing a service provider in Category B.

14. Independent reviewers are expressly included (on page 1) as a class of persons for whom the Draft Guidance is to be relevant. Having regard to the role of a service provider in Category C that conducts an independent review, the Committee submits that it is confusing to treat such a service provider's appointment as an outsourcing by a reporting entity.
15. By definition, and although they are appointed by the reporting entity, that person must not act on behalf of or even assist the reporting entity in its compliance (in that case they would cease to be "independent" as defined in rules 8.6.3 and 9.6.3 of the *Anti-Money Laundering and Counter Terrorism Financing Rules Instrument 2007 (No. 1) (Cth)* (the **AML/CTF Rules**). While it may be beneficial for the Draft Guidance to assist reporting entities to clarify selection processes for such a person, and the mechanism for a reporting entity to define their terms of reference, any suggestion of such a person reporting to or oversight from the reporting entity is likely to be inconsistent with the person's role.
16. For services in Category D that a reporting entity does not have the capacity to provide, such as external legal services, the Committee submits that it may be best to simply limit the responsibility of the reporting entity to applying a suitable selection process when choosing and appointing the service provider.

#### *Liability of reporting entity*

17. Page 1 of the Draft Guidance makes the following statements in a highlighted box:

*Your business remains liable for any breach of your AML/CTF obligations, even under outsourcing arrangements.*

*You should take steps to ensure you manage any risks of outsourcing and have appropriate oversight of your providers.*

18. The Committee recommends removing the word "remains" and replacing it with "may be" in the first line, because section 236 of the AML/CTF Act creates a defence of taking reasonable precautions, and exercising due diligence, to avoid a contravention. Section 236 provides as follows:

#### *Scope*

- (1) *This section applies to the following proceedings:*
  - (a) *criminal proceedings for an offence against the regulations;*
  - (b) *section 175 proceedings for a contravention of a civil penalty provision;*
  - (c) *proceedings under the Proceeds of Crime Act 2002 that relate to this Act.*

#### *Defence*

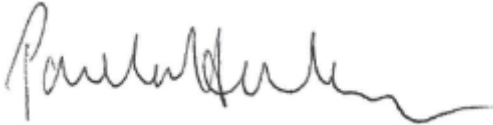
- (2) *In the proceedings, it is a defence if the defendant proves that the defendant took reasonable precautions, and exercised due diligence, to avoid the contravention in respect of which the proceedings were instituted.*

*Note: In criminal proceedings, a defendant bears a legal burden in relation to the matters in subsection (2)—see section 13.4 of the Criminal Code.*

### **Conclusion and further contact**

19. The Committee would be pleased to discuss any aspect of this submission with representatives of AUSTRAC.
20. Please contact the Committee's Chair Pip Bell ([committeechairfsc@gmail.com](mailto:committeechairfsc@gmail.com)) if you would like to do so.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Pamela Hanrahan', with a long horizontal flourish extending to the right.

**Dr Pamela Hanrahan**  
**Chair**  
**Business Law Section**