
Submission to the Productivity
Commission's inquiry into cost
recovery for Commonwealth
agencies

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1 Introduction

1.1 Purpose of this submission

- 1.1.1 The Productivity Commission has released an Issues Paper regarding cost recovery for government regulatory, administrative and information agencies. ‘Cost recovery’ refers to the implementation of a ‘user pays’ system for the provision of goods and services.
- 1.1.2 The issue of cost recovery for AUSTRAC (as ‘*user pays*’) was addressed by the Senate Standing Committee on Legal and Constitutional Affairs (“Senate Committee”) in the *Checking the Cash* report (1993) and the Taskforce of the Office of Regulation Review’s (“ORR”) consideration of the competition principles of the Financial Transaction Reports Act and Regulations (2000).
- 1.1.3 In the absence of a cost recovery system for the collection, monitoring, analysis and dissemination of financial transaction reports (FTR) information, this Submission assesses the potential impact of a cost recovery system on Australia’s anti-money laundering program, with particular reference to the operations of AUSTRAC.

1.2 Scope of the inquiry

- 1.2.1 In so far as it relates to AUSTRAC, the following is the scope of the inquiry as published by the Productivity Commission.

The Commission is to report on:

- a) the nature and extent of cost recovery arrangements across Commonwealth Government regulatory, administrative and information agencies, including identification of the activities of those agencies for which cost recovery is undertaken;
- b) factors underlying cost recovery arrangements across Commonwealth Government regulatory, administrative and information agencies;
- c) who benefits from the regulations, administrative activity and information to which cost recovery arrangements are applied;

- d) the impact on business, particularly small business, consumers and the community of existing cost recovery arrangements, including any anti-competitive effects and incentive effects;
- e) the impact of cost recovery arrangements on regulatory, administrative and information agencies, including incentive effects;
- f) the consistency of cost recovery arrangements with regulatory best practice;
- g) appropriate guidelines for:
 - i where cost recovery arrangements should be applied;
 - ii whether cost recovery should be full, partial, or nil;
 - iii ensuring that cost-recovered activities are necessary and are provided in the most cost effective manner;
 - iv the design and operation of cost recovery arrangements, including the treatment of small business;
 - v the review of cost recovery arrangements; and
 - vi where necessary, implementation strategies to improve current arrangements.

1.2.2 In reporting on the matters above, the Commission should, where relevant, have regard to:

- a) implications of recent and emerging technologies; and
- b) legal constraints on the design and operation of cost recovery arrangements.

1.3 AUSTRAC's approach

1.3.1 The methodology adopted by AUSTRAC in providing a Submission to the Productivity Commission's Inquiry into cost recovery for Commonwealth agencies is to:

- a) explain the objectives of Australia's anti-money laundering program and AUSTRAC's role in it;
- b) address the implications of the introduction of cost recovery arrangements in the context of Australia's anti-money laundering program; and
- c) provide AUSTRAC's views to the Productivity Commission as to how to take the objectives of Australia's anti-money laundering program into account in recommending to Government Guidelines for cost recovery arrangements across Commonwealth regulatory, administrative and information agencies.

1.4 Format of this submission

1.4.1 This submission is divided into a number of chapters:

- Chapter 1: Introduction
- Chapter 2: Background – This provides an outline of the policy objectives and the legislative requirements of the FTR Act and the operations of AUSTRAC
- Chapter 3: AUSTRAC and cost recovery – the debate so far. This discusses prior consideration of “user pays” for AUSTRAC as undertaken by the Senate Standing Committee on Legal and Constitutional Affairs and the Office of Regulation Review and successive Governments’ assessments of the application of user pays or cost recovery systems for financial intelligence
- Chapter 4: The impact of a cost recovery system on AUSTRAC. This discusses how a cost recovery system would affect AUSTRAC’s operations and the objective of Australia’s anti-money laundering program.
- Chapter 5: Conclusion.

2 Background

2.1 The FTR Act

2.1.1 The *Financial Transaction Reports Act 1988* (FTR Act) is part of Australia's anti-money laundering program. Along with the *Proceeds of Crime Act 1987* and the *Mutual Assistance in Criminal Matters Act 1987*, the FTR Act seeks to ensure that criminals and tax evaders do not enjoy the fruits of their crimes. These measures along with others, such as the creation of the National Crime Authority, arose out of the conclusions drawn by a number of Royal Commissions conducted during the 1980s. The conclusions included that:

- (a) to best fight crime, investigators need to follow the "money trail", and;
- (b) like the criminals perpetrating the crimes, the agencies tasked with countering them need to do it co-operatively and with imagination.

2.1.2 The FTR Act's particular contributions to this work are:

- to provide law enforcement, revenue and national security agencies with financial intelligence (FTR information) which can identify the "money trail" associated with the above activities;
- to foster a financial environment hostile to money laundering, serious crime and tax evasion.

2.1.3 As part of Australia's anti-money laundering program, the FTR Act sets out a comprehensive identification and reporting scheme. The FTR Act requires cash dealers, solicitors and members of the public to report particular financial transactions to the Director of AUSTRAC.

2.1.4 'Cash dealers' are defined in section 3 of the FTR Act as:

- financial institutions, including authorised deposit-taking institutions (such as banks, building societies and credit unions)
- financial corporations
- insurance companies and insurance intermediaries

- securities dealers and futures brokers
- cash carriers
- managers and trustees of unit trusts
- firms that deal in travellers cheques, money orders, and similar instruments
- bullion sellers
- money transmitters (including remittance dealers)
- casinos and gambling houses
- bookmakers and totalisator agency boards.

- 2.1.5 Under the FTR Act, AUSTRAC receives reports from cash dealers concerning:
- significant cash transactions, being transactions of \$10,000 or more (or foreign currency equivalent);
 - all international funds transfer instructions; and
 - suspicious transactions (as defined in the FTR Act).
- 2.1.6 The FTR Act also requires cash dealers to verify the identity of persons who open “accounts” or become signatories to “accounts” (as defined in the FTR Act). The FTR Act prohibits accounts being opened or operated in false names. This makes the financial system conducive to investigative activity by law enforcement and revenue agencies.
- 2.1.7 Solicitors are required to report to the Director of AUSTRAC significant cash transactions, being transactions of \$10,000 or more (or the foreign currency equivalent) entered into in the course of practicing as a solicitor.
- 2.1.8 Members of the public must report to AUSTRAC, either directly or through the Australian Customs Service, movements of currency of \$10,000 or more (or the foreign currency equivalent) being brought into or taken out of Australia (international currency transfer reports), including by means of mailing or shipping.
- 2.1.9 Due to constitutional constraints, the FTR Act is underpinned by complementary State and Territory legislation¹. Under these complementary arrangements, cash dealers are required to report

¹ *Financial Transaction Reports Act 1992 (NSW)*
Financial Transaction Reports Act 1992 (Qld)
Financial Transaction Reports Act 1992 (NT)
Financial Transaction Reports (State Provisions) Act 1992 (SA)
Financial Transaction Reports Act 1993 (Tas)
Financial Transaction Reports Act 1995 (WA)
Crimes (Confiscation of Profits) Act 1986 (Vic) (s.3(1), 41P(6) and 49B)
Australian Securities Commission Law of a State or Territory (s.243D)

suspicious transactions which may relate to State or Territory (as the case may be) offences to AUSTRAC the Commonwealth agency. In turn, the FTR Act provides for FTR information to be provided to State and Territory agencies. This is discussed in greater detail in Chapter 4 of this Submission.

These arrangements are typical of the many mutually beneficial aspects of the national anti-money laundering program. For this program to work effectively, there is a continual inter-play between agencies at various levels of government, where all benefit from each other's activities.

Other examples of this type of co-operative effort are the highly successful National Crime Authority Task Forces, which require multi-agency investigations and the pooling of intelligence expertise and sources.

2.2 The role of AUSTRAC

2.2.1 The Australian Transaction Reports and Analysis Centre (AUSTRAC), was established under section 35 of the FTR Act. AUSTRAC's mission is to make a valued contribution towards a financial environment hostile to money laundering, major crime and tax evasion.

2.2.2 AUSTRAC is:

- The anti-money laundering regulator of the Australian financial sector; and
- Australia's specialist financial intelligence agency responsible for collecting, monitoring, analysing and disseminating financial data which supports law enforcement, revenue collection and national security.

2.2.3 By collecting, monitoring, analysing and disseminating financial intelligence, AUSTRAC provides essential support to its partner agencies. Through its provision of financial intelligence and analytical expertise, AUSTRAC makes those agencies more efficient and effective.

Collection of FTR information

2.2.4 FTR information is collected from cash dealers, solicitors and the public. AUSTRAC compiles the data from those reports in ways which provide intelligence sources to law enforcement, revenue and national security agencies. AUSTRAC undertakes its regulatory function by ensuring that cash dealers comply with their reporting obligations and undertake identification procedures under the FTR

Act and that solicitors and the public comply with their reporting obligations.

- 2.2.5 By working with the financial sector, AUSTRAC has been able to provide reporting structures which are complementary to, and which leverage off, cash dealer business systems. A large part of AUSTRAC's success in the financial environment can be attributed to its ability to keep compliance costs low. Less than 2% of FTR information is delivered through paper based methods. Electronic delivery has the added advantage that reports are made to AUSTRAC and are available for analysis and dissemination within an extremely short time frame, usually within a few days after the transactions occur.

Suspicious transaction reports (SUSTRs)

- 2.2.6 Section 16 of the FTR Act, complementary State and Territory FTR legislation, and section 243D of the Australian Securities and Investments Commission Act 1989 require that cash dealers submit to AUSTRAC reports of transactions (completed or otherwise) where the cash dealers have reasonable grounds to suspect that the transactions may be related to Commonwealth, State or Territory offences. Reporting of SUSTRs commenced on 1 January 1990. Most SUSTRs are reported on paper. 7,085 SUSTRs were made in 1999-2000.

Significant cash transaction reports (SCTRs)

- 2.2.7 Cash dealers and solicitors are required to report to AUSTRAC when a transaction involves currency of \$10,000 or more. Reporting of SCTRs by cash dealers commenced on 1 July 1990. Reporting SCTRs by Solicitors commenced on 15 May 1997. 1,492,935 SUSTRs were made in 1999-2000.

International currency transfer reports (ICTRs)

- 2.2.8 Persons who are carrying or sending currency of \$10,000 or more (or the foreign currency equivalent) into or out of Australia have been required to report to AUSTRAC since 15 May 1997. (Prior to that date, the threshold value was \$5,000). All ICTRs have been reported on paper. 21,212 ICTRs were made in 1999-2000.

International funds transfer instructions (IFTIs)

- 2.2.9 Cash dealers are required to report all international fund transfer instructions made on behalf of their customers. The obligation to report IFTIs commenced on 6 December 1992. 5,538,043 IFTIs were made in 1999-2000.

Monitoring and analysing FTR information

- 2.2.10 AUSTRAC monitors and analyses FTR information to ensure that law enforcement, revenue and national security agencies receive the most relevant information for their operational needs.
- 2.2.11 AUSTRAC provides authorised users in partner agencies with online access to the AUSTRAC database (which comprises over 50 million transaction reports) via an in-house developed enquiry system (TES2000). Other tools are also provided to users to assist them with the extraction of data. These users are also provided with specialised training from AUSTRAC staff on how to use these tools to the maximum benefit.
- 2.2.12 In addition to providing partner agencies with access to the FTR information for existing investigations and assessments, AUSTRAC also assists partner agencies by identifying suspect financial activity using automated profiling tools. This information is then referred to relevant agencies for investigation. Often, suspicious financial activity is detected by AUSTRAC before any criminality is identified. In some cases if AUSTRAC had not identified the financial activity, the predicate criminal activity would not have been detected and investigated at all.

Disseminating FTR information

- 2.2.13 AUSTRAC disseminates FTR information to partner agencies to assist investigations of serious and organised criminal activity and major tax evasion.
- 2.2.14 AUSTRAC's partner agencies are:
- Australian Bureau of Criminal Intelligence
 - Australian Customs Service
 - Australian Federal Police
 - Australian Securities and Investments Commission
 - Australian Security Intelligence Organisation
 - Australian Taxation Office
 - Criminal Justice Commission (QLD)
 - Independent Commission Against Corruption (NSW)
 - National Crime Authority
 - New South Wales Crime Commission
 - Police Integrity Commission (NSW)
 - State and Territory Police Services (7)
 - State and Territory Revenue Authorities (8).

How valuable is FTR information?

- 2.2.15 In recent AUSTRAC Annual Reports (available on www.austrac.gov.au), AUSTRAC has provided details on a significant number of cases in which FTR information was used by law enforcement and revenue agencies. During the 1999-2000 financial year, feedback from AUSTRAC's partner agencies indicated that FTR information had been of value in at least 628 cases. In some instances, FTR information had been the catalyst for the investigations. In a majority of cases, it added value and provided new lines of enquiry in relation to current investigations. Of the 628 matters, 430 were regarded as significant investigations.
- 2.2.16 In addition, the use of FTR information during the 1999-2000 financial year led directly to over \$44 million in assessments issued by the Australian Taxation Office (ATO). In addition, FTR information and AUSTRAC's work have indirectly contributed to the ATO's collection of many tens, if not hundreds of millions of dollars in revenue each year, as well as helping in managing risks associated with overall tax compliance.
- 2.2.17 During the Office of Regulation Review's consideration of the competition principles of the Financial Transaction Reports Act and Regulations, a number of agencies provided details of how FTR information has provided invaluable assistance to their operations.
- 2.2.18 The Commonwealth Director of Public Prosecutions states:
- A criminal organisation is no different from any large scale commercial enterprise. If the organisation is profitable, it will find it difficult to function without leaving a money trail. If the money trail can be identified, it can often be followed to its source. The data gathered by AUSTRAC, if used properly, can help identify the money trails left by criminals or tax evaders.*
- This type of intelligence has a marked advantage over more traditional sources of criminal intelligence, like relying on informers. FTR Act data will usually point most clearly to those organisations which are the most successful, and hence the most dangerous to the community, and it holds the promise of allowing the investigators to follow the money all the way to the top of the organisation, which is where prosecution and assets recovery action can do the most good.*
- 2.2.19 The Australian Taxation Office comments:
- During the last three financial years, the ATO has conducted approximately 433,000 searches on the AUSTRAC database. Over the last five financial years \$160 million in additional*

tax and penalties have been raised by the ATO that can directly be attributed to FTR information².

As administrators of the tax law, we believe that the Financial Transaction Reports Act 1988 and Financial Transaction Reports Regulations (FTR Act) requirements:

- *Act as a deterrent to those who may seek to conceal their income, taxable transactions or the movement of funds;*
- *Improve the ability of the ATO and other agencies to detect tax evasion, criminal activity and money laundering; and*
- *Allow the ATO to better target our activities and thereby ensures compliant taxpayers are less likely to be subject to compliance activity.*

2.2.20

The NSW Crime Commission states:

FTR information is used in all cases investigated by the Commission. Results of the Commission investigations are summarised below.

Results for year ended 30 June 1999:

<i>Persons Arrested:</i>	<i>223 (most drug related)</i>
<i>Charges:</i>	<i>495</i>
<i>Restraining Orders (Proceeds of Crime):</i>	<i>101</i>
<i>Value of Proceeds Restrained:</i>	<i>\$11.9 million</i>
<i>Realisable Confiscation Orders (including legal costs recovered):</i>	<i>\$10.0 million</i>

Results for year ended 30 June 2000³:

<i>Persons Arrested:</i>	<i>244 (most drug related)</i>
<i>Charges:</i>	<i>860</i>
<i>Restraining Orders (Proceeds of Crime):</i>	<i>156</i>
<i>Value of Proceeds Restrained:</i>	<i>\$38.4 million</i>
<i>Realisable Confiscation Orders (including legal costs recovered):</i>	<i>\$12.0 million</i>

2.2.21

The National Crime Authority advises:

Importantly though the FTR Act has brought significant benefits to law enforcement, revenue agencies, and the Australian community. The FTR Act and financial

² This figure does not include the \$44 million attributed to the 1999-2000 financial year

³ At the request of the New South Wales Crime Commission, the figures provided in this paper have been updated from those provided in the submission to the Office of Regulation Review.

intelligence made available by AUSTRAC plays a key strategic role in much of the work of the NCA and other agencies with responsibilities for counteracting large scale money laundering, related criminal activity and sophisticated tax evasion schemes...

The Agio taskforce is just one example of how FTR information is used by government agencies to improve resource allocation and strategies to counteract the effects of organised crime on the Australian community. This approach would not be possible without the central database maintained by AUSTRAC and its computerised analytical capabilities.

Focusing on the future

- 2.2.22 Advancements in information technology continue to create new challenges for law enforcement and revenue agencies. The Action Group into the Law Enforcement Implications of Electronic Commerce (AGEC), chaired by the Director of AUSTRAC, has produced a number of reports and issues papers which address these issues (available on www.austrac.gov.au). Part of this challenge is to ensure that the investigative tools which agencies rely on remain effective in the new environment. This work includes assessing how FTR information can remain a useful tool for investigating agencies.
- 2.2.23 In particular, AUSTRAC is examining ways in which the FTR Act might be adapted to keep pace with changes in the financial sector and to ensure that new technologies cannot be used to avoid meeting reporting requirements under the FTR Act.
- 2.2.24 AUSTRAC chairs the AGEC and chairs or facilitates a number of other cross-agency initiatives on behalf of the Heads of Commonwealth Operational Law Enforcement agencies (HOCOLEA)⁴ and in conjunction with various Commonwealth, State and Territory agencies and private sector bodies. AUSTRAC is well placed, and widely sought, to undertake these co-ordinating roles because of the unique role it has in Australia's anti-money laundering program. That role is one of providing support and promoting co-operation based on AUSTRAC's independence from excessive influence from any one partner agency or group of partner agencies.

⁴ The HOCOLEA Agencies are the Attorney-General's Department; Australian Competition and Consumer Commission; Australian Customs Service; Australian Federal Police; Australian Prudential Regulation Authority; Australian Securities and Investments Commission; Australian Taxation Office; Australian Transaction Report & Analysis Centre; Director of Public Prosecutions and the National Crime Authority.

3 AUSTRAC and Cost recovery – the debate so far

- 3.1.1 Often, implementation of a cost recovery system is an effective means of controlling access to a resource or service. Such systems can also be used as a means of making an entity more responsive by opening it up to competition. Charging systems can also be used to make the charging entity more efficient.
- 3.1.2 This part of the submission addresses whether such a policy is appropriate for the dissemination of FTR information, where a major aim of Australia's anti-money laundering program is to encourage the use of financial intelligence, such as FTR information, in order to improve the expertise and efficiencies of the using entities.
- 3.1.3 Another issue is whether AUSTRAC should "pay" cash dealers for the reports they make under the FTR Act. This point was made by the Australian Bankers' Association in its recent submission to the Office of Regulation Review of the FTR Act.
- 3.1.4 The Productivity Commission may also wish to consult the Attorney-General's Department as to whether there are any legal impediments to or difficulties with a charging regime.

3.2 Senate Standing Committee on Legal and Constitutional Affairs

- 3.2.1 To review the effectiveness of the FTR Act, the Senate Committee conducted an inquiry in 1993. It produced a report entitled "Checking the Cash". During this process, the Senate Committee discussed the possible implementation of a user pays regime in relation to AUSTRAC's services. Under this system, AUSTRAC's partner agencies would be charged a fee to access FTR information.
- 3.2.2 On the subject of a user pays regime, AUSTRAC's submission to the inquiry stated:

AUSTRAC is decidedly opposed to its clients having to pay for a money cost for AUSTRAC services. That is because the FTR Act is part of a program being promoted by Government

and the Parliament to better focus law enforcement and revenue administrators on issues concerning financial misbehaviour and certain types of tax evasion. Clearly that is the case with the International Funds Transfer Instructions if one considers what the Martin Committee had to say. The issues raised in chapter 3.4 of this submission, about shifting law enforcement activity more towards financial crime, reflects a philosophy that the prevailing legislative and legal administrative environment must attract enforcement officers and their agencies towards dealing with financial crime.

To charge those officers and agencies a money cost for the data and the services of AUSTRAC would be a retrograde step in the promotion of that goal.

Some argue that if the data has a user market in law enforcement or in the Australian Taxation Office, then it will be paid for. This view, in context, is naïve; it stands to retain a status quo from which those with foresight like Costigan QC sought to depart. It does not appreciate the required change of culture and direction that is implicit in programs like the one being reviewed by the Committee. With some exceptions, there is no ready market in the law enforcement for this type of data; rather the supply of the data is part of legislative driving of law enforcement to better deal with aspects of financial crime and money laundering.⁵

3.2.3 The Committee's report,⁶ subsequently issued in November 1993, stated that:

The dominant difficulty the Committee has with the proposition that law enforcement agencies should be made to pay for the use of those mechanisms which they need to properly carry out their duties is the concept of government upon which it is based.

The idea that fundamental obligations of government can be more or less met, or not met at all, depending upon the ability or willingness of its instruments to pay for information that will or may help them to carry out their functions is ill-founded.

Government must discharge those functions which are basic to its purpose. Seeing that justice is done is one of these. To

⁵ AUSTRAC, 1993, A Submission by the Australian Transaction Reports and Analysis Centre (AUSTRAC) Prepared for the review of the Financial Transaction Reports Act 1988 Conducted by the Senate Standing Committee on Legal and Constitutional Affairs, p207.

⁶ Senate Standing Committee on Legal and Constitutional Affairs final report entitled *Checking the Cash*.

*allow the meeting of that purpose to be determined by market forces would be amazing.*⁷

- 3.2.4 The Committee indicated that on the basis of the evidence before it, was not persuaded that a cost recovery regime for AUSTRAC was appropriate. The Committee considered that a user pays regime:

*...would, at best, create some additional costs and complications for both AUSTRAC and its clients. At worst it could damage the aims and intentions of the FTR legislation for no benefit.*⁸

- 3.2.5 In responding to Checking the Cash, the then Government agreed with the Senate Committee. The Government confirmed this in its 1996 response to the Report.

3.3 Office of Regulation Review (ORR)

- 3.3.1 Among the submissions made to the ORR Taskforce considering the competition principles of the Financial Transaction Reports Act and Regulations⁹, the question of a user pays cost recovery regime was raised in only one submission, that of the Australian Bankers' Association (ABA). The submission stated:

Financial institutions incur considerable costs in systems development, document retention and retrieval and staff training to comply with the FTRA and provide a very large volume of data to AUSTRAC. The usefulness of data provided in terms of limiting money laundering needs to be assessed by AUSTRAC in conjunction with the financial institutions in a cost-benefit framework.

*In the context of such an assessment, consideration needs to be given to the introduction of 'user pays' that would result in more focussed information gathering.*¹⁰

- 3.3.2 This proposal indicates that the ABA would like to see AUSTRAC pay for the data that is provided by cash dealers. This would reimburse cash dealers for the costs associated with reporting and account identification.

⁷ Senate Standing Committee on Legal and Constitutional Affairs, Op. cit. p. 154 para 12.37-39.

⁸ Senate Standing Committee on Legal and Constitutional Affairs, Op. cit. p. 154.

⁹ AUSTRAC's submission is available on www.austrac.gov.au/policy_consultation/orr.htm. The Taskforce's report is available on www.law.gov/fttr.

¹⁰ ABA submission. p3

- 3.3.3 In response to this statement from the ABA, the Taskforce considered this issue in the *Checking the Cash Report*.
- 3.3.4 The submission from the Attorney-General's Department to the Senate Committee made the following statement:
- An underlying point of the Act is to make available to law enforcement agencies, and to encourage them to adopt, new, more sophisticated investigative techniques¹¹.*
- 3.3.5 In response to these previous comments and review of the user pays/cost recovery initiative, the Taskforce concluded:
- ...the Taskforce believes that the imposition of a charge for the use of financial intelligence would be detrimental to the objects of the Act. The significant cost of administering a payment system is another compelling reason for not introducing a charge for the use of financial transactions information. For some organisations such as the Australian Customs Service, this would require a payments system between different parts of the same legal entity. On one hand, Customs would charge for the provision of financial intelligence relating to the carrying of cash into and out of Australia, and on the other, would be charged for the use of other financial transaction information to assist investigations. The cost of implementing such a payments system is difficult to justify. A user-pays system would also create difficulties in joint-agency investigations. Many investigations involve more than one agency. If such an investigation were to require the use of AUSTRAC information at a cost, there is potential for a dispute over how the agencies involved should meet that cost.¹²*
- 3.3.6 In its concluding comments the Taskforce again turned to the *Checking the Cash* report in which it agreed with the following:
- The dominant difficulty the Committee has with the proposition that law enforcement agencies should be made to pay for the use of those mechanisms which they need to properly carry out their duties is the concept of government upon which it is based.*

¹¹ Attorney-General's Departments' submission p. 152

¹² Commonwealth Legislative Review Program, Report of the Taskforce on the Financial Transaction Reports Act and Regulations. p53.

The idea that fundamental obligations of government can be more or less met, or not met at all, depending upon the ability or willingness of its instruments to pay for information that will or may help them carry out their functions is ill-founded.

Government must discharge those functions which are basic to its purpose. Seeing that justice is done is one of these. To allow the meeting of that purpose to be determined by market forces would be amazing¹³.

¹³ Ibid, quoting *Checking the Cash*. p54

4 The impact of a cost recovery system on AUSTRAC

4.1.1 The effectiveness of the FTR Act largely lies in AUSTRAC's ability to maintain close working relationships with both cash dealers (from whom FTR information is gathered) and the law enforcement and revenue community (to whom this information is disseminated).

4.1.2 The implementation of a cost recovery system (whether it be to charge AUSTRAC's partner agencies or, that AUSTRAC should charge the cash dealer community or that AUSTRAC should pay the cash dealer community) would affect all aspects of AUSTRAC's work, being:

- the collection of FTR information (including AUSTRAC's regulatory function).
- the current arrangements for the provision and use of FTR information (financial intelligence).
- the terms of the Memoranda of Understanding (MOUs) agreed between AUSTRAC and its partner agencies and the legislative basis for them.
- the agency's relationship with the States and Territories, particularly in respect of complementary State and Territory legislation which is essential for the operation of this national system.
- the way in which AUSTRAC interacts on an international level, including Australia's obligations under international agreements.
- the ability for AUSTRAC to continue to be the national innovator and catalyst for the better use of financial intelligence and its role in assisting with policy development relating to the FTR Act and the wider anti-money laundering program.

4.2 Collection of FTR information

4.2.1 The FTR Act places a number of reporting obligations on cash dealers, solicitors and members of the public, the aim being to create an environment that actively discourages money laundering activities.

- 4.2.2 Ensuring compliance with these reporting obligations is fundamental to AUSTRAC's function, in terms of:
- conducting audits and joint studies of cash dealers to ensure that compliance obligations are fulfilled.
 - developing and maintaining user friendly reporting software applications for cash dealers.
 - educating cash dealers, solicitors and the public about their reporting obligations.
 - with the co-operation of the financial sector and law enforcement and revenue agencies, undertaking research into the implications of new payment technologies for Australia's anti-money laundering program.
- 4.2.3 There are a number of potential consequences for AUSTRAC's regulatory work which would flow from the introduction of a costs recovery regime under which AUSTRAC's partner agencies would pay for FTR information.
- 4.2.4 Firstly, AUSTRAC has implemented a number of feedback and review mechanisms to ensure that cash dealers understand where and how FTR information is applied. This feedback comes from AUSTRAC's partner agencies. If partner agencies are required to pay for these services, they could become disinclined to continue with their current "payments in kind" – the provision of information back to AUSTRAC, so that it can, in turn, inform cash dealers, the public and Parliament as to what is done with FTR information. This reduction in feedback would also, have effects on AUSTRAC's analytical capacity. This will be discussed in section 4.3.1.
- 4.2.5 Another consequence would be that, rather than continue the currently successful model in relation to suspect transaction reporting (that is, the cash dealers determine what is suspicious and choose what to report), paying agencies may wish to influence what is reported. For example, the ATO may wish to ensure that cash dealers concentrate on reporting indicators of tax evasion, while the police services may have different 'targets' in mind.
- 4.2.6 If cost recovery were to be attempted by requiring AUSTRAC to charge the cash dealers for "regulating" their industry, the way AUSTRAC and the financial services industry currently operate within an environment of co-operation, would disappear. The administration of the FTR Act would become considerably more difficult. AUSTRAC's capacity to regulate a large financial sector with few resources is dependent on goodwill and generally high compliance levels.
- 4.2.7 If cash dealers were to be paid for complying with their reporting obligations, again, reporting levels and the subject matter of reports could change. Both AUSTRAC and the cash dealers have spent

considerable time refining what kinds of transactions should be reporting as suspicious. To impose a payment system where cash dealers were paid for reports could lead to more reports being made, but the quality of reports could suffer.

As with all intelligence, whether it is ultimately valuable depends on how it is used and in some cases, circumstances which have nothing to do with the intelligence itself, will determine outcomes.

- 4.2.8 In any of these scenarios, AUSTRAC would have to redirect resources from compliance and regulatory activities to the development of marketing and accounting functions within the organisation. This would reduce AUSTRAC's capacity to administer the FTR Act for the benefit of all.
- 4.2.9 To date AUSTRAC has liaised closely with the cash dealers through a number of channels including the Provider Advisory Group (PAG). This environment of co-operation would be replaced if fee arrangements of any kind were introduced.
- 4.2.10 In the 1993 Senate Review, cash dealers provided detailed information on costs related to compliance with the FTR Act. The Committee recorded that these costs were 'substantial'¹⁴, particularly in relation to account opening procedures.¹⁵ Nevertheless, the Committee considered that:
- ...as a matter of principle, there was no merit in the proposal to reimburse cash dealers for their costs of compliance.*
- 4.2.9 Since that time, cash dealer compliance costs have decreased dramatically. This is largely due to the "upfront" costs (in identifying customers on the introduction of the FTR Act) having been overtaken by time. The costs of electronic reporting are miniscule. It should also be noted that, in any event, cash dealer costs in identifying their customers can not be attributed solely to compliance with the FTR Act. Prudent risk management requires cash dealers to know who they are dealing with in order to counter fraud and other losses.

4.3 Provision and use of FTR information

- 4.3.1 There are three possible effects on the use made of FTR information associated with the implementation of a cost recovery system:

¹⁴ Senate Standing Committee on Legal and Constitutional Affairs. p28.

¹⁵ Senate Standing Committee on Legal and Constitutional Affairs. p148.

- A neutral effect – law enforcement and revenue agencies continue to use FTR information and provide AUSTRAC with feedback in the same way as they do now.
- A counter productive effect – law enforcement and revenue agencies continue to use FTR information and provide AUSTRAC with feedback but at a reduced level. This affects AUSTRAC’s ability as “lead agency” in this area to ensure that FTR information is used to best effect, thus harming efforts to improve our capability to counter crime and tax evasion.

It may also have the completely undesirable result that AUSTRAC may be holding information of significant interest to agencies, which no agency is willing to pay for. In the past, major results have been achieved where AUSTRAC itself has picked up the significance of information it holds where investigating agencies have not. AUSTRAC has drawn these matters to the attention of the relevant agencies.

- Another counter productive effect – faced with budgetary restraints of their own, law enforcement and revenue agencies look to short term gains and therefore use their resources in other areas, which do not have the same long term benefits. In this case cost recovery would have a hugely detrimental impact in that FTR information would not be accessed appropriately. This would make the using (and non-using) agencies less efficient and effective. In turn, reduced usage (presuming that AUSTRAC would be largely dependent on charges for its funding) would lead to significantly reduced funding for AUSTRAC. AUSTRAC’s overall ability to administer the FTR Act and to collect, monitor, analyse and disseminate useful and timely information would be affected. A downward spiral of reducing budgets and reducing “product” quality would occur.

4.3.2 In commenting on the introduction of a user pays system at the 1993 Senate Review, the Australian Customs Services (ACS) stated:

There may be a variety of ways to cover cost but Customs is of the opinion that any introduction of charges for access to information would have a negative impact on the future effectiveness of the Act.

...if a cost recovery regime were to be introduced then the ACS would have to consider its role in collecting reports required under the Act, and, whether it would have to take up the issue of cost recovery with AUSTRAC for the performance of this function on its behalf.¹⁶

¹⁶ ACS, quotes in *Checking the Cash*, p153

- 4.3.3 As is alluded to by the ACS above, AUSTRAC's partner agencies provide support to it in ways other than monetary contributions to costs, including:
- Facilities for AUSTRAC's officers posted on-site at partner agency offices;
 - In providing debriefing and feedback on significant cases;
 - Support for international anti-money laundering work and obligations, most of which are Australian obligations, but which AUSTRAC undertakes (without budgeting resources).
- 4.3.4 AUSTRAC value adds to the FTR information it receives from cash dealers and others by providing world's best financial intelligence information technology. The tools AUSTRAC provides to its partner agencies allow:
- On-line specific report searching;
 - Macro analysis of various kinds;
 - Alerts (for matters of interest);
 - Profiling to identify matters of interest.

While all these tools have been developed in consultation with partner agencies, AUSTRAC has been the driver. AUSTRAC's information technology expertise is widely recognised as giving it the edge in finding new and better ways to use financial intelligence. A cost recovery system would jeopardise AUSTRAC's ability to keep doing this.

4.4 MOUs between AUSTRAC and its partner agencies

- 4.4.1 Over the past decade the FTR Act has provided Australia's law enforcement agencies with a valuable financial intelligence investigative tool. Free access to FTR information in exchange for provision of feedback and other assistance as required under the terms of the MOUs has enhanced a collaborative law enforcement and revenue effective environment which supports the appropriate sharing of resources and a whole-of-government approach to Australia's anti-money laundering program.
- 4.4.2 The conditions under which an AUSTRAC partner agency may access FTR information are set out in each MOU entered into by the Director of AUSTRAC and the head of the partner agency.
- 4.4.3 These agreements formalise the rules and conditions for the exchange of information, and:

- promote the effective use of FTR information by users in the performance of their statutory duties, functions and responsibilities
- assist users in meeting their agency goals and objectives
- ensure that privacy and security requirements are met
- provide an audit trail of user access to FTR information
- provide an agreement by which inactive users have their access privileges revoked
- promote feedback from users as to their use of FTR information (for provision to cash dealers and government and to allow further analytical research and development of financial intelligence techniques)
- act as a starting point in seeking to measure direct and indirect results from the use of FTR information.

4.4.4 The implementation of each MOU rests on the fundamental premise of information sharing and collaboration. Partner agency adherence to these conditions relies on the understanding that this information is provided to them free of charge and AUSTRAC is therefore under no obligation to tolerate any breach of the MOU.

4.4.5 Under a cost recovery system there is the potential for this balance to be compromised. With AUSTRAC essentially 'selling' information, there would be reduced incentive for partner agencies to provide feedback or share knowledge subsequently gained through utilising FTR information. In such circumstances, opportunities to share new knowledge with other law enforcement and revenue agencies would be lost. The multi-agency dimensions of AUSTRAC's work as facilitator and catalyst for more efficient investigative practices could be replaced with a series of formalised bilateral relationships which would be far less effective than current relationships.

4.4.6 As with the change in the relationship between AUSTRAC and the cash dealers, the partnerships with law enforcement and revenue agencies would shift to interaction based on the exchange of payment and defined services as opposed to the enhancement of a collaborative and mutually supporting environment for law enforcement and revenue agency co-operation.

4.4.7 Instead of AUSTRAC encouraging and educating law enforcement and revenue agencies on the best way to use financial intelligence to benefit their investigations and operations thereby supporting an intelligence driven culture, the market would dictate the use of FTR information. Developing markets are always not the best judges of what they need in the longer term. AUSTRAC's efforts to encourage smarter techniques could also be mistaken for overly

energetic marketing, the primary purpose of which is to generate revenue.

4.4.8 It is also true to say that unlike many other services for which value can be established easily, financial intelligence is only one part of the overall intelligence picture. Its use is still limited and expertise levels amongst AUSTRAC partner agencies vary widely. It is AUSTRAC's experience (and that of its partner agencies) that the use of financial intelligence, like any complex skill, requires dedication and persistence to achieve the user's full potential. In organisational and cultural terms, this takes a long time. Introducing a factor based on short term issues, such as this year's budget, would not enhance Australia's national capacity in this area.

4.4.9 Just as significant, these circumstances could create the potential for privacy and security to be compromised. In *Checking the Cash* the Senate Committee noted that:

...the operations of AUSTRAC and the discretion of the Director to allow access to information held by AUSTRAC are subject to the Information Privacy Principles ('IPPs') under the Privacy Act 1988.¹⁷

4.4.10 In summary, the IPPs require the Director to put in place clear procedures to ensure that FTR information is: held under proper security; only used for the purposes for which it is collected; and only released outside AUSTRAC when the Director is satisfied that receiving agencies have in place systems and procedures to ensure compliance with the IPPs.

4.4.11 The shift to an environment dominated by market forces would leave AUSTRAC less well placed to influence how partner agencies consider these issues. Consequently the urge to inappropriate usage to "get the most out of this information we (partner agencies) are paying for" could adversely affect the ways in which FTR information is utilised and stored. It would also detract from AUSTRAC's ability to enforce other conditions set out in its MOUs.

4.5 AUSTRAC's relationship with other levels of government

4.5.1 As was the case with other legislation generated in Australia's response to organised crime and tax evasion, the FTR Act's enactment required the full support and cooperation of the State and

¹⁷ Senate Standing Committee on Legal and Constitutional Affairs Op. cit.pp. 60, 61.

Territory governments and their recognition of the need for a uniform and consistent national approach.

- 4.5.2 Support for this legislation also offered clear benefits to the States and Territories, in that a national program allows them to utilise the information generated by the FTR Act to retrieve revenue and counter organised crime within their own jurisdiction and across jurisdictions, as appropriate.
- 4.5.3 An example of this was Operation Quit¹⁸, where State and Territory revenue agency personnel seconded to an NCA taskforce utilised FTR information to identify and monitor suspect activities. Operation Quit ultimately resulted in the collection of around \$36 million in State and Territory tobacco licensing fees.
- 4.5.4 Of perhaps greater long term significance, such practical and effective applications of FTR information by the States and Territories have in turn generated an upsurge of co-operation which is demonstrated in their support for AUSTRAC's compliance and feedback mechanisms and collaborative efforts with other State and Commonwealth entities to tackle crime and tax evasion.
- 4.5.5 The success of the national program and the Commonwealth's legislation lies in complementary State and Territory legislation. If the Commonwealth was to decide to charge State and Territory law enforcement and revenue agencies for the use of FTR information, potentially the States and Territories could charge the Commonwealth for use of information reported under State/Territory jurisdiction. Such a scenario would introduce a complicated matrix of charges and counter charges.
- 4.5.6 Changes to the interlocking provisions of the Commonwealth, State and Territory legislation would significantly weaken the FTR Act. For example, it would provide uncertainty with regard to meeting reporting obligations and thereby weaken the obligation on cash dealers to report suspect transactions. If, say, the transaction was carried out in a State where the legislation had been repealed it could be argued that reporting a suspect transaction was a breach of banker/customer confidentiality, which is the situation at common law.
- 4.5.7 In addition, as has been indicated by the national law enforcement community, the introduction of a cost recovery system for the States and Territories would most likely have adverse effects on the way FTR information is provided and the relationship between AUSTRAC, other Commonwealth agencies and the State and Territory agencies.

¹⁸ See NCA Annual Report

- 4.5.8 With a reduced perception of the ease of use of FTR information created by a cost recovery or user pays system there would be a disincentive to the efficient use of FTR information and AUSTRAC's expertise. The aims of streamlining and reducing the costs of intelligence driven processes would be overridden by the introduction of complicated methods for charging for the use of financial intelligence. It would also lead to an environment of charges and counter charges. This would not be conducive to promoting greater efficiencies and collaborations between agencies.

4.6 Australia's international obligations and AUSTRAC's relationships with other countries

- 4.6.1 Money laundering is a global problem. National security organisations, law enforcement agencies and financial intelligence units are having to work more and more closely on investigations which cross multiple jurisdictions. International agreements have been entered which require Australia to, where appropriate, share information and develop collaborative responses to major crime and money laundering.
- 4.6.2 In preparing this submission AUSTRAC conducted a survey of our international counterparts in the United States, United Kingdom, New Zealand, France, Belgium, Denmark, Singapore, Hong Kong and China. The survey asked each country whether law enforcement agencies were required to pay their financial intelligence units for financial intelligence? Each country indicated that, in accordance with international practice, their domestic law enforcement agencies received financial intelligence free of charge.
- 4.6.3 This practice is required by international forums which assist in establishing best practice methods for implementing anti-money laundering programs, such as the G-7 backed and OECD based, Financial Action Task Force on money laundering (FATF), the Asia/Pacific Group on money laundering (APG), and the Egmont Group (of specialist financial intelligence units). Australia and AUSTRAC, are lead contributors in all these forums.
- 4.6.4 Under the FTR Act and the Mutual Assistance in Criminal Matters Act, the Attorney-General may enter into reciprocal arrangements with other countries to exchange financial intelligence. These MOUs are governed by the general principles of 'mutual assistance'. MOUs are in place with the United States of America, United Kingdom, France, New Zealand, Belgium and Denmark. More are being negotiated, with another two expected with the next few months.

4.6.5 If Australia wishes to continue its international work in this area, AUSTRAC could not require a counterpart agency to pay for intelligence it provides, nor would it be acceptable for AUSTRAC to pay other countries for their assistance. To introduce this, would be a dangerous precedent for other kinds of law enforcement co-operative arrangements.

4.6.6 The need to exchange information on an international level is only becoming more and more apparent. Cases such as the ILOVEYOU virus demonstrate not just the need for international co-operation in law enforcement operations, but the timely and free exchange of information which can be used in these investigations.

4.6.7 The FATF's 1996 Mutual Evaluation of Australia's anti-money laundering system found Australia to be in compliance with the FATF 40 Recommendations. Its report stated:

Australia can pride itself on a well-balanced, comprehensive and in many ways exemplary system, and must be congratulated accordingly. It meets the objectives of the FATF Recommendations and is constantly reviewing the implementation of their anti-money laundering provisions, simultaneously looking well ahead into the future.¹⁹

4.6.8 About AUSTRAC, the FATF said:

"The Australian system has matured significantly since the first evaluation was conducted in March 1992. AUSTRAC has grown in importance and effectiveness. In this regard, it is to be commended for its untiring efforts in working closely with the financial sector, in receiving and analysing financial transactions data and in providing the data in the form of intelligence to the appropriate agencies. It is clear that, if AUSTRAC had not taken a major leading role, the anti-money laundering regime in Australia would have been far less successful."

4.6.9 This position as a world leader in the fight against money laundering would be compromised by the introduction of a cost recovery system.

4.7 AUSTRAC's ability to conduct research and assist in policy development

4.7.1 AUSTRAC is uniquely placed to research trends in the financial services industry both at the national and international level. In the past this research has resulted in important amendments to the FTR

¹⁹ FATF (1997). Financial Action Task Force on Money Laundering Annual Report 1996-97. June 1997. (p13).

Act, such as the inclusion of section 17B which requires the reporting of international funds transfers. This is an extremely valuable source of intelligence.

4.7.2 Current research focuses on emerging issues relating to electronic commerce and the movement of value on the Internet. Through the Action Group into the Law Enforcement Implications of Electronic Commerce (AGEC) and internal work on the Keeping AUSTRAC Relevant Technologically project, AUSTRAC consults on a regular basis with representatives from government, business and industry to maintain at the forefront of technological developments.

4.7.3 Under a cost recovery system AUSTRAC's operations and strategic direction would be "market driven". Therefore, its research focus which currently operates ahead of "the market" would be strongly influenced by the immediate (or perceived) future needs of its partner agencies (and its larger ones in particular) rather than being focused on the holistic long term strategic needs of law enforcement, revenue and national security agencies.

4.8 Would cost recovery make AUSTRAC and Australia's anti-money laundering program work better?

4.8.1 For many kinds of services, the introduction of cost recovery charges leads to greater efficiencies and reduces unnecessary usage, thus saving resources. For financial intelligence, however, the more it is used the more efficient its users become. As financial intelligence is still an evolving discipline, experimentation and exploration is vital to discover what it can be used for. It is AUSTRAC's experience, and that of many of its partner agencies, that the true value of a piece of financial intelligence is not known for a considerable time. Like much research and development work, the potential of new analytical methods is not known until after extensive testing and trials 'in the field'. The above comments by some of AUSTRAC's partner agencies illustrate that, unlike some other government services, it is in the community's interest for financial intelligence to be freely used and for the purposes for which it is used to be widened.

4.8.2 This submission and AUSTRAC's annual reports show that AUSTRAC's existing strategies work. Australia has one of (if not the) most effective financial intelligence systems in the world. Much of this is due to the way AUSTRAC carries out its functions. AUSTRAC:

- (a) works closely and responsively with the cash dealer community; this has led to low cost compliance, good quality raw intelligence, generally high levels of compliance and positive relations with the cash dealer community;
- (b) is Australia's expert financial analysis organisation; this has been achieved by intensive liaison with investigating agencies and world leading use of Information Technology;
- (c) helps to make its partner agencies more intelligence driven so that they can have high value outcomes – we do that by proactively assisting and training partner agency personnel.

AUSTRAC is an efficient and effective organisation. Its collegiate, and co-operative methods are based on goodwill. That goodwill would be detrimentally affected by any cost recovery system.

4.9 Excluding financial intelligence services from General Guidelines for cost recovery arrangements.

- 4.9.1 The Productivity Commission's objective in this Inquiry is to seek information as to how Guidelines could be crafted in relation to cost recovery by regulatory, administrative and information agencies.
- 4.9.2 It is AUSTRAC's view that the services which AUSTRAC provides to the Australian community via its law enforcement, revenue and national security agencies as part of Australia's anti-money laundering program, should not be subject to any cost recovery arrangements.
- 4.9.3 As such, there should be a clear exclusion from the operation of the Guidelines for AUSTRAC's services (both as regulator and intelligence agency).

5 Conclusion

It is often the case that cost recovery arrangements are good for both the provider and user of goods and services.

These arrangements are clearly advantageous where a resource or service has been used excessively or inappropriately, where major capital investment has been made, or where the application of the 'market choice' principle would produce significant cost savings or productivity improvements.

However, cost recovery arrangements are not the only means by which improvements in efficiency and effectiveness can be achieved. The arrangements AUSTRAC has with the financial services industry and its partner agencies are world's best practice. Even so, financial intelligence is still a relatively new discipline. Its full potential has not yet been realised. To do so, requires both AUSTRAC and its partner agencies to promote innovation, experimentation and long term strategies. This is best done in a collegiate, mutually beneficial environment where group outcomes are considered more important than single agency outcomes amongst providers and users. AUSTRAC's current arrangements are building on an already successful strategy. These arrangements promote responsiveness, effectiveness and efficiency.

Australia's anti-money laundering program is a government activity which benefits the Australian community greatly. AUSTRAC is an essential part of that program and its methods for carrying out its functions show that it is doing so in the most effective way.