

Potential Policy Responses to De-banking in Australia

Developed for the Australian Government by the Council of
Financial Regulators, AUSTRAC, ACCC and the Attorney-General's
Department

August 2022

© Commonwealth of Australia 2022.

The contents of this publication shall not be reproduced, sold or distributed without the prior consent of the Department of the Treasury.

ISBN 978-0-6456221-0-2 (Online)

Contents

Executive Summary	1
Background	2
Recommendation one: Data collection	3
Recommendation two: Transparency and fairness measures	4
Recommendation three: Guidance by specified banks	5
Recommendation four: Capability uplift	6
Options considered but not supported	7
Stakeholder consultation	8
Attachment A: Terms of Reference.....	9

Executive Summary

On 21 March 2022, the then Australian Government issued Terms of Reference (set out in Attachment A) requesting the Council of Financial Regulators, AUSTRAC, the ACCC, and the Department of Home Affairs¹ (Participating Agencies), to provide advice on policy options to address the issue of de-banking as it specifically relates to financial technology firms (FinTech), digital currency exchanges (DCE), and remittance providers.

A Working Group, led by Treasury and comprising officers from the above agencies, consulted with a range of stakeholders and presented its advice to the Council of Financial Regulators, AUSTRAC and ACCC at their meeting held on 20 June 2022. The recommendations of the Working Group were endorsed at that meeting.

Accordingly, the Participating Agencies provide the following policy proposals for the Government's consideration:

- 1. Collect de-banking data** – A data collection process would provide additional information into the extent and nature of the de-banking problem and inform any future policies.
- 2. Introduce transparency and fairness measures** – Five mutually reinforcing measures are recommended to address stakeholder concerns about banks' processes in relation to the provision of core banking services. Those concerns include that the banks' processes are not transparent and there is little opportunity for businesses and individuals to seek review of the banks' decisions.
- 3. Advise the major banks of the Government's expectation that they provide guidance on their risk tolerance and requirements to the affected sectors** – This guidance is intended to help customers and potential customers understand the major banks' requirements to access banking services. This recommendation is consistent with the Participating Agencies' view that banks should not engage in blanket de-banking of specific industries or sectors.
- 4. Consider funding capability uplift within the affected sectors** – Targeted guidance, outreach and education by AUSTRAC and other agencies on regulatory compliance should help uplift the compliance processes of businesses in the affected sectors, particularly small enterprises.

In addition, the Participating Agencies are hopeful that as Treasury and financial regulators continue their work to reform Australia's payments, crypto assets, and other financial regulatory regimes, banks will become increasingly comfortable with providing core banking services to legitimate businesses in those sectors.

De-banking is a global challenge, and any responses necessarily balance support for businesses with the need to appropriately manage financial crime and other risks. The agencies expect that the proposed package of policy measures, while not providing a complete solution to de-banking challenges, will have a positive effect and address some of the main frustrations experienced by the affected businesses. Some of the measures will also provide the Government with more information on de-banking practices and a foundation for any future policy measures.

¹ As part of the Machinery of Government changes implemented from 1 July 2022, the policy function for AML/CTF has been transferred to the Attorney-General's Department.

Background

De-banking occurs when a bank declines to provide banking services or withdraws banking services from an existing customer. Banking services in this context refers to transaction accounts and not the provision of more complex banking or credit products. Over the past decade, Australian banks have been de-banking customers, including FinTechs, DCEs and remittance providers.

De-banking is a global challenge driven by a number of inter-related causes, including Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) laws, sanctions compliance, profitability and reputational risk considerations. Few affected countries have been able to adequately address the issue of de-banking. The systematic de-banking of legitimate businesses across entire sectors can have significant impacts on affected businesses and increase their risk profile by forcing them to operate outside of the legal framework and conduct transactions exclusively in cash.

The Financial Action Task Force's (FATF) international standards for combatting money laundering and terrorism financing (which are reflected in Australia's domestic regime) and AUSTRAC guidance make it clear that in complying with their AML/CTF obligations, banks are expected to apply a risk-based approach and assess and understand the ML/TF risks presented by each customer.

Developing policy options to address de-banking and its drivers is challenging, with no widely acknowledged solutions that respect the principle that banks are commercial enterprises and must manage their own risks and resources. Additionally, some existing policy settings, such as the AML/CTF and sanctions regimes, seek to achieve crime prevention and have competing national security objectives, which need to be balanced against intentions to promote competition and innovation in the financial sector. However, Government, regulators and the banking industry should all play a role in addressing any blanket de-banking of specific industries or sectors.

The Participating Agencies acknowledge that while banks must make commercial decisions, they also have corporate social responsibilities. The Government continues to place considerable trust in banks to act as gatekeepers of the financial system and to provide banking services that Australian businesses and consumers need to participate in the Australian economy. As the responsible operator of this gatekeeping function, they must exercise appropriate risk management procedures and processes to ensure that core banking services are reasonably accessible across the community. Denial of banking services to some groups and individuals would increase the risk that they are forced to operate outside the formal economy.

While it has not been considered in-depth here, stakeholders have pointed to work begun by Treasury in 2022 regarding the development of licensing frameworks for crypto industry participants and payments providers as potentially helping to alleviate the perception that these are high-risk sectors. Comprehensive licensing regimes would likely increase the general professionalism and risk management capability of businesses within these sectors (although they would not address AML/CTF compliance risks specifically). Examples of this can be found in Malaysia, Singapore and South Africa, which have stringent remittance provider licensing schemes. These schemes significantly raise the bar to market entry, resulting in smaller, but professionalised remittance sectors that the banks are generally willing to conduct business with.

Recommendation one: Data collection

Recommendation one: That voluntary data collection on de-banking be undertaken by the four major banks, following which, consideration will be given to a formal phase of data collection, subject to appropriate resourcing for relevant agencies.

There is persuasive anecdotal evidence available that de-banking is continuing to occur in Australia, but there is a lack of systemic data on the extent and nature of de-banking practices from the banks. The Participating Agencies therefore consider it important to gather data on instances of de-banking from the four major banks to assist the formulation and monitoring of policies over time.

Data can only be collected and reported on a de-banked customer if and when they have submitted a formal account application. However, these data would not paint a full picture of the issue as it will not capture those deterred from applying. Data cannot be easily captured in respect of businesses that:

- have stopped applying for banking services after numerous unsuccessful efforts with a range of financial institutions;
- do not proceed to a final application after engaging with banks; or
- have workaround arrangements outside the Australian banking system.

The Participating Agencies recommend a two-phased approach to data collection:

- **Phase one:** A voluntary and iterative data collection exercise, undertaken by APRA on behalf of Treasury, where data are collected by banks cooperatively and collection methods are refined over time.
- **Phase two:** Depending on whether data collected in Phase one are useful, and subject to a further decision on ongoing data collection, a more regular and formal data collection process be augmented under the *Financial Sector (Collection of Data) Act 2001*.

The rationale for the phased approach is to collect initial data as quickly as possible, refine the ongoing collection and confirm it provides useful insights before implementing a permanent requirement.

This measure will require modest additional resourcing for both APRA and Treasury. Treasury would be the lead agency for the data collection.

Recommendation two: Transparency and fairness measures

Recommendation two: That all banks implement five related measures to improve transparency and fairness in relation to de-banking. These measures would apply to all instances of de-banking.

Stakeholders raised concerns about existing de-banking processes and a perceived lack of ability to seek review of de-banking decisions.

This recommendation consists of five mutually reinforcing measures designed to increase transparency, consistency, and fairness to individual and small business customers regarding all de-banking decisions of all banks. The five measures proposed are:

- **Measure 1:** That banks document reasons for de-banking a customer;
- **Measure 2:** That banks provide a customer with reasons for being de-banked;
- **Measure 3:** That banks ensure a de-banked customer who is an individual or small business has access to their Internal Dispute Resolution procedures;²
- **Measure 4:** That banks provide a minimum of 30 days' notice before closing existing core banking services of a customer. This account closure notice should also inform the customer that they may access the bank's Internal Dispute Resolution procedures; and
- **Measure 5:** That banks self-certify adherence to measures 1-4.

There is no readily identifiable legislative power to mandate these measures. Therefore, if Government accepts this recommendation, Treasury and the relevant regulators will need to work with the banking industry to achieve the full and consistent implementation of these measures. Further engagement with industry over time will be necessary to gauge the efficacy of these measures.

If the Government accepts this recommendation but would prefer to implement the measures in a mandatory and enforceable way, a package of legislative reform will be necessary.

² Banks have Internal Dispute Resolution procedures in place to handle disputes from individuals and small businesses relating to financial services. These procedures are required to meet standards specified by ASIC in RG271. Although access to these procedures is not mandatory for all complaints relating to de-banking decisions, banks may choose to make their IDR procedures available to de-banked customers.

Recommendation three: Guidance by specified banks

Recommendation three: That the four major banks be advised of the Government's expectations that they publish guidance applicable to the DCE, FinTech and remittance sectors concerning their risk tolerance and their requirements to bank these sectors.

The Participating Agencies have further considered a Due Diligence Scheme (DDS) (as requested under the Terms of Reference) but would not recommend such a scheme, for the reasons described later in the paper.

A DDS is intended to reduce uncertainty for banks' customers about what is expected of them.

The Participating Agencies consider that it would be beneficial for the four major banks to publish guidance for the DCE, FinTech and remittance sectors, advising what information is required and the compliance standards that are expected to be met to maintain a banking relationship. The Government may seek to expand this guidance expectation to all banks after it has been tested. Further guidance to other sectors affected by de-banking may also be necessary. With greater clarity and certainty, existing and potential customers in these sectors have an opportunity to invest in the areas that meet the banks' requirements (although without guarantee that a bank would provide them with services).

Recommendation four: Capability uplift

Recommendation four: That consideration be given by Government to funding targeted education, outreach and guidance to the FinTech, DCE and remittance sectors. If the Government is interested in pursuing capability uplift, the Participating Agencies can advise on implementation options.

Taking account of stakeholder views, the Participating Agencies consider that additional Government investment to enhance the capability of the affected sectors through targeted guidance, outreach and education would have a positive impact by enhancing compliance outcomes and reducing compliance risk. This would particularly benefit small businesses, such as individual remittance and DCE providers, from the affected sectors who require assistance in meeting their regulatory obligations.

Stakeholders provided feedback that continued support of the DCE, FinTech and remitter industries to bolster their ability to comply with AML/CTF and sanctions obligations would have long-term benefits. The Participating Agencies agree with this view. Consultation with stakeholders in the relevant sectors indicated that even some large entities with relatively sophisticated compliance systems and checks have had considerable difficulty securing core banking services in Australia. Nonetheless, the Participating Agencies believe that capability uplift will support smaller industry participants to meet their compliance obligations and hopefully in turn, the banks' requirements.

If the Government supports this recommendation to increase targeted education, outreach and guidance for these sectors, it will require providing additional funding to AUSTRAC, or industry groups to support their members. The Participating Agencies can advise on implementation options.

Additional resource support for AUSTRAC would also allow it to publish more regulatory guidance for banks (a consistent request from stakeholders), and to expand its existing education and outreach program. The banks have requested more detailed guidance on AML/CTF compliance expectations to deal with high-risk customers. AUSTRAC is expected to finalise and publish this additional guidance by the end of the year.

Options considered but not supported

A DDS was first recommended in the ACCC's Foreign Currency Conversion Services Inquiry report published in 2019. The DDS model consulted on by the Participating Agencies would involve the establishment of an independent agency providing independent audit assurance and certification of a business' AML/CTF and sanctions systems and controls.

The major banks have indicated that the proposed DDS would be unlikely to influence their decision on whether to bank a customer given that certification under the DDS would not provide protection against regulatory action. Ultimately, the Participating Agencies consider that a DDS would not succeed without banks giving weight to certification.

Setting up an External Dispute Resolution Scheme (EDRS) involving AFCA was one of the de-banking recommendations in the Senate Select Committee on Australia as a Technology and Financial Centre. The EDRS would involve either AFCA, or another body becoming responsible for resolving complaints and disputes regarding customers (including potential customers) who have been denied banking services. The EDRS would provide a mechanism for retail clients to make a complaint regarding their banking services being refused or withdrawn to increase certainty and transparency around de-banking.

AFCA indicated that this scheme would be outside of its current jurisdiction, and the establishment of another body would be impractical. There are two compelling reasons for this. First, it is difficult for an external body to intervene in the commercial decisions of a bank. Second, where the reasons for de-banking are related to suspicious matters reported to AUSTRAC under AML/CTF legislation, it would be a criminal offence for the bank to communicate information that indicated or inferred that such a report had been made. Consequently, the external body would have incomplete information.

Therefore, the Participating Agencies have decided to not recommend a DDS or an EDRS.

Stakeholder consultation

During the consultation period, the Working Group consulted a range of stakeholders. These included: the Australian Banking Association (ABA); the four major banks; the Australian Financial Complaints Authority (AFCA); the Australian Remittance and Currency Providers Association (ARCPA); Blockchain Australia; FinTech Australia; and Western Union.

Feedback received from the affected sectors indicated that de-banked customers are generally not provided reasons concerning the withdrawal of banking services. Further, customers are not provided access to internal review processes and may be required to move their funds and secure alternative banking services within a short timeframe. They also suggested that banks appear to be choosing not to bank any customers from perceived higher risk sectors and thus engaging in blanket de-banking rather than assessing risks posed by individual customers.

Most of the industry stakeholders that were consulted, through their peak bodies, represent larger or more prominent businesses in the affected industries. These stakeholders highlighted that, despite some of the sophisticated businesses investing significant resources and effort into uplifting their regulatory compliance capabilities, they continue to have ongoing challenges in accessing and/or maintaining access to banking services. They further expressed difficulty in understanding the requirements of the banks to meet their internal risk appetites, primarily because of the lack of information available or the limited engagement opportunities.

Further comments from industry highlighted that the banks have increasingly developed a lower risk tolerance in dealing with regulatory risks in Australia, particularly in response to the significant penalties that have applied to breaches of AML/CTF and sanctions obligations in Australia and elsewhere. The Participating Agencies heard from FinTech businesses that have not been able to secure access to banking services in Australia despite holding bank accounts in a large number of foreign jurisdictions.

Banks submitted that there are numerous reasons for de-banking customers, including but not limited to AML/CTF risks, sanctions compliance, corruption, modern slavery, reputation, fraud and scams, and other regulatory obligations and expectations. The banks contend that servicing these higher risk sectors and conducting enhanced due diligence to mitigate the risks is costly and therefore commercially unattractive. Banks stressed that it is important for them to retain control over these commercial decisions.

AFCA indicated that its remit in respect of de-banking is limited to reviewing whether the bank has fulfilled the terms and conditions of service. There are significant challenges to expanding AFCA's remit.

All industry stakeholders supported the collection of de-banking data to better understand the extent and nature of the problem.

Attachment A: Terms of Reference

In response to the Final Report of the Senate Select Committee on Australia as a Technology and Financial Centre (the Senate Report), I request the Council of Financial Regulators (the Council), being the Reserve Bank of Australia, Australian Prudential Regulation Authority, Australian Securities and Investments Commission and the Treasury, with assistance from the Australian Competition and Consumer Commission, the Department of Home Affairs and Australian Transaction Reports and Analysis Centre, to provide advice to the Government on potential policy responses to address de banking in Australia.

Context

De-banking (or de-risking) occurs when a bank declines to offer or continue to provide a banking service. Key businesses affected include financial technology firms, digital currency exchanges, and remittance providers. De banking can have a devastating impact on de-banked businesses and individuals. It can also stifle competition and innovation in the financial services sector, and hence negatively impact Australia's economy.

The Senate Report made two recommendations to the Government on de-banking:

- to enact the recommendation from the 2019 ACCC inquiry into the supply of foreign currency conversion services in Australia that a scheme to address the due diligence requirements of banks be put in place, and that this occur by June 2022; and
- to develop a clear process for businesses that have been de-banked, in order to increase certainty and transparency around de-banking. This should be anchored around the Australian Financial Complaints Authority which services licensed entities.

Objectives

The Council is requested to deliver advice to Government addressing:

- Trends in, and the underlying causes of, de-banking, drawing on consultation with a range of key stakeholders; and
- Possible policy responses which could be deployed, including an analysis of those recommended in the Senate Report. Policy responses should be assessed by their potential costs, benefits, complexity, risks and likely efficacy, and include the views of affected sector and financial institutions.

Timing

The Council is requested to provide advice to the Government on policy options by the end of June 2022.