



**Australian
Privacy
Foundation**

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Review of Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Framework

**Submission to the Attorney-General's
Department**

March 2014

The Australian Privacy Foundation

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For further information about the Foundation and the Charter, see www.privacy.org.au

Please note that APF does not have a single postal address – we prefer communication by e-mail. If a postal address is required please contact the signatory.

Publication of submissions

We note that we have no objection to the publication of this submission in full. To further the public interest in transparency of public policy processes, APF strongly supports the position that all submissions to public inquiries and reviews should be publicly available, except to the extent that a submitter has reasonable grounds for confidentiality for all, or preferably part of, a submission.

Introduction

APF welcomes the opportunity to provide input to this review of the AML/CTF regime. APF has been kept informed of the operation of the regime through its representative on the AUSTRAC Privacy Consultative Committee – initially Mr Chris Connolly and since 2000 Mr Nigel Waters. APF has worked closely with the two other consumer members of the PCC – Ms Jan Whitaker (who is also an APF member) and Ms Georgia King-Siem from the Liberty Victoria (previously Mr Michael Pearce).

We would like to acknowledge the continuous commitment of successive AUSTRAC CEOs and senior staff to consultation with civil society NGOs through its PCC, since it was established in 1994. The amount of information provided, frankness of discussion, and comprehensive record keeping in the form of minutes is unprecedented for any government agency, and provides a model that should be followed

by others. Through the AUSTRAC PCC, the relevant section of the Attorney-General's Department has also been relatively open and consultative about successive amendments to the legislation.

Our relative satisfaction with the level of consultation does not translate into comfort with the AML-CTF regime itself. APF has from the outset opposed the highly privacy intrusive nature of the AML-CTF (formerly FTRA) record-keeping and reporting regime as wholly disproportionate to the declared objectives.

Comments on Guiding Principles for the Review

We start by commenting on the **Guiding Principles** which accompanied the Terms of Reference for the Review.

"The Review will be guided by the following principles as they relate to anti-money laundering and counter-terrorism financing:

*Create a financial **environment hostile** to money laundering, the financing of terrorism, serious and organised crime and tax evasion, through industry regulation and the collection, analysis and dissemination of financial intelligence."*

We have no difficulty with this principle.

*"Ensure Australia fulfils its **international obligations** and addresses matters of **international concern** (including the FATF standards, the Egmont Group, Group of 20 Nations, United Nations Security Council Resolutions, the United Nations Convention against Corruption and the United Nations Convention on Transnational Organised Crime)."*

We have grave concerns about this principle, as it elevates so called 'obligations' derived from secretive and largely unaccountable forum of government agencies over the sovereignty of the Australian Parliament. We respect the need for Australia to comply with UN Security Council Resolutions and UN Conventions, but the 'secondary' instruments referenced, including the FATF (Financial Action Task Force) Standards which have largely driven the shape and content of Australia's AML/CTF law, have never been the subject of appropriate debate by Australian legislators. We believe the balance of objectives has become severely tilted in favour of intrusion into financial affairs without clear evidence that it is necessary or effective in combating money laundering or terrorist financing.

*"Support the **better regulation agenda** to simplify the regulatory burden on reporting entities (in particular, small businesses), while maintaining an AML/CTF regime which represents the most **appropriate, efficient and effective** means of achieving government objectives."*

We strongly support this principle to the extent that it will hopefully lead to a more rigorous assessment of the proportionality and effectiveness of the obligations on business under the AML/CTF regime (see below, especially pp 4-5).

*“Foster and enhance **international cooperation and collaboration.**”*

This is only desirable to the extent that it meets Australia’s needs and reflects a balanced approach both to those needs and to genuine and justifiable international obligations.

*“Work in **partnership** with industry, the states and territories to promote a national effort to maintaining the AML/CTF regime.”*

We have no difficulty with the concept of partnership, but the partners should expressly include civil society which can represent the interests of affected individuals. The principle should also be qualified to make it clear that the effort should be to maintain an ‘effective and appropriate’ AML/CTF regime, not an automatic assumption that *the* current regime meets these criteria.

*“Ensure the AML/CTF regime produces **information necessary** to assist the Australian Government and law enforcement agencies to combat money laundering, the financing of terrorism and serious and organised crime.”*

We challenge whether the information generated by the regime is all necessary to meet the declared objectives. We submit that much of the information about customers collected by reporting entities, and much of the information automatically reported to AUSTRAC, is far in excess of what is necessary, particularly if the objectives were, in reality, confined to the three ‘threats’ listed. In practice, the regime is clearly now at least partly designed to provide financial intelligence for a much wider range of government functions – see below for our further comments on ‘scope creep’.

*“Ensure **privacy considerations** are appropriately addressed.”*

There should be a clearer recognition of the need for balance between effective regulation on the one hand, and the legitimate privacy rights and expectations of individuals. While we are pleased to see privacy expressly mentioned in these principles, they relegate privacy to a second-order issue, with an implicit assumption that it can just be ‘addressed’ and does not involve a fundamental conflict of public policy objectives. The terms of reference say that a central aim of the AML/CTF regime has been to ‘strike a balance between efficient conduct of business and effective regulation to combat money laundering and terrorism financing’. We submit that there is another balance that must be struck, and which to date has not been struck appropriately i.e. the balance between effective regulation and privacy.

The misleading name of the Act in light of continuous scope creep

The terms of reference would lead readers to believe that the AML/CTF regulatory scheme is actually directed solely at the two ‘threats’ mentioned in the name of the Act – namely terrorism and money laundering, together with the wider domain of ‘serious and organised crime’. This is simply not true, and the same deception is inherent in the name of the legislation.

In reality, the scope and operation of the AML/CTF regime have progressively been expanded to cover a much wider range of law enforcement, revenue protection and general regulatory activities, including

pursuit of relatively minor offences such as welfare fraud. While not condoning any offences, we question whether it is appropriate for a highly intrusive regulatory scheme which was initially justified on the basis of combating serious and organised crime (including terrorism), to be used for a much wider range of activities.

To allow this to continue offends against the important principle of proportionality – that the strength of any regulatory regime should be both necessary and proportionate to the risk or threat that it is designed to counter.

We submit that the Review should open up the question of the name/title of the legislation and regulatory regime, which is currently misleading.¹

The massively increased scope and ‘reach’ of the AML/CTF Regime is clear from statistics in AUSTRAC annual reports, with a brief indication being given on page 10 of the Issues Paper (from 4000 to 13,800 reporting entities and from 18 million to 84 million reports in just the last five years).

International context and FATF

APF has major concerns about the way in which the regime, and successive changes, have been premised on an imperative to meet international standards in the form of the FATF 40 Recommendations. We submit that successive Australian governments have consistently misrepresented the status of these Recommendations and exaggerated the need for Australia to meet them.

We have no argument with the importance of international co-operation to combat major threats from serious and organised crime, including terrorism and major money laundering (which should be seen as the crimes that they are rather than being elevated to some special status). But we reject the presumption that Australia needs to slavishly follow all FATF recommendations. We also have major concerns about a ‘democratic deficit’ in the development and agreement on the FATF standards, which have never directly been the subject of parliamentary debate or approval. We question whether the FATF standards amount to a binding international obligation, which is the basis on which Australia’s AML-CTF regime has been justified and constructed. The fact that the FATF standards are called Recommendations should be a pointer to their true status – which is more akin to the rules of a club which the Australian Government has chosen to join². They are not a treaty.

Another indication that the FATF Recommendations cannot be used as a blind justification for the Australian regime is the fact that Australia’s AML-CTF law includes obligations which go well beyond even those Recommendations. One example is the extent of the reporting obligation for international funds transfers. A recent statement by the AUSTRAC CEO illustrates this:

¹ To the extent that AML-CTF remains in use, we urge a revision of the hyphenation – the Act currently reads as though it is concerned about the laundering of Anti-Money, and the financing of Counter-Terrorism! Its real intention is of course to combat Money-Laundering, and Terrorism-Financing.

² See <http://www.fatf-gafi.org/pages/aboutus/historyofthefatf/>

"Australia is very fortunate among its international counterparts, in that we are one of the few countries which currently collects all international funds transfers, into or out of Australia," John Schmidt, CEO of Austrac, told Senate estimates today. (ZDNet 24 February 2014³)

We are aware that most members of FATF pick and choose which aspects of the 40 Recommendations to implement, and to what extent. Most countries sensibly take the Recommendations into account in their AML-CTF related legislation but also ensure that they do not unduly sacrifice other important values and public interests.

We note the statement in the Issues Paper that "Australia will be one of the first countries to be assessed against the revised standards during the forthcoming mutual evaluation in 2014." and that "The findings of that evaluation will be relevant for the Review of the operation of the regime and will be taken into account in the final report and in any recommendations to Government." While it is perfectly sensible for the mutual evaluation to be an input to this statutory review, we submit that the weight given to any findings should be proportionate to the true status of the FATF standards as 'Recommendations' and not taken as determinative.

Our response to the Issues Paper 'Questions for consideration'

Objects of the Act

We submit that the current objects in s.3 are far too narrow. We support the express inclusion of a privacy objective. However, rather than a separate 'add on' object which would inevitably be overlooked, we submit that privacy should be built in to the suggested 'proportionality' object, which could be re-worded as:

"To apply a risk-based approach that strikes an appropriate balance between effective AML/CTF measures; the efficient conduct of business, and the privacy of individuals and their personal information."

The risk-based approach and better regulation

Risk-based and rules-based approaches

We welcome the renewed emphasis on reducing the regulatory burden on industry, which would in many cases incidentally reduce privacy intrusion. We have concerns about a risk based approach which leaves too much discretion with businesses – particularly small businesses which are not resourced to apply complex judgments. There is a danger that a risk based approach with wide discretion will lead to 'precautionary' surveillance and/or reporting which is not really justified; and/or to inconsistent, inequitable and potentially discriminatory surveillance and/or reporting. One glaring example is the operation of the 'suspicious matters' reporting requirement where a wide discretion inevitably means that thousands of extremely subjective and potentially prejudicial judgments are being made about

³ See <http://www.zdnet.com/australian-government-tracks-every-aud-conversion-into-bitcoin-7000026666/>

individuals, without their knowledge and with no 'remedy' (see our comments below on Secrecy and Access).

On the whole, we support a more prescriptive rules based approach, provided that there is a presumption that the rules should 'level down' both the compliance burden and surveillance to the level appropriate for the majority of transactions, rather than levelling it up to the level required for exceptions. It is inherent in an overall risk based approach to AML-CTF regulation that some unlawful activity will 'escape'. The regime should not seek to meet unrealistic and unachievable targets.

Modifications and exemptions

We welcome exemptions and modifications that simultaneously reduce the compliance burden and reduce the level of intrusion into the financial affairs of individuals. We note that one exemption is for the purchase of bullion with a value of \$5000 or less. We question why the same threshold cannot be applied in other areas of the regime e.g. international funds transfers. Unless exemptions are consistent, they will presumably create loopholes and incentives for unlawful activity to use particular channels, while imposing unnecessary compliance burden and intrusion in relation to other channels.

Minimising regulatory burden on reporting entities

We would welcome increased use of the reliance provisions in section 38 to minimise the need for additional or duplicate customer due diligence (CDD) enquiries. We support the adoption of simplified CDD requirements such as those suggested in the Issues Paper, including greater flexibility in relation to 'low-risk' customers, and the adoption of cumulative transaction thresholds for triggering CDD.

Regime scope

The Issues paper suggests a review of 'gaps' which implies a search for increased coverage. We submit that consideration of the scope of the regime should be at least as open to the possibility of reducing the scope as increasing it.

Designated services and Industry Sectors

We note that there has been a longstanding intention to extend the regime to cover designated non-financial businesses and professions (DNFBPs) such as lawyers, accountants and real estate agents. While we can understand the desire to ensure that exclusion of particular sectors does not continue to create loopholes and alternative channels for evading justified scrutiny, we are very concerned that the already highly intrusive regime is not extended without very sound justification. Factors to be considered included not just the compliance burden on many thousands of small businesses, but also the massive increase in surveillance that would occur. This would be of particular concern in the real estate sector, where many thousands of junior staff, often casual, would have obligations under the suspicious matter reporting regime – it is even less reasonable to expect them to exercise mature judgment about individuals than it is with bank tellers etc.

We can see no justification for some residual obligations to remain in the 'old' FTR Act, and would support rationalisation of the regime. Where these obligations can be justified they should be transferred into the AML-CTF Act and the FTR Act repealed.

The growth in off-shore service providers

The problems that the growth of offshore services poses for regulation is not unique to the AML-CTF regime. Regulators in many areas, including the Information and Privacy Commissioners are struggling to ensure that regulatory objectives are met by entities which are at least partly outside Australian jurisdiction. We do not offer any solutions, but support the principle of international co-operation with a view to ensuring legislated Australian standards continue to apply even where activities affecting Australian interests take place offshore.

Number and nature of partner agencies and their use of AML-CTF information

APF is very disappointed that the Issues Paper is silent on the issue of the number and nature of AUSTRAC's partner agencies and their use of AML-CTF information to which they have access via AUSTRAC.

We submit that this is a key issue relating to the scope of the AML-CTF regime. As we have already stated above, the progressive 'scope creep' of the regime is one of the most disturbing aspects of the history of the AML-CTF and FTR Acts. There are now 41 partner agencies, including 21 non-Commonwealth agencies⁴. While some of this growth reflects the increasing number of anti-corruption and watchdog bodies at all levels of government, other agencies which have been given access have only a tenuous connection to the investigation of serious and organized crime. The most glaring example is the Commonwealth Department of Human Services (DHS), a broad umbrella agency now subsuming a wider range of operational agencies administering health and welfare services and benefits. DHS access now covers the specific access previously enjoyed by Centrelink, which was always questionable – while there are some examples of organized welfare fraud, they are in a completely different league from the sort of serious and organized crime that the AML-CTF legislation was enacted to combat. The transfer of Centrelink's access to the broader DHS opens up the prospect of use of AML-CTF information for similar 'second order' crime and misconduct investigations, which would never have independently justified the highly intrusive AML-CTF regime.

Access for the Department of Immigration and Citizenship, and the corporate regulators ASIC, APRA and the ACCC is also questionable. In some cases, the partnership agreements 'claw back' the purposes for which AML-CTF information may be used to areas of those agencies involved in investigation of serious and organized crime, but we are not confident that the agreements succeed in adequately quarantining use to the declared objectives of the AML-CTF Act. We submit that many of the agencies that have been given direct access only need to use AML-CTF information in exceptional circumstances and would more appropriately be given access when required indirectly, through one of the mainstream law

⁴ AUSTRAC Annual Report 2012-13 Appendix A

enforcement agencies with whom they should be co-operating. We suspect that some have been granted direct access simply because it is 'easier' than having to justify themselves to an intermediate 'gatekeeper'. We question whether mere convenience is a sufficient rationale for direct access.

Harnessing technology to improve regulatory effectiveness

Industry monitoring and supervision

We support a graduated system of monitoring and supervision, with lower levels for lower risk sectors and activities, and use, in this context, of self-assessment as an appropriate tool.

Industry engagement

It is most regrettable that the Issues Paper only presents this as about engagement with the regulated industries, rather than with a wider range of stakeholders. In practice, as we noted at the beginning of this submission, AUSTRAC has taken a 'best practice' approach to stakeholder engagement, including consultation with civil society NGOs. The Privacy Consultative Committee has on occasions had to remind AUSTRAC when they have consulted with industry stakeholders but not with civil society even through the PCC. We submit that a multi-stakeholder approach, including civil society NGOs, should be recognised and made express in the legislation.

Financial group supervision

No comment

Enforcement

APF has limited experience or knowledge of AUSTRAC's enforcement activity in practice, but it appears to apply a sensible and proportionate approach. We support maximum transparency of enforcement actions, both to send a message to Reporting Entities (and hopefully act as a deterrent) and to be open to public scrutiny, serving as an important accountability device.

Reporting obligations

Transaction reporting

One of our main objections to the current AML-CTF regime is the scope and extent of transaction reporting, which we contend goes well beyond what is necessary to meet the legitimate objectives of the regime. We are particularly concerned about the following:

- The \$10,000 value for threshold transaction reporting appears arbitrary and has not changed since 1988. We submit that it should at least be raised to reflect changes in the cost of living

since 1988, should be indexed in the future, and should also be compared with thresholds in other countries to ensure Australia is not setting the limit unnecessarily low.

- The requirement to report all international financial transfer instructions (IFTIs), without a threshold. We have already cited above the admission by the AUSTRAC CEO that this is not required in at least some other countries claiming to follow the FATF standards. We note that the AML-CTF Act provides for an IFTI threshold to be specified in Regulations and submit that such a threshold should be introduced.
- The obligation to report ‘suspicious matters’ is a fundamentally flawed concept in that it relies on wholly subjective judgements by often junior and ill-equipped employees. The guidance offered by AUSTRAC as to criteria is only partially effective in mitigating this fundamental flaw. We submit that the suspicious matter reporting obligation should be re-framed around more objective criteria.

Cross-border movements

The specific requirement relating to cross-border movement of physical currency has been subject to a \$10,000 threshold for some time. We note that the requirement to declare bearer negotiable instruments (BNIs) of any value across the border is only if requested by a Customs or police officer – this seems inconsistent with the physical currency requirement. Either the same threshold should apply automatically to both, or, preferably, both declaration requirements should be made subject to a ‘reasonable suspicion’ test.

Thresholds

The Issues Paper notes that thresholds vary from country to country. It would have been useful to have included some examples. APF suspects that Australia’s thresholds are at the lower end of the range, meaning that there is a much higher level of surveillance (both data collection and reporting) than is necessary to meet the legitimate objectives of the regime. See our submission above supporting the introduction of an IFTI threshold, and for review of the thresholds for TTRs and cross-border movement of physical currency.

Intelligence value of transactions reports

It would have been helpful if the Issues Paper had contained some statistical analysis of the ‘profile’ of successful use of intelligence generated from AML-CTF reporting. Neither AUSTRAC’s Annual Reports nor its annual *Typologies and Case Studies* reports provide this analysis. If it is the case that a large number or proportion of AML-CTF intelligence based successes result from high value TTR, IFTI reports, or Cross border currency declarations, then this would strengthen the case for raising thresholds, thereby both reducing the compliance burden and reducing privacy intrusion.

Secrecy and access

Government agencies

Those secrecy provisions in the AML-CTF Act which limit the use and disclosure of AML-CTF information by AUSTRAC and its partner agencies are mostly important safeguards that contribute to privacy protection. Over the years, APF and other civil society NGOs have, through AUSTRAC's Privacy Consultative Committee, lobbied for improvements both in the safeguards written in to AUSTRAC's agreements with 'user' agencies (both domestic and foreign), and in the monitoring of uses. We are pleased that AUSTRAC has taken this issue very seriously and has responded with successive improvements.

Subject access

The exception to this generally satisfactory situation is the exemption of AUSTRAC suspicious matter reports (SMRs) and suspect transaction reports (SUSTRs) under the FTRA) from the FOI Act (and consequently from the Privacy Act) in relation to an individual's right of access to personal information about themselves. There is in our view no justification for this blanket exemption – there are sufficient other case specific exemption provisions in the FOI and Privacy Acts to protect ongoing law enforcement operations. Once investigations are complete, or if no investigation results from a report, individuals should be able to find out if they have been the subject of a suspicious matter report, not least so that they may challenge the basis of the reporting, and of the retention of the report by AUSTRAC, and by any user agency. The blanket exemption of SMR/SSTR reports from 'subject access' in effect means that there is a secret blacklist – accumulating at the rate of more than 40,000 per year⁵ - individuals on this blacklist may at any time in the future have adverse implications drawn by AUSTRAC or any one of its 41 partner agencies, without any knowledge or means of redress. This is an intolerable situation. APF submits that the blanket exemption for AUSTRACs records of SM/SUST reports be removed.

Reporting entities

Reporting entities are under an obligation not to reveal that they have made a suspicious matter report, under pain of committing a 'tipping off' offence. We are very disappointed that the only question about this provision in the Issues Paper is about the constraint that the tipping off offence imposes on sharing of intelligence within business groups.

We submit that a far more important issue is the natural justice implications for individuals of the prohibition on 'tipping off'. This relates to the issue of subject access already discussed above. If individuals' right of access to suspicious matter reports (and SUSTRs) under FOI and Privacy Acts were restored (subject to the normal exemptions for law enforcement interests), then the retention of a tipping off offence would be less objectionable. We submit that the tipping off offence be revisited in the context of a review of the subject access right.

⁵ Average of 43,365 SMRs/SSTRs per year between 2008-9 and 2012-13 (AUSTRAC Annual Report 2012-13 page 32)

Privacy and record keeping

The Issues paper acknowledges that the AML-CTF regime is privacy intrusive and states that it seeks to strike a balance. We have already commented earlier on how we don't think this balance has been struck appropriately, and submitted that the need for privacy to be balanced against other objectives and interests needs to be much more clearly articulated in the objects of the Act.

Privacy protections

Most of our other submissions go to practical implications of the AML-CTF regime for privacy and ways in which privacy could be further protected without compromising the justified objectives of the regime.

We support the continuation of the two specific Privacy Act related provisions

- for partner agencies not already subject to that Act to commit to meeting Commonwealth standards of privacy protection, and
- for Reporting Entities that may be exempt from obligations under the Privacy Act in terms of other business activities to be subject to the Privacy Principles when handling personal information collected for the purposes of complying with obligations under the AML/CTF Act and the AML/CTF Rules.

The Issues Paper notes the recent amendments to the Privacy Act, which have replaced the IPPs and NPPs with a single set of APPs. The implication is that that the specific Privacy Act related provisions in the AML-CTF Act will need updating.

APF recognises that the introduction of a more risk-based approach to AML-CTF compliance has in some respects reduced the level of privacy intrusion and surveillance arising from the regime. However, as we have already submitted above, this has to be balanced against the potential for inequitable and inconsistent privacy intrusion which follows from the exercise of discretion and judgment by Reporting Entities and their employees. We have called above for a more prescriptive rules based approach, with objective rather than subjective criteria for both Customer Due Diligence and Reporting. We acknowledge that this may involve additional data collection and reporting beyond what would occur under a more risk based approach. However, we submit that on balance, rules based approach, together with the other changes we have recommended, would better protect privacy.

Record keeping

APF notes the explanation in the Issues Paper of the record-keeping requirements under the AML-CTF Act, and the requirement that relevant records must be kept for seven years. We support the continuation of s.105 which provides that records retained in compliance with the AML/CTF Act for longer than the maximum period permitted under the Privacy Act should only be used by reporting

entities for the purposes associated with fulfilling the record-keeping requirements of Part 10 of the AML/CTF Act and for no other purpose.

We welcome the recognition in the Issues Paper of the ALRC's Recommendation 16-4 in its 2008 Report 108 *For Your Information – Australian Privacy Law and Practice*, and welcome the intention to address the elements of that Recommendation in this review. We note that the Recommendation goes to many of the issues we have already canvassed in this submission.

International cooperation

APF acknowledges that international co-operation is integral to the objectives and operation of Australia's AML-CTF regime. Through the AUSTRAC PCC, APF has contributed to evolution, and content of the more than 65 agreements with overseas counterpart agencies. These agreements include safeguards relating to privacy protection, but there remain serious question marks over the enforceability of these safeguards and the effective monitoring of the use of AUSTRAC information by overseas agencies. We submit that some aspects of the privacy safeguards in the agreements could be supported by more specific legislative provisions in the AML-CTF Act.

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