Cost recovery for AUSTRAC's regulatory functions

Submission to AUSTRAC

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Australian Privacy Foundation

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The Australian Privacy Foundation

The Australian Privacy Foundation (APF) 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

Introduction

APF welcomes the opportunity to comment on the Discussion Paper. We are disappointed that AUSTRAC appears to see it primarily as an *Industry* consultation, rather than a wider public consultation, despite Principle 10 in the government's cost recovery guidelines which state:

> "Agencies with significant cost recovery arrangements should ensure that they undertake *appropriate stakeholder consultations*" (our emphasis)

While we acknowledge that it was brought to the attention of the Privacy Consultative Committee (but only 10 days before the deadline for submissions) and placed on the agenda for the recent PCC meeting, locating it on the AUSTRAC website under Industry Consultation[1] has reduced the chance of the wider community becoming aware of the proposal – the announcement in the May 2010 budget had certainly escaped our notice.

As will become apparent from our comments, we think the proposal for cost recovery raises some important matters of general public interest.

[1] http://www.austrac.gov.au/industry_consultation.html

Cost recovery principles

We note that the rationale for this proposal is stated to be the general Commonwealth government cost-recovery principles (2005 Guidelines). These state that:

> "Cost recovery encompasses fees and charges related to the provision of government goods and services, including regulation, to the private sector."

We submit that while regulation is expressly covered, the intention of the Guidelines is clearly to include regulation where it is clearly and primarily for the benefit of the regulated sector.
The Discussion Paper asserts that:

> "Reporting entities obtain a benefit through being regulated by AUSTRAC. By complying with the requirements of the AML/CTF Act, the risk that a reporting entity will be used for money laundering or terrorism financing purposes is reduced."

This may be an important public policy objective, but is not a benefit to the reporting entities. We accept that there are some marginal direct benefits to reporting entities, listed later in the Discussion Paper, but it is very clear that the major objectives, and benefits, of the AML-CTF scheme (as with the predecessor FTRA scheme) are wider public policy ones, for which the taxpayer should remain responsible. We note that this argument appears to have been accepted in relation to AUSTRAC functions as a financial intelligence unit (FIU), the costs of which will not be recovered. However, we submit that much of AUSTRAC's work as the AML/CTF regulator (costs of which will be recovered) is much more in the nature of financial intelligence (building up databases of reports for use by partner enforcement agencies) than it is in the nature of 'government goods and services'.

It is already objectionable that the AML-CTF scheme in effect privatizes and externalizes (and in the process hides from plain sight) a quintessentially government function - financial surveillance. Seeking to recover the costs of the scheme from reporting entities (and ultimately from their customers) adds insult to injury and is in our view entirely inappropriate. Indeed, if anything, this is an example of regulation which imposes costs on private sector businesses almost entirely for a general public benefit, and it would not be unreasonable for reporting entities to seek to recover the costs of compliance *from* government!

We also submit that an unfortunate, though possibly unintended, side effect of cost recovery mechanisms, both in general and in the case of AUSTRAC, is to relieve Commonwealth agencies from the pressure of budget restrictions. If mechanisms exist to allow costs to be passed on to regulated entities, there is a reduced incentive for the regulating agency to keep tight control over its costs (or for the government setting agency budget allocations to do so).

It is illuminating that the proposal for a transaction reporting component to the levy would not apply to suspicious matter reporting – clearly the government's calculation is that this might deter

reporting entities from making such reports, which are the most 'sensitive' and presumably also most useful from a law enforcement perspective. The possible deterrent effect of a per-report cost for other types of reports has presumably been cynically traded off in favour of the overall objective of revenue collection. The conclusion is that the government and AUSTRAC are prepared to forego a few significant transaction or international funds transfer reports to make the levy appear 'fairer' but is not prepared to similarly risk a reduction in the level of suspicious matter reports.

We have no particular views on the detail of the proposed cost recovery model, which will of course be of much more interest to regulated entities. Our concern, explained above, is more with the principle of cost recovery for AUSTRAC functions, since they seem to us not to be in the category of 'services, including regulation' to which the Government's Cost Recovery Guidelines are intended to apply.

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