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By email only (to Ms Mason, Ms Jones and Ms Lecuna)

Dear All

AUSTRAC Review of the extent to which trustee service providers are exempt from the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* – Response of Licenced Trustee Companies

1. The Financial Services Council (**FSC**) represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, licenced trustee companies and public trustees. The Council has over 125 members who are responsible for investing more than \$2.5 trillion on behalf of 11 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the third largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.
2. By way of background, various licenced trustee companies which are now FSC members, were previously members of a predecessor trustee association, namely the Trustee Corporations Association of Australia (**TCA**). From March 2012, the then members of the TCA joined FSC, with TCA ceasing to exist shortly thereafter following the transition of various TCA members to FSC. Accordingly, FSC is now the industry body representing licenced trustee company (**LTC**) members.
3. This submission is made solely on behalf of LTC members of the FSC. (The public trustee members of FSC, who benefit from exemptions from the AML/CTF Act, have made a separate submission to AUSTRAC's Trustee Industry Review, and FSC has lodged a letter of support in relation to our public trustee members' submission.)

4. We refer to AUSTRAC’s letter dated 19 February 2015 in relation to the AUSTRAC trustee service provider review (the **Trustee Industry Review**) seeking information in relation to *licenced trustee companies*. We thank AUSTRAC for the opportunity to lodge a submission in relation to our LTC members to the Trustee Industry Review and for the extension of time to respond to AUSTRAC’s letter. In AUSTRAC’s 19 February 2015 letter, AUSTRAC also refer by way of background to the exemption application submitted by the Trustee Corporations Association of Australia on behalf of *licenced trustee companies* dated 15 July 2011 (the **LTC Exemption Application**). (Following the transition of TCA members to FSC, FSC now represents LTCs in respect of the LTC Exemption Application.)
5. AUSTRAC states in its 19 February 2015 letter to FSC that:

“AUSTRAC does not propose to grant any exemptions to licenced trustee companies while conducting the Trustee Industry Review.”
6. AUSTRAC’s 19 February letter also states:

“(i) In the event that the outcome of the Trustee Industry Review leads to a regulatory or legislative outcome which may provide your members with sufficient relief, you will be asked to withdraw the exemption application.

(ii) In the event that the outcome of the Trustee Industry Review does not provide your members with sufficient relief, you should request AUSTRAC to resume consideration of the exemption application and may wish to provide any further information in support of the exemption application. We will then proceed to finalise our assessment of the exemption application as expeditiously as possible.”
7. Given AUSTRAC’s statements above, other than referring to the LTC Exemption Application in general terms and to provide context, we do not intend to address further the matters set out in AUSTRAC guidance note 14/01 *Applications for exemptions and modifications under the AML/CTF Act* (which in any event we consider are broadly addressed in the LTC Exemption Application lodged by TCA; we note that exemption application was not prepared by FSC).
8. Depending on whether the outcome of the Trustee Industry Review provides sufficient relief (or comfort – see our comments below in relation to seeking AUSTRAC confirmation that certain matters the subject of the TCA’s LTC Exemption Application in fact are not *designated services* when provided by LTCs in certain circumstances), FSC will provide the names and ABNs of all LTCs seeking the exemptions the subject of the LTC Exemption Application.

Background and Context: Exemption Application by Licenced Trustee Members

9. In relation to the LTC Exemption Application:

- (a) The LTC Exemption Application sought an exemption in respect of designated services in items 33, 34, 46, 51 and 53 of Table 1 of section 6(2) of the AML/CTF Act and designated services in items 1 and 2 of table 2 of section 6(3) of the AML/CTF Act to apply in circumstances where Licenced Trustee Companies are providing such designated services when providing various “traditional trustee company services”, namely when acting as:
- (1) A manager, appointed by the law or a Court/Tribunal, of the financial affairs of a person who is unable to manage their own affairs;
 - (2) An executor or administrator of deceased estates;
 - (3) A trustee for trusts created by a will, an *inter vivos* deed, an order of Tribunal/Court or a direction of a statutory office-bearer; or
 - (4) An attorney under an enduring power of attorney, or an agent under another agency arrangement, for a person lacking capacity.
- (b) Our LTC members note that AUSTRAC has provided exemptions to other reporting entities (public trustees) for the same designated services referred to in the LTC Exemption Application. AUSTRAC’s Guidance note 14/01 *Application for exemptions and modifications under the AML/CTF Act* specifically references competitive neutrality matters. Not providing the exemption to LTCs (to the extent it is needed – see our request below for clarification from AUSTRAC) involves a significant and inappropriate competitive disadvantage to LTC Members compared to other trustees which do have a similar exemption. The LTC Exemption Application notes (on page 4) that there is no material difference from an AML/CTF perspective between how traditional [trustee company] services are provided by LTCs as compared to public trustees. Further, to the extent an exemption is needed, where services are provided in respect of a person under a legal disability, our LTC Members consider that in such circumstances there is a low AML/CTF risk in relation to designated services provided in such circumstances.

Responses to AUSTRAC’s Trustee Industry Review letter relating to Licenced Trustee Companies

AUSTRAC Question: *Please describe the circumstances in which licenced trustee companies provide each of the designated services which are the subject of its 15 July 2011 exemption application. Please include a description of the customer for each designated service.*

- 10. The role of the Licenced Trustee Company differs from the common provider of specified designated services, for example, in relation to items 33 (the acquisition and disposal of a security or derivative). As executor, the Licenced Trustee Company in its capacity as Legal Personal Representative acquires the asset as the legal personal representative of the estate – the asset does not belong to the Licenced Trustee Company in that capacity. External service providers are then instructed by the Legal Personal Representative to dispose of the asset or it is transferred in specie to a beneficiary. (The transfer in specie of the asset is not a “sale”.)
- 11. We provide a summary in the table below:

(1) Our Row No.	(2) Designated Services Item No.	(3) Circumstances	(4) Description of Customer	(5) FSC request for AUSTRAC clarification
A.	Table 1, item 33	<p>Where a Licenced Trustee Company is providing Chapter 5D “traditional trustee company services”, namely when acting as:</p> <p>(a) A manager, appointed by a Court or Tribunal or by operation of law, of the financial affairs of a person who is unable to manage their own affairs; [Court/Tribunal/Law Appointment]</p> <p>(b) An executor or administrator of deceased estates; [Executor/Administrator]</p>	<ol style="list-style-type: none"> 1. A person unable to manage their own affairs; 2. A beneficiary of the estate; 3. Generally a beneficiary of the estate; 4. Generally, the appointer or person 	<p>On further consideration since the LTC Exemption Application lodged by the TCA, it is a commonly held view among LTCs that no item 33 designated service is provided by the LTC when the designated service is provided in the LTC’s capacity set out in the Circumstances set out in paragraphs (a), (b) and (c) in Column (3) (Circumstances), namely a <i>Court/Tribunal/Law Appointment</i>, acting as <i>Executor/Administrator</i> or as trustee for <i>Will or Other Trusts</i>.</p> <p>This is because the LTC in the Circumstances in (a), (b) and (c) is not acting as an agent. Hence no item 33 designated service is being provided and hence no exemption is required by LTCs (if</p>

(1) Our Row No.	(2) Designated Services Item No.	(3) Circumstances	(4) Description of Customer	(5) FSC request for AUSTRAC clarification
		<p>(c) A trustee for trusts created by a will, an inter vivos deed, an order of a Tribunal/Court or a direction of a statutory office-bearer; [Will or Other Trusts] or</p> <p>(d) An attorney under an enduring power of attorney, or an agent under another agency arrangement, for a person lacking capacity [Acting for Person with Legal Disability],</p> <p>the Licenced Trustee Company is involved in transactions listed in paragraphs (a) to (d) above, and in relation to traditional trustee company services as outlined in Chapter 5D of the Corporations Act 2001, in its capacity as Executor, Trustee or Attorney/Administrator or by order of a Court or Tribunal.</p>	<p>lacking legal capacity.</p>	<p>that view is correctly held).</p> <p>We seek AUSTRAC’s written confirmation that AUSTRAC agrees with this view. If so, FSC would withdraw the LTC Exemption Application so far as it related to an item 33 designated service provided in the Circumstances in (a), (b) and (c), subject to final instructions from our LTC Members to withdraw the LTC Exemption Application to that extent.</p> <p>In relation to the Circumstances in paragraph (d) of Column (3) (Circumstances), namely <i>Acting for Person with Legal Disability</i>, our LTC members consider such Circumstances constitute a low AML/CTF risk.</p>
B.	Table 1, item 34	See above under Row A.	See above under Row A.	<p>On further consideration since the LTC Exemption Application lodged by the TCA, it is a commonly held view among LTCs that no item 34 designated service is provided by the LTC when the designated service is provided in the LTC’s capacity set out in the Circumstances set out in paragraphs (a), (b) and (c) in Column (3) (Circumstances), namely a <i>Court/Tribunal/Law Appointment</i>, acting as <i>Executor/Administrator</i> or as trustee for <i>Will or Other</i></p>

(1) Our Row No.	(2) Designated Services Item No.	(3) Circumstances	(4) Description of Customer	(5) FSC request for AUSTRAC clarification
				<p><i>Trusts.</i></p> <p>This is because the LTC in the Circumstances in (a), (b) and (c) is not acting as an agent. Hence no item 34 designated service is being provided and hence no exemption is required by LTCs (if that view is correctly held).</p> <p>We seek AUSTRAC’s written confirmation that AUSTRAC agrees with this view. If so, FSC would withdraw the LTC Exemption Application so far as it related to an item 34 designated service provided in the Circumstances in (a), (b) and (c), subject to final instructions from our LTC Members to withdraw the LTC Exemption Application to that extent.</p> <p>In relation to the Circumstances in paragraph (d) of Column (3) (Circumstances), namely <i>Acting for Person with Legal Disability</i>, our LTC members consider such Circumstances constitute a low AML/CTF risk.</p>
C.	Table 1, item 46	See above under Row A.	See above under Row A.	<p>Our LTC members are currently giving further consideration in relation to item 46. While our members are still considering the matter, it is not entirely clear whether an item 46 designated service is provided when the Circumstances are as set out in paragraphs (a), (b) and (c) in Column (3) (Circumstances), namely a <i>Court/Tribunal/Law Appointment</i>, acting as <i>Executor/Administrator</i>, or acting as trustee for <i>Will or Other</i></p>

(1) Our Row No.	(2) Designated Services Item No.	(3) Circumstances	(4) Description of Customer	(5) FSC request for AUSTRAC clarification
				<p><i>Trusts.</i> We do not reach a concluded view and consider the matter may involve some doubt. Therefore, LTCs at this stage would still seek the exemption for an item 46 designated service subject to the outcome of the Trustee Industry Review. This is due to some debate as to whether a custodial or depository service is provided in relation to the Trustee Services and the typical Australian Financial Services License provided to entities licensed under Chapter 5D of the Corporations Act 2001.</p> <p>Entities may provide custodial or depository services in other capacities and under different Australian Financial Services License authorisations (that is, not being a Chapter 5D related AFSL authorisation), however these services and license authorisations are not proposed to be included in the previous LTC Exemption Application.</p> <p>In relation to the Circumstances in paragraph (d) of Column (3) (Circumstances), namely <i>Acting for Person with Legal Disability</i>, our LTC members consider such Circumstances constitute a low AML/CTF risk to the extent an item 46 designated service is provided.</p>

(1) Our Row No.	(2) Designated Services Item No.	(3) Circumstances	(4) Description of Customer	(5) FSC request for AUSTRAC clarification
D.	Table 1, item 51	See above under Row A.	See above under Row A.	<p>On further consideration since the LTC Exemption Application lodged by the TCA, it is a commonly held view among LTCs that no item 51 designated service is provided by the LTC when the designated service is provided in the LTC’s capacity set out in the Circumstances set out in paragraphs (a), (b), (c) and (d) in Column (3) (Circumstances), namely a Court/Tribunal/Law Appointment, acting as Executor/Administrator or as trustee for Will or Other Trusts, or Acting for Person with Legal Disability.</p> <p>This is because a commonly held view among LTCs is that to the extent that an LTC may (albeit not commonly) collect physical currency or hold physical currency, LTCs are not providing such service in the course of carrying on <i>a business of collecting or holding physical currency</i>.</p> <p>The circumstances in which LTCs may collect or hold physical currency are uncommon, such as locating currency on the premises of a recently deceased person for whose estate the LTC acts as executor or administrator; or hold currency as part of managing the financial affairs of a person under a legal disability.</p> <p>We seek AUSTRAC’s guidance on this matter. If AUSTRAC were to agree with the commonly held view above that in such Circumstances, an LTC (in that capacity) is not providing an item 51 designated service, then FSC would to that extent withdraw the LTC Exemption Application, subject to receiving final instructions from our LTC members to do so. To the extent AUSTRAC holds an</p>

(1) Our Row No.	(2) Designated Services Item No.	(3) Circumstances	(4) Description of Customer	(5) FSC request for AUSTRAC clarification
				<p>alternative view, our LTC members would pursue the Exemption Application relating to item 51, subject to the outcome of the Trustee Industry Review.</p>
E.	Table 1, item 53	See above under Row A.	See above under Row A.	<p>On further consideration since the LTC Exemption Application lodged by the TCA, it is a commonly held view among LTCs that no item 53 designated service is provided by the LTC when the designated service is provided in the LTC’s capacity set out in the Circumstances set out in paragraphs (a), (b), (c) and (d) in Column (3) (Circumstances), namely a Court/Tribunal/Law Appointment, acting as Executor/Administrator or as trustee for Will or Other Trusts, or Acting for Person with Legal Disability.</p> <p>This is because a commonly held view among LTCs is that to the extent that an LTC may (albeit not commonly) deliver physical currency, LTCs are not providing such service in the course of carrying on a <i>business of delivering physical currency</i>.</p> <p>The circumstances in which LTCs may deliver physical currency are uncommon, such as dispensing currency as part of managing the financial affairs of a person under a legal disability.</p> <p>We seek AUSTRAC’s guidance on this matter. If AUSTRAC were to agree with the commonly held view above that in such Circumstances, an LTC (in that capacity) is not providing an item 53 designated service, then FSC would to that extent withdraw the LTC Exemption Application, subject to receiving final instructions from our LTC members to do so. To the extent AUSTRAC holds an</p>

(1) Our Row No.	(2) Designated Services Item No.	(3) Circumstances	(4) Description of Customer	(5) FSC request for AUSTRAC clarification
				alternative view, our LTC members would pursue the Exemption Application relating to item 53, subject to the outcome of the Trustee Industry Review.
F.	Table 2, item 1 (buying bullion)	<p>Where a Licenced Trustee Company is providing Chapter 5D “traditional trustee company services”, namely when acting as:</p> <ul style="list-style-type: none"> (a) A manager, appointed by a Court or Tribunal or by operation of law, of the financial affairs of a person who is unable to manage their own affairs; [Court/Tribunal/Law Appointment] (b) An executor or administrator of deceased estates; [Executor/Administrator] (c) A trustee for trusts created by a will, an inter vivos deed, an order of a Tribunal/Court or a direction of a statutory office-bearer; [Will or Other Trusts] or (d) An attorney under an enduring power of attorney, or an agent under another agency arrangement, for a person lacking capacity [Acting for Person with Legal Disability], <p>the Licenced Trustee Company is involved in transactions listed in paragraphs (a) to (d) above,</p>	The person from whom bullion is bought.	<p>On further consideration since the LTC Exemption Application lodged by the TCA, it is a commonly held view among LTCs that the designated service in item 1 of Table 2 is not provided by LTCs when providing services.</p> <p>In extremely rare occasions trustees may find bullion on the premises of a recently deceased person and may be required to dispose of that bullion (let alone buy bullion) in the course of administering an estate. Clarification from AUSTRAC is sought to confirm that in these cases, Licenced Trustee Companies are not considered to be providing the related Designated Services at item 1 of Table 2 as they are not in the business of providing these services.</p> <p>Subject to receiving the appropriate clarification from AUSTRAC, we may not need to pursue an exemption from the item 1 of Table 2 designated service. If the appropriate clarification is not received, our Licenced Trustee Company members may need to pursue the exemption relating to item 1 of Table 2 given the low AML/CTF risk.</p>

(1) Our Row No.	(2) Designated Services Item No.	(3) Circumstances	(4) Description of Customer	(5) FSC request for AUSTRAC clarification
		and in relation to traditional trustee company services as outlined in Chapter 5D of the Corporations Act 2001, in its capacity as Executor, Trustee or Attorney/Administrator or by order of a Court or Tribunal.		
G.	Table 2, item 2 (selling bullion)	<p>Where a Licenced Trustee Company is providing Chapter 5D “traditional trustee company services”, namely when acting as:</p> <ul style="list-style-type: none"> (a) A manager, appointed by a Court or Tribunal or by operation of law, of the financial affairs of a person who is unable to manage their own affairs; [Court/Tribunal/Law Appointment] (b) An executor or administrator of deceased estates; [Executor/Administrator] (c) A trustee for trusts created by a will, an inter vivos deed, an order of a Tribunal/Court or a direction of a statutory office-bearer; or [Will or Other Trusts] or (d) An attorney under an enduring power of attorney, or an agent under another agency arrangement, for a person lacking capacity [Acting for Person with Legal Disability], 	The person from whom bullion is sold.	<p>On further consideration since the LTC Exemption Application lodged by the TCA, it is a commonly held view among LTCs that the designated service in item 2 of Table 2 is not provided by LTCs when providing services.</p> <p>In extremely rare occasions trustees may find bullion on the premises of a recently deceased person and may be required to dispose of that bullion in the course of administering an estate. Clarification from AUSTRAC is sought to confirm that in these cases, Licenced Trustee Companies are not considered to be providing the related Designated Services at item 2 of Table 2 as they are not in the business of providing these services.</p> <p>Subject to receiving the appropriate clarification from AUSTRAC, we may not need to pursue an exemption from the item 2 of Table 2 designated service. If the appropriate clarification is not received, our Licenced Trustee Company members may need to pursue the exemption relating to item 2 of Table 2 given the low AML/CTF risk.</p>

(1) Our Row No.	(2) Designated Services Item No.	(3) Circumstances	(4) Description of Customer	(5) FSC request for AUSTRAC clarification
		the Licenced Trustee Company is involved in transactions listed in paragraphs (a) to (d) above, and in relation to traditional trustee company services as outlined in Chapter 5D of the Corporations Act 2001, in its capacity as Executor, Trustee or Attorney/Administrator or by order of a Court or Tribunal.		

AUSTRAC Question: *Do licenced trustee companies provide any designated services which would not be subject to the proposed exemption? If so, please describe the designated services and the circumstances in which they are provided?*

(1) Our Row No.	(2) Designated Services Item No.	(3) Circumstances	(4) Description of Customer
A.	Various	Due to the need to ensure we lodge this application on time, our response is brief and given in general terms. Various of our LTC members may provide other designated services not in their capacity of providing Chapter 5D “traditional trustee company services”. Such designated services may include item 33 and item 34 designated services (by way of example) and may include	Various. FSC would be pleased to arrange a conference call with our members if that would assist.

(1) Our Row No.	(2) Designated Services Item No.	(3) Circumstances	(4) Description of Customer
		<p>other designated services. LTCs do not seek an exemption for these circumstances (when not provided in their capacity as an LTC providing a Chapter 5D “traditional trustee company service”). Some LTCs may broadly only provide designated services in their capacity of providing a Chapter 5D “traditional trustee company services”, however we would need more time to provide further information.</p> <p>FSC would be pleased to arrange a conference call with our members if that would assist.</p>	

12. The Customers of the Designated Services where exemptions have been sought are by definition persons lacking legal capacity and are considered to be associated with very low levels of AML/CTF risk. Trustees have fiduciary obligations to manage the affairs of these persons in such a way as to provide benefits to them over their life and the source of the funds obtained to support these purposes is generally well known and subject to either a court or some other form of settlement or compensation. These customers typically do not have the identification documentation that would be required to meet AML/CTF requirements and imposing these requirements on them would constitute further unwarranted hardship on them.

Exemption Application

13. We look forward to the outcome of the Trustee Industry Review. Subject to that outcome, FSC may, on behalf of its LTC Members, continue to pursue some or all of the exemptions sought in the LTC Exemption Application.
14. We request an opportunity, with our LTC members, to discuss this submission with AUSTRAC after AUSTRAC has had an opportunity to consider this submission.

Please contact Stephen Judge on (02) 9299 3022 if you have any questions on this Licenced Trustee Company response to the Trustee Industry Review, and (if AUSTRAC agrees to our request) to arrange a meeting with our LTC Members to discuss this submission.

Yours sincerely



Stephen Judge
General Counsel