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2021 Code Review
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Submission to 2021 Code Review

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 regard to the Banking Code Review.

This submission draws upon the findings of Eros' 2017 report "Financial Discrimination Against Adults-Only Businesses" which documented structural exclusion of sex-related and "adults-only" small businesses by financial service providers.

It recommends that the Banking Code be amended to allow for a presumption in favour of providing basic financial services to lawfully operating small businesses and for greater disclosure to be provided when basic financial services are denied.

Responding to Terms of Reference

Overall, does the Code adequately articulate the standards of service and behaviour currently expected by individual and small business customers?

The experience of Eros members is that financial service providers are not consistent in providing basic banking services to adults-only small business customers. This appears to be the result of limited obligations to provide basic operational services to lawfully operating small businesses under the Code.

The experience of Eros members is that banks are not forthright in communicating the reasons for rejecting adults-only small business customers. This is a repeated criticism and appears to extend from the limited obligations for disclosure under the Code.

Has the Code contributed to banking services being inclusive, affordable, and accessible to all customers?

Without clear obligations to provide basic banking services to lawfully operating small businesses, the Code is not ensuring services are accessible to small business customers. The Eros Association's 2017 report documented systematic exclusion of lawfully operating adults-only small businesses by financial service providers in Australia.

Should the Code include more specific undertakings regarding the steps that banks will implement so that services are inclusive and accessible to all customers?

Eros agrees with recommendations put forward by Sex Work Law Reform Victoria that the term 'small business' should be properly integrated into the Code.

Specifically, a new clause 32(e) should be inserted for 'lawfully operating small businesses' which requires small businesses to have access to, at a minimum, transactional debit services.

The Code should also provide specific obligations for banks to disclose the risk considerations which have led to the rejection of lawfully operating small businesses. This should include both (i) the type of risk noted as a concern and (ii) the evidence underlying this risk assessment.

It is currently unlawful to discriminate on the basis of "profession, trade, occupation or calling" under ACT anti-discrimination law.¹ Eros is concerned that the current lack of disclosure obligations has allowed financial service providers to avoid compliance with the law in the ACT.

How effective are the provisions in the Code requiring banks to first refer customers to their internal dispute resolution processes and if the complaint cannot be resolved successfully, referring the customer to ACFA? Do customers understand the role of the Customer Advocate? Are customers using the Customer Advocate?

Both AFCA and the Customer Advocate have proven ineffective in resolving small business customer disputes on the basis of industry type exclusion.

This is because the current self-regulatory standards for the industry allow for the exclusion of businesses on the basis of vague "risk" considerations.

¹ Section 7(1)(p), *Discrimination Act 1991* (ACT)

Conclusion

The Eros Association welcomes the opportunity to assist in improving access to financial services.

If there is any way we can assist further in reviewing obligations under the Code, please don't hesitate to contact.

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

Rachel Payne
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FINANCIAL DISCRIMINATION AGAINST ADULTS-ONLY BUSINESSES

Eros Association Report

October 2017

Prepared by
Jarryd Bartle

erOS the **adults only**
association

About Eros

With 25 years experience in providing services and advocacy to adults-only businesses, the Eros Association is Australia's longest serving adult industry association. Eros is an incorporated, not-for-profit membership-based organisation.

The core focus of the Eros Association is ensuring members success through a combination of professional representation, education, advocacy and service provision.

About the Author

Jarryd Bartle is the Policy and Campaigns Advisor for The Eros Association with a diverse background in legal practice, policy analysis and law reform.

Jarryd is a sessional law lecturer at Deakin University and RMIT University. He has published in academic journals on law reform topics regarding 'vice' and effective regulation.

Jarryd obtained a Juris Doctor from Monash University and a Bachelor of Forensic Science from Deakin University.

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Executive Summary

This report summarises the findings of surveys undertaken by twenty-four adults-only businesses regarding their negative experiences with financial service providers.

Businesses surveyed included adults-only retailers, wholesalers, licensed brothel owners and entertainment providers contacted through Eros' industry networks.

The report notes the prevalence of industry-based discrimination by financial service providers, in particular the rejection of financial services, such as merchant facilities and business loans, to adults-only businesses.

The reasons provided by financial service providers for industry-based discrimination are limited, with reasons including moral/ethical concerns as well as perceptions that the industry is at an increased risk of fraud, charge-backs and non-repayment.

The majority of survey participants could not see any other reason for the behaviour of financial service providers other than broad brush discrimination on the basis of industry-type.

Most participants had been rejected services or treated unfavourably by financial service providers in the past.

Overall, it appears financial service providers are treating adults-only businesses unfavourably on the basis of broad internal policies against the 'adult industry' rather than tailored assessments of financial risk.

Introduction

The Eros Association frequently receives complaints of institutional discrimination against adults-only businesses in Australia. Of particular frequency are complaints of unfair treatment by financial service providers.

According to internal estimates, there are over 1000 adults-only businesses operating in Australia. Adults-only businesses are a distinct, often misunderstood, industry sector that carry a unique set of commercial challenges including specialist regulation, social stigma and discrimination.

Discrimination by financial service providers are commonly cited as a barrier to running adults-only businesses globally. Often, industry based financial discrimination can be directly traced to government policies incentivising unfavourable treatment.

This report summarises the findings of a qualitative survey undertaken by adults-only businesses of their negative experiences with financial service providers.

Methodology

Eros contacted members of the adult industry asking them to share their negative experiences with financial service providers either over the phone or via an online survey.

Twenty-four participants contacted Eros to share their experiences, a sample size which meets the minimum saturation for a qualitative study¹.

Participants were asked to think of their most recent negative experience with a financial service provider. They were then asked to describe their experience, with particular reference to:

- Statements made by representatives or brokers.
- Reasons (if given) for treatment.
- History with the financial institution.
- Other financial risk considerations that may have played a role in the financial service provider's assessment.

¹ Guest, G Bruce, A and Johnson, L "How Many Interviews Are Enough?" (2006) 18(1) *Field Methods* 59-82.

Characteristics of Participants

Gender

Of the participants, 12 identified as male, 11 identified as female and one participant identified as neither male nor female.

Position in Industry

The vast majority of participants (23 out of the 24) were a business owner / managing director of an adults-only business. However, one participant was an employee (manager).

Industry Type

The vast majority of participants (21 out of 24) were associated with adult retail/wholesale. Two of the participants owned a brothel or escort agency and one operated an adult entertainment venue.

Financial Service Providers

A majority of participants (16 out of the 24) cited a recent incident of discrimination by one of the 'big 4' banks in Australia (NAB, Commonwealth Bank, ANZ or Westpac).

Four participants cited recent discrimination by a 'medium sized' Australian bank (Bank of Queensland, Suncorp, Bendigo Bank).

Finally, four participants cited recent discrimination by specialist merchant services (Afterpay, ZipPay, Shopify).

Key Findings

Overall, the experiences of participants indicated a clear trend of industry based discrimination against adults-only businesses.

Type of Discrimination

The vast majority of participants experienced discrimination whilst applying for a particular financial service. However, one participant had merchant facilities withdrawn after having used the providers' services for over 20 years (see case extract below).

For those who were rejected on application, the most common service requested was merchant services (EFTPOS, AMEX, AfterPay, ZipPay etc.) consisting of 15 of the 24 participants.

Five participants were rejected in their application for a business loan. One participant was rejected in their application for a business debit card. One participant was rejected in their application for a mortgage in relation to freehold property that operated a licensed brothel. Finally, one participant applied for a personal loan and was rejected on the basis they were an employee of an adult retail store.

The vast majority of applications for services occurred directly to a representative of the financial service provider (23 out of the 24), however one application occurred via a broker.

After having been a customer [with this bank] for over 20 years and them providing me with merchant facilities for adult shops last night I received a phone call after 6pm telling me that my merchant services were going to be turned off today. Sure enough at 1pm they pulled the plug leaving me with four retail stores, 5 online retail sites and our wholesale without credit card transaction facilities. No letter, no notice.

Survey Response, Adult Retail and Wholesale Business

History with the Bank

Thirteen of the participants had a history of dealings with the financial service provider. In some cases, participants had been openly dealing with the bank for decades before the incident of discrimination.

Reasons Given for Discrimination

The reasons provided by the financial service provider (or broker) for discrimination included:

- Being 'part of the adult industry' (14)
- That adult products have a high risk of chargebacks, fraud or non-repayment (3)
- Ethical/moral reasons (2)
- Selling the 'wrong type of product' (2)
- The application did not accord with their 'merchant application criteria' (1)
- Breach of MasterCard policies (1).

In one case, no reason was provided for the rejection of financial services, despite complaints being made to the Financial Ombudsman Service.

[We were rejected] simply for being in an adult industry. We were totally upfront with them right from the beginning and I asked their rep to not waste our time in making us think we had a chance as I didn't want to go through the application process only to be denied at the last minute, as had been the previous case with another bank. What eventually happened was identical with what happened with the other bank. We established bank accounts and were granted an EFTPOS facility, but then denied the Internet Merchant facility.

Survey Response, Adult Entertainment Business

The financial adviser in the bank had opened a new account for us while we were sitting there. I told him we needed the EFT machine to be up and running before we shut down the [other account]. He got on the phone and rang the EFT people to make an appointment to put the machine in the shop. The lady on the other end of the phone asked to talk to me, she asked me the sort of business we ran (I said adult shop), what did we sell (I said toys, magazines, costumes, lingerie etc), did we offer any services (I said no, we are just a shop selling adult products). She then asked for the adviser to come back on the line, his face went a bit red, and he said "Really? Oh, ok, bye". He then told us that for ethical reasons they cannot provide this service for our shop.

Survey Response, Adult Retail Business

Other Considerations

When asked whether there were any other pertinent facts about their application or circumstances that may have influenced the decision to discriminate, the majority of participants could not identify a reason.

One participant noted that their business was relatively new and that may have impacted the application.

There was no other reason to reject us. We have a perfect record and never received any charge-backs after operating for 4.5 years.

Survey Response, Adult Retail Business

Other Instances of Discrimination

When asked whether this was the only time that they had experienced discrimination by a financial service provider on the basis of belonging to the industry, 23 out of the 24 of the participants said that it had happened in the past.

Happens all the time! There is just no rhyme or reason to it.. I've got more than one store and for some stores I'm approved and for others I'm rejected – even with the same bank!

Survey Response, Adult Retail Business

Discussion

Findings of Eros' survey reflect a long trend of industry based discrimination against adults-only businesses in Australia.

The underlying reasons for industry-based discrimination remain unclear. Eros has repeatedly requested to view internal policies of NAB, Commonwealth Bank, Westpac and ANZ but have been denied access.

Some possible underlying rationales for industry-based discrimination include the flow-on effect of overseas government policies, moral objections to the industry and perceptions that the industry poses unique financial risks.

Government Policies

In other jurisdictions, adult-industry discrimination is a direct result of government policies.

In the United States, many members of the adult industry were rejected financial services as a direct result of 'Operation Chokepoint' a US Justice Department initiative designed to tackle money laundering.²

Industry based discrimination occurred as the Federal Deposit Insurance Corporation characterised adult goods and services as being of particular risk of money laundering and therefore government sanction.

PayPal, JPMorgan Chase, Visa/MasterCard, and Square at various points have all refused to provide services to anyone in the adult industry as a result of this characterisation.³

Operation Chokepoint formally ceased in August 2017, however the impact of the initiative is reflected in many of the internal policies of US-based financial service providers which continue to exclude adults-only businesses.⁴

² Alan Zibel and Brent Kendall, 'Probe Turns Up Heat on Banks' *Wall Street Journal*, 7 August 2013. Can be found at: <http://www.wsj.com/news/articles/SB10001424127887323838204578654411043000772>.

³ Violet Blue, 'PayPal, Square and Big Banking's War on the Sex Industry' *EnGadget Magazine*, 12 February 2015. Can be found at: <https://www.engadget.com/2015/12/02/paypal-square-and-big-bankings-war-on-the-sex-industry/>.

⁴ Free Speech Coalition Statement on Operation Chokepoint, 25 August 2017 <https://www.freespeechcoalition.com/blog/2017/08/25/free-speech-coalition-statement-on-operation-choke-point/>.

Although Australia has never formally adopted a policy against adults-only businesses, it is possible that the US experience is having a direct impact on how local financial service providers categorise risk at home.

Moral Objections and ‘Reputational Risk’

It is commonly believed within the Australian adult industry that the behaviour of financial service providers is the direct result of moral objections to the industry.

In some cases, financial service providers have cited directly ‘moral concerns’ regarding the industry. This may tie into broader concerns about ‘reputational risk’ impacting banking practices. The Basel Committee on Banking Supervision (BCBS) defines ‘reputational risk’ as:

“[R]isk arising from negative perception on the part of customers, counterparties, shareholders, investors, debt-holders, market analysts, other relevant parties or regulators that can adversely affect a bank’s ability to maintain existing, or establish new, business relationships and continued access to sources of funding”.

Although this is purely speculative, it could be that larger financial service providers are worried that providing services to the adults-only sector may cause certain business relationships to be severed, increasing ‘reputational risk’.

This assessment of reputational risk does not appear in keeping with the values of the Australian public.

Adult retail has been a recognised part of the Australian economy since the early 1960s. There are no good figures on the contribution of the adult retail sector to the economy, however the retail sector generally accounts for 4.1 per cent of Australia’s GDP and 10.7 per cent of employment.⁵

The adult retail sector is diverse, consisting of small businesses and large retail chains. As cultural attitudes regarding sexuality have become more liberal, there has been a growing acceptance of adult retail stores in both urban and regional environments.⁶

⁵ Productivity Commission, ‘Economic Structure and Performance of the Australian Retail Industry’ (2011) Inquiry Report No. 56. Can be found at <http://www.pc.gov.au/inquiries/completed/retail-industry/report/retail-industry.pdf>

⁶ Paul Maginn and Christine Steinmetz, ‘Sex in the city: the changing face of adult retailing’ (2011) *The Conversation*. Can be found at: <https://theconversation.com/sex-in-the-city-the-changing-face-of-adult-retailing-3083>

Adult retail environments have also been noted by academics as having unique social benefits, including avenues for the promotion of sex-positive values and the provision of sexual health information.^{7 8}

Given the growing acceptance of adult retail as a key feature of the Australian economy, it is unlikely that moral opposition to adult retail is reflective of public views towards the industry.

More controversial segments of the adult industry including licensed brothels and adult entertainment providers, make up a relatively small proportion of adults-only businesses and a small proportion of complaints received by Eros.

If moral opposition is playing a role in the practices of financial service providers they appear to focus on all 'sex-related' industry. This would seem at odds with the liberal and progressive values towards sex reflected by the majority of Australians.

Unique Financial Risks

Another commonly cited reason for industry based discrimination against adults-only businesses is that the industry sector poses unique financial risks including increased risk of chargebacks and/or fraud.

Eros is unable to find any studies of financial risk substantiating that the adult industry poses greater risks than other retailers or service providers.

The underlying rationale appears to be that customers of adults-only businesses are more likely to deny purchases out of shame or embarrassment.

Claims of 'increased risk' have been asserted against adults-only businesses even when businesses can document decades of operating without issues in merchant services.

⁷ Michael Reece, Debby Herbenick & Catherine Sherwood, 'Sexual Health Promotion and Adult Retail Stores' (2004) *The Journal of Sexual Research* 41(2), Can be found at http://www.tandfonline.com/doi/abs/10.1300/J455v02n01_05.

⁸ Michael Reece et al, 'Adult Retail Stores as a Partner for Community-Based HIV Prevention' (2005) *Health Education Monograph Series* 22(3). Can be found at http://indiana.edu/~aids/monographs/0199_001.pdf

The claims of increased chargebacks or fraud would appear to be based on data from when the primary product line for adult retail was adult DVDs/videos. With the growth of online media this is no longer the case.

The largest growth area in adult retail is in female pleasure devices and toys.^{9 10} These adult products do not carry much societal stigma and are unlikely to be susceptible to chargebacks or other financial risks.

Overall, broad brush categorisation of adults-only businesses as posing unique financial risks do not appear evidence based. Instead, they rely heavily on an outdated stereotype of the industry.

[Our business] has never had a successful chargeback. In fact, from memory we've had less than five enquiries which were all resolved with the customer calling their banks to cancel the chargeback when they've been reminded what the charge was for.

Survey Response, Adult Retail Business

Conclusion

The findings of our survey document industry based discrimination by financial service providers against adults-only businesses.

The practice of excluding adults-only goods and services by industry type appears influenced by broad brush assumptions about the industry, many of which are outdated.

Assessments for suitability in regard to financial services should be based on the particular risks posed by *individual* businesses rather than broad discriminatory practices against 'sex-related' industry.

It is hoped that this report can assist financial service providers review their internal policies to determine whether their current treatment of adults-only businesses demonstrates best practice.

⁹ Janet Burns, 'How The 'Niche' Sex Toy Market Grew Into An Unstoppable \$15B Industry' *Forbes Magazine* 15 July 2016. Can be found at <http://www.forbes.com/sites/janetwburns/2016/07/15/adult-expo-founders-talk-15b-sex-toy-industry-after-20-years-in-the-fray/#22834aa538a1>.

¹⁰ David Rosen, 'Sex Toy Industry Has Quietly Turned Into Multi-Billion-Dollar Business' *AlterNet*. 14 November 2014. Can be found at <http://www.alternet.org/economy/sex-toy-industry-has-quietly-turned-multi-billion-dollar-business>.

FINANCIAL DISCRIMINATION UPDATE

In 2017, Eros documented the exclusion of the adult industry by financial service providers in our Financial Discrimination Report.

Since then...

Business is booming!

A recent survey of Eros adult retail members found that:

- Over half (55%) have turnover over \$250,000 per year.
- Members hire on average 6 employees per business.
- Nearly half (46.7%) have become more profitable than 5 years ago.
- Despite the pressures of the COVID-19 pandemic, 60% of our members said that their financial position either stayed the same size or grew in 2020!

Yet discrimination remains...

Eros receives on average one complaint every two months about financial discrimination. Around one third of our membership have experienced discrimination by financial service providers in the last 12 months.

Of those who have experienced discrimination since our 2017 report: 65% were adult retailers or wholesalers with 35% operating brothel and escort agencies.

The providers noted in complaints include:

- **Major banks:** including the Commonwealth Bank, Bendigo Bank, ANZ, NAB, Bank of Queensland, Westpac and Bank of Queensland.
- **“Buy-now-pay-later” services:** including Tyro, Prospa, Stripe and ZipPay.
- **Foreign exchange services** such as OFX.

Reasons given for exclusion ranged from a “change of risk appetite” to obscure “internal assessment criteria” with service providers increasingly citing “AML/CTF compliance” to justify exclusion.

The industry deserves better!

As Small Business and Family Enterprise Ombudsman, Kate Carnell, noted following our last report:

“[B]anks are wrong to discriminate against legitimate small businesses in the adult industry by blocking their access to essential financial services.”

It's time to acknowledge that sexy jobs are real jobs - and for financial service providers to end their broad brush exclusion of the industry!