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Discussion Paper – Cost Recovery
Australian Transaction Reports and Analysis Centre
PO Box 3173
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Dear Sir/Madam,

Submission responding to Australian Transaction Reports and Analysis Centre (AUSTRAC), Discussion paper – Cost recovery for AUSTRAC's regulatory functions (Discussion Paper)

Commencing 2011-2012, AUSTRAC proposes to recover the costs of its regulatory activities from businesses that AUSTRAC regulates under the *Anti-Money Laundering and Counter Terrorism Financing Act 2006 (AML/CTF Act)*. As set out in its Discussion Paper, AUSTRAC proposes to charge reporting entities a supervisory levy, which comprises a base component, large entity component and a transaction reporting component (**Supervisory Levy**). AUSTRAC has invited industry to provide feedback on its proposal.

Linfox Armaguard Pty Ltd (**Armaguard**) operates a cash logistics, currency management and precious cargo business across Australia and New Zealand. The amount of physical currency held or moved by Armaguard on behalf of customers is routinely greater than \$10,000. As such, Armaguard is a reporting entity and is required to submit a significant number of threshold transaction reports under the AML/CTF Act. Armaguard welcomes this opportunity to make a submission on the Supervisory Levy.

Armaguard believes that the supervisory levy which AUSTRAC proposes to charge reporting entities is inappropriate given that the reporting entities, in complying with their obligations under the AML/CTF Act, are providing information to AUSTRAC to assist it in:

- preventing and detecting money laundering and terrorism financing by meeting the needs of law enforcement agencies for targeted information about possible criminal activity; and
- bringing Australian laws in line with international standards, including standards set by the Financial Action Task Force.

There is a broader public benefit to be served by the reporting entities complying with their obligations and assisting AUSTRAC with its stated aims and that public benefit is not well served by having the entities that comply with their obligations financially penalised through the supervisory levy.

Notwithstanding that Armaguard believes that the supervisory levy should not be charged at all, the feedback below specifically relates to the transaction reporting component of the proposed Supervisory Levy.

The transaction component should be removed from the Supervisory Levy

Armaguard firmly believes that the transaction component should be removed from the Supervisory Levy and the proportion of AUSTRAC's regulatory budget that it approximates relates to transaction reporting (\$16.576m for 2011-12) should be removed from any cost recovery arrangement implemented by AUSTRAC. That is, the monetary amount of the base component and large entity components, if implemented, should be no greater than currently proposed.

Transaction reports are an integral part of AUSTRAC's financial intelligence function and provide a broad public benefit. All of AUSTRAC's activities that relate to transaction reporting should be funded from general tax revenue.

- AUSTRAC and the Australian Government have determined that AUSTRAC's activities relating to its financial intelligence function, due its broad public benefit, should be taxpayer funded and not subject to costs recovery.
- AUSTRAC's 'AML/CTF regulatory activities' relating to transaction reports (eg the collection and monitoring of reports) are inseparably linked to and cannot be isolated from its financial intelligence function.
- Therefore, AUSTRAC's costs associated with its transaction reporting regulatory activities should also be funded by taxpayers.

If not removed, the transaction reporting component or any other additional component of the Supervisory Levy should be shared between the reporting entities that directly benefit from AUSTRAC's regulatory activities, not all reporting entities

Even if some of AUSTRAC's regulatory activities in relation to transaction reporting could be said to be unrelated to its financial intelligence function (which Armaguard does not believe is correct), the proposed method of calculating and charging the transaction reporting component of the Supervisory Levy is inappropriate and unfair.

- It arbitrarily allocates costs from a range of activities to threshold transaction reports (TTRs) and international funds transfer instruction (IFTI) reports, which is inconsistent with the Cost Recovery Guidelines, and then only charges the levy to particular reporting entities.
- It does not truly adopt a risk-based approach as it purports to.
- AUSTRAC has failed to deal with the unnecessary financial burden it imposes on a select group of reporting entities.

If any additional component to the Supervisory Levy is charged (whether in relation to transaction reporting or some other regulatory activity), it should be charged to the reporting entities that directly benefit from the regulatory efforts/costs that AUSTRAC seeks to recover, not all reporting entities. The direct beneficiaries of AUSTRAC's regulatory activities and its related intelligence holdings identified by AUSTRAC are financial institutions, banks and gaming operators.¹ On this basis, any additional component included in the Supervisory Levy should be shared between those particular reporting entities.

¹ Discussion Paper, p 1.

Again, if the transaction reporting component is not removed, any Rules made must include a process by which AUSTRAC'S proposed reporting figures are provided to reporting entities in advance, subject to a dispute resolution process and externally audited

Any Rules made in relation to the determination of the calculation of the Supervisory Levy must include provisions to ensure that the reporting data on which any transaction reporting component is calculated each year is accurate, transparent and subject to review.

The above submissions are discussed in further detail below.

A. The transaction component should be removed from the Supervisory Levy

1. **AUSTRAC and the Australian Government have determined that AUSTRAC's activities as a financial intelligence unit, due its broad public benefit, should be taxpayer funded and not subject to costs recovery**

AUSTRAC's contribution to the Attorney-General's Portfolio Budget Statements for 2010-2011 (Portfolio Budget Statements) provide for AUSTRAC's financial intelligence component of its program/strategy to be taxpayer funded.

Applying the principles set out in the Australian Government's cost recovery guidelines, July 2005² (Cost Recovery Guidelines), AUSTRAC's financial intelligence information constitutes AUSTRAC's 'basic product set'. 'Basic product set' is defined as products and services that the Government agrees should be taxpayer funded.³

The decision to exclude AUSTRAC's financial intelligence activities from its cost recovery proposal is justified and consistent with the principles set out in the Cost Recovery Guidelines in that the information product resulting from AUSTRAC's collection, compilation and storage, analysis and enhancement, and dissemination of the financial information received by it:

- (a) has 'public good' characteristics;
- (b) generates significant spill over benefits to the broader community; and
- (c) there are other policy reasons for taxpayer funding.⁴

As stated in the Discussion Paper:

'AUSTRAC is Australia's specialist financial intelligence unit. It provides information about potentially criminal activity to law enforcement agencies, which put it together with other intelligence to detect people smuggling, drug importations, black market weapons trade, and other serious and violent crimes. This financial intelligence has a broad public benefit, and is funded from our taxes. Law enforcement agencies use this intelligence to protect businesses and keep the public safe.'⁵

'AUSTRAC's functions as a financial intelligence unit are not subject to cost recovery'⁶

² Department of Finance and Deregulation, Australian Government Cost Recovery Guidelines No. 4, Canberra, 2005

³ Cost Recovery Guidelines, p 6.

⁴ Cost Recovery Guidelines, p 29.

⁵ Discussion Paper, Minister's foreword, p 2.

⁶ Discussion Paper, p 14.

2. AUSTRAC's 'regulatory' activities that relate to transaction reporting are inseparably linked to and cannot be isolated from AUSTRAC's financial intelligence function

AUSTRAC's financial intelligence and AML/CTF regulatory functions are components of the one AUSTRAC strategy of countering money laundering and terrorism financing⁷ and, as such, there is necessarily overlap between the two functions.

The following passage from the Portfolio Budget Statements provides an example of this overlap:

'AUSTRAC addresses the risk of non-compliance through industry outreach, assessment and supervision of regulated entities and sectors, and, where required, remedial and escalated enforcement action. Input from the financial intelligence unit (component 1.1.2) also complements compliance information on high-risk sectors that require closer supervision. Compliance information can, in turn, assist the financial intelligence unit to identify and counter money laundering and terrorism financing risks, including emerging threats (component 1.1.2 objective).'⁸

The Portfolio Budget Statements makes clear in several statements that transaction reports are an integral part of AUSTRAC's financial intelligence unit function. For example:

'In its regulatory role, AUSTRAC oversees compliance with the reporting obligations of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act) and the Financial Transactions Reports Act 1988 of approximately 17,000 businesses across diverse industry sectors that include financial services providers, the gambling industry and other specified 'regulated entities'. As Australia's financial intelligence unit, AUSTRAC collects and analyses financial information provided by regulated entities to assist Australian law enforcement, national security, social justice and revenue agencies and certain international counterparts in the investigation and prosecution of serious criminal activity, including terrorism financing, organised crime and tax evasion.'⁹

See also AUSTRAC's Outcome Statement from the Portfolio Budget Statement reproduced at Appendix C of the Discussion Paper for another example of the financial intelligence unit's reliance on financial information from reporting entities.

While reporting entities' obligations to submit transaction reports and AUSTRAC's regulatory responsibility for receiving and monitoring the reports are derived from the AML/CTF Act, these obligations are imposed for the purpose of producing AUSTRAC's 'basic product set', namely financial intelligence information. AUSTRAC's 'regulatory' efforts and costs related to transaction reports (such as those set out in the Discussion Paper, Appendix B, p 17) are linked to and cannot be divorced from AUSTRAC's financial intelligence function.

AUSTRAC justifies its cost recovery proposal on its claim that reporting entities directly benefit from AUSTRAC's regulatory activities. However, AUSTRAC has not identified any direct benefits that reporting entities derive from AUSTRAC's regulatory activities relating to transaction reports that are not related to its financial intelligence holdings nor different to those benefits enjoyed by all Australians.

⁷ See Portfolio Budget Statements, p 263.

⁸ Portfolio Budget Statements, p 264.

⁹ Portfolio Budget Statements, p 259.

Charging reporting entities who submit transaction reports, might provide reporting entities with a disincentive to report. This would jeopardise AUSTRAC's important financial intelligence function.

3. Therefore, AUSTRAC's costs associated with its transaction reporting regulatory activities should also be funded by taxpayers

Because transaction reports are so vital to the activities of AUSTRAC's financial intelligence unit, all of AUSTRAC's efforts/costs that relate to transaction reports (whether they primarily relate to AUSTRAC's regulatory function or not) should be funded by taxpayers.

The transaction reporting component should not form part of the Supervisory Levy, and the proportion of AUSTRAC's regulatory budget that it approximates relates to transaction reporting (\$16.576m for 2011-12) should be removed from any cost recovery arrangement implemented by AUSTRAC and funded through the budget process instead. To be clear, the monetary amount of the base component and large entity components, if implemented, should be no greater than currently proposed in an attempt to cover the proportion of AUSTRAC's regulatory budget that it approximates relates to transaction reporting.

B. If not removed, the transaction reporting component or any other additional component of the Supervisory Levy should be shared between the reporting entities that directly benefit from AUSTRAC's regulatory activities, not all reporting entities

Even if AUSTRAC could establish that some or all of AUSTRAC's 'regulatory' activities in relation to transaction reporting were completely divorced from its financial intelligence function to justify cost recovery from reporting entities (which Armaguard does not believe is correct), the proposed method of calculating and charging the transaction report component of the Supervisory Levy is inappropriate and unfair.

4. AUSTRAC's proposal arbitrarily allocates costs from a range of activities to TTRs and IFTI reports, which is inconsistent with the Cost Recovery Guidelines.

The Cost Recovery Guidelines require that an agency should choose the appropriate approach for charging for a particular product/service by, amongst other things, linking the charge or charges as closely as possible to the activity or product to be cost recovered.¹⁰ For regulatory products or services, the Cost Recovery Guidelines provide that cost recovery charges ideally should reflect the costs of undertaking individual activities.

'As far as possible, the agencies should identify costs against particular activities to minimise the need to distribute costs arbitrarily among activities'¹¹

There is no evidence that AUSTRAC has complied with aspects of the Cost Recovery Guidelines when designing the transaction reporting component of the Supervisory Levy.

AUSTRAC approximates that 56% of its regulatory budget relates to a range of activities associated with transaction reporting. These are described as:

- (a) facilitating the collection of transaction reports through AUSTRAC systems;

¹⁰ Cost Recovery Guidelines, p 40.

¹¹ Cost Recovery Guidelines, p 43.

- (b) monitoring the timing, quality and volume of transaction reports;
- (c) monitoring the adequacy of reporting entities' transaction monitoring systems through on-site assessment; and
- (d) undertaking behavioural assessments to identify under, over and non-reporting by reporting entities.¹²

However, AUSTRAC fails to apportion its efforts/costs between these activities. For example, it is unclear the extent to which AUSTRAC's efforts/costs relate to:

- (a) transaction monitoring, as opposed to transaction reports;
- (b) suspicious matter reports; and
- (c) monitoring and enforcing compliance with reporting obligations (arguably, primarily an AML/CTF regulatory function), as opposed to using, analysing and disseminating the information (primarily a financial intelligence function).

In attempting to recover AUSTRAC's costs for all of the above activities, it is neither efficient, fair or appropriate to:

- isolate the calculation of the levy to the number and value of TTRs and IFTI reports submitted amongst the range of AUSTRAC's activities; and
- then, only charge the levy to those reporting entities that are part of the industry groups that AUSTRAC identifies as having 'significant transaction reporting obligations'.

AUSTRAC's proxy measure of its transaction reporting costs and the application of the levy unfairly distributes AUSTRAC's costs associated with protecting all reporting entities and the general community from criminal exploitation to a select group of reporting entities.

5. AUSTRAC's proposal does not truly adopt a risk-based approach as purported

Section 212(3) of the AML/CTF Act requires that in performing its functions, AUSTRAC must have regard to the desirability of adopting a risk-based approach.

AUSTRAC claims that its proposed levy reflects the risk-based approach AUSTRAC applies to supervision. For example, in relation to the transaction reporting component of the Supervisory Levy, AUSTRAC claims that the greater number and value of transactions that a reporting entity undertakes, the higher its exposure to money-laundering and terrorism financing (ML/TF) risk. This is a broad generalisation, which over simplifies the issues involved. The size of a cash transaction does not determine the ML/TF risk involved. An assessment of the ML/TF risk must take into account a range of factors, including the customer (eg Armaguard's customers are often other reporting entities, namely banks), the service being provided, the jurisdiction and the context of the transaction. A reporting entity undertakes such a risk assessment in the context of its own business.

If AUSTRAC truly applied a risk-based approach to its costs recovery proposal, it would seek to recover costs from reporting entities that submit suspicious matter reports, which by their nature involve a significant ML/TF risk. By virtue of their cross-border nature, IFTIs generally

¹² Discussion Paper, Appendix B, p 17.

pose greater ML/TF risks than threshold transactions, however AUSTRAC does not treat these reports differently for the purposes of its proposed levy.

While Armaguard appreciates there are problems in taking a truly risk-based approach to cost recovery (eg not wanting to create a disincentive to comply with the suspicious matter reporting obligation), it is still an important principle that must guide AUSTRAC and it highlights the undesirability and difficulties in implementing cost recovery arrangements to AUSTRAC's regulatory functions.

6. The transaction reporting component unnecessarily imposes a financial burden on particular reporting entities

Section 212(3) of the AML/CTF Act also requires that in performing its functions, AUSTRAC must have regard to, amongst other things, the desirability of ensuring that regulatory considerations are addressed in a way that does not impose unnecessary financial and administrative burdens on reporting entities. AUSTRAC has failed to demonstrate that it has had regard to the financial burden its proposal imposes on reporting entities that will be charged for submitting TTRs and IFTI reports.

The very nature of the services that Armaguard provides to its customers, namely the transportation and management of physical currency on behalf of customers, results in Armaguard being required to submit a significant number of TTRs.

Compliance with the TTR obligation in the AML/CTF Act already imposes a significant administrative and financial burden on Armaguard.

As an 'approved cash carrier', Armaguard was not subject to the TTR obligation under the *Financial Transaction Reports Act 1988*. It has incurred significant capital and labour costs implementing systems that comply with AUSTRAC's technical specifications for submitting TTRs and ensuring that all reportable details under the AML/CTF Rules are collected. Imposing a levy based on volume and value of TTRs further increases the financial and administrative costs of Armaguard carrying on its core business. This burdens Armaguard and inevitably its customers where Armaguard's increased business costs lead to an increase in the prices it charges for its services.

AUSTRAC claims that it devotes more regulatory effort to reporting entities like Armaguard, who submit higher volumes and higher values of TTRs and IFTI reports, however a reporting entity such as Armaguard does not derive benefits from AUSTRAC's regulatory efforts that differ from the benefits derived by any other Australian.

Further, a reporting entity like Armaguard cannot reduce AUSTRAC's costs of regulation and the cost to the Australian community of ML/TF activities by undertaking appropriate countermeasures in relation to TTRs, as suggested in the Discussion Paper.¹³ Armaguard's TTR obligation applies whenever the \$10,000 threshold is met, regardless of the ML/TF risk involved or whether Armaguard's customer is another reporting entity (as is often the case eg banks). Armaguard does not have the countermeasure available to it of not reporting threshold transactions. The only way that Armaguard could avoid the regulatory cost is to discontinue business.

The direct benefits that AUSTRAC claims reporting entities derive are described in the Discussion Paper as follows:

¹³ Discussion Paper, p 1.

'Reporting entities directly benefit from AUSTRAC's regulatory activities and its related intelligence holdings. Law enforcement agencies use AUSTRAC's data to disrupt criminal activities; for instance by:

- *detecting the embezzlement of funds by financial sector employees*
- *investigating major loan fraud committed upon financial institutions*
- *disrupting international scams involving malicious emails that impact financial institutions*
- *following the money trail where corporate crimes have committed in Australia and banks as creditors or investors have suffered losses*
- *identifying criminal syndicates operating in gaming venues.*¹⁴

The above statement provides no justification for charging the transaction reporting component either at all or as proposed.

First, the benefits it describes are principally derived from AUSTRAC's financial intelligence activities (which AUSTRAC concedes should be taxpayer funded), not its regulatory activities.

Second, none of the above examples would benefit Armaguard any more than any company in Australia. Armaguard is not a financial institution, it is merely a service provider to, amongst others, many financial institutions.

6.1 For the reasons previously stated in this submission, the transaction reporting component of the Supervisory Levy should be removed. However, if it is not removed or AUSTRAC adopts some other additional component to the Supervisory Levy, the method adopted for charging for AUSTRAC's activities should be reflective of the benefits derived by those that AUSTRAC regulates. If, as claimed by AUSTRAC, financial institutions, banks and gaming operators obtain direct benefits from AUSTRAC's regulatory activities, then it should be those entities that are charged, not all reporting entities.

7. C. If the transaction reporting component is not removed, the Rules must include a process by which AUSTRAC'S proposed reporting figures are provided to reporting entities in advance, audited and subject to a dispute resolution process or otherwise reviewable

If, contrary to Armaguard's submission, the transaction reporting component is not removed from the Supervisory Levy, AUSTRAC must ensure that there is integrity and transparency in the process for determining and calculating any levy that is implemented.

Based on the details provided in the Discussion Paper¹⁵ it is proposed that:

- the transaction reporting component will be calculated based on transaction reports lodged with AUSTRAC in the calendar year preceding the start of the financial year to which the levy relates (**Transaction Report Component Measurement Period**);
- the levy will relate to costs incurred by AUSTRAC in the financial year in which the levy is invoiced and collected; and
- in the last quarter of each financial year (between 31 March and 30 June), AUSTRAC will consult with industry and make a final determination on the components of the Supervisory Levy, which will then be set out in Rules;

¹⁴ Discussion Paper, p 1.

¹⁵ Discussion Paper, p 6, including Figure 2.3.

The following details/processes should be enshrined in any Rules that are made for this purpose:

- (a) the levy should be calculated on transaction reports lodged that pertain to *transactions undertaken during the Transaction Report Component Measurement Period*, rather than the reports lodged during the Transaction Report Component Measurement Period;
- (b) during the 'industry consultation' period, at a minimum:
 - (i) AUSTRAC must provide each reporting entity with the number and value of TTRs and IFTI reports that it claims the particular reporting entity has lodged that pertain to transactions carried out during the Transaction Report Component Measurement Period on which the levy will be calculated;
 - (ii) each reporting entity must be given a time period within which to dispute AUSTRAC's figures;
 - (iii) a dispute resolution mechanism be included setting out the manner with which any such dispute will be dealt with; and
- (c) AUSTRAC's data on which the levy is calculated and its charging of the levy must be subject to an annual external audit.

We would be very pleased to discuss Armaguard's submission with you at your convenience. Please contact Kerrie-Anne Hutchins if you would like to arrange a time for such a meeting or if you have any questions.

Yours sincerely

Kerrie-Anne Hutchins
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