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Dear Director

AUSTRAC Industry Contribution: Second stakeholder consultation discussion paper

1. The Law Council of Australia welcomes the opportunity to respond to the *AUSTRAC Industry Contribution: Second Stakeholder Consultation Paper* of 25 September 2014.
2. The paper seeks views on the final form of the replacement of the cost recovery arrangements administered by AUSTRAC (known as the AUSTRAC Supervisory Levy) with an Industry Contribution Levy to fund AUSTRAC's regulatory and financial intelligence functions. The new model comprises two components: one based on the earnings of the reporting entity; and one based on the volume of transactions reported.
3. The Law Council strongly opposes all forms of financial criminality and is committed to ensuring Australian legal practitioners are:
 - aware of their professional, ethical and legal obligations, including in relation to the Anti-Money Laundering and the Counter- Terrorism Financing Regime¹ (AML and CTF Regime);
 - properly informed of proactive risk management measures specific to money laundering (ML) and the financing of terrorism (TF) that fortify Australian legal practices against unwitting involvement in acts of ML or TF; and
 - provided with practical guidance about their role in combatting and where possible preventing money laundering and the financing of terrorism while respecting their unique function within the Australian system of justice.²

Application to the Legal Profession

¹ Note: The term 'AML/CTF Regime' has the same meaning in this paper as was assigned to it during the Statutory Review conducted in 2014 by the Attorney General Department and the AUSTRAC - that is the *Anti- Money Laundering and Counter- Terrorism Act 2006, the Anti- Money Laundering and Counter- Terrorism Regulations 2008 and the Anti- Money Laundering and Counter- Terrorism Rules* are collectively referred to as the AML/CTF regime.

² A statement of the relevant principles including for example the need to preserve the confidentiality of all communications between a lawyer and client and others, is contained in the United Nations, Office of the High Commissioner for Human Rights *Basic Principles on the Role of Lawyers* adopted by Australia at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990 available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>

4. In April 2014, the Law Council of Australia (Law Council) provided the Attorney General's Department and AUSTRAC with two substantive submissions in response to the Statutory Review of the Anti-Money Laundering and Counter - Terrorism Financing Regime. The Law Council submitted that if extended to legal practitioners, Tranche 2 reforms (pursuant to which legal practitioners become *reporting entities* under the regime), would place legal practitioners in a possible position of conflict. It was submitted, that a better approach to making law practices less vulnerable to inadvertent or unintentional involvement in money laundering or terrorism financing activities is through the existing comprehensive legal profession regulatory scheme by raising awareness and providing risk management guidance to legal practitioners.
5. Should Tranche 2 reforms proceed some legal practices will become potential new leviable *reporting entities* pursuant to the 2014 Industry Contribution Levy.

Concern about changes to the funding model

6. The changes to funding arrangements under the AUSTRAC Industry Contribution Levy have been described as unprecedented and have attracted strong criticism from some commentators³ suggesting the changes could threaten AUSTRAC's working relationship with the *reporting entities* upon whom it relies for intelligence.⁴
7. The Law Council has concern that respondents to the Statutory Review of the AML/CTF Regime- (some of whom are themselves *reporting entities*) provided submissions on the expectation that the liability to pay for AUSTRAC funding would continue on a relatively stable *cost recovery basis*. In particular, submissions made in support of expanding the scope of the AML/CTF Regime were provided before private sector organisations became aware that a smaller group would be paying for a much larger proportion of AUSTRAC's operating expenditure.
8. The carve out of funding arrangements from the Statutory Review of the AML/CTF Regime and the subsequent timing of announcements about changes in the liability of *reporting entities* to pay, calls into question the adequacy of the consultation process of the Statutory Review of the AML/CTF Regime and the Statutory Review of the AUSTRAC's Supervisory Cost Recovery Levy.

Cost Recovery Principles

9. The funding arrangements under the 2011 AUSTRAC Supervisory Cost Recovery Levy were, until the end of June 2014, subject to the principles of the Australian Government's Cost Recovery Guidelines.
10. The Cost Recovery Guidelines are based on the recommendations of the Productivity Commission's Inquiry into *Cost Recovery By Government Agencies*.⁵ The Inquiry's Reports identified certain Cost Recovery Principles that should underpin governmental policy in this area, including for example:

*'Not using cost recovery to finance policy development, ministerial or parliamentary services, or meeting certain international obligations'*⁶

³ Banking Day, *AUSTRAC's 'industry contribution' funding model hotly debated* 08 September 2014 available at http://www.bankingday.com/nl06_news_selected.php?act=2&selkey=17287 ; Banking Day, *AUSTRAC's Performance Rated Poor*, 11 June 2014 available at http://www.bankingday.com/nl06_news_selected.php?act=2&selkey=16748

⁴ D Lynch, *The poisoned chalice: Is 'regulation for profit' the way of the future?* University of New South Wales, Faculty of Law; Centre for Law, Markets and Regulation, Published online 22 May 2014 available at <http://www.clmr.unsw.edu.au/article/accountability/regulatory-design/poisoned-chalice-regulation-profit-way-future>; M Williams, *Industry shouldn't pay for AUSTRAC: AFMA*, Asia Pacific Banking and Finance 16 May 2014 available at <http://www.australianbankingfinance.com/banking/industry-shouldn-t-pay-for-austrac-afma/>

⁵ Productivity Commission, *Cost Recovery By Government Agencies ; Inquiry Report; Report No 15*, 16 August 2001 available at http://www.pc.gov.au/data/assets/pdf_file/0004/36877/costrecovery1.pdf

⁶ *Ibid* see the section on Key Messages at page XXIX

11. The Productivity Commission Report insists this is because cost recovered activities should exclude activities undertaken by Government (such as policy development, or to comply with international obligations) that are public interest duties that would be undertaken even in the absence of regulation.⁷ Until the 2011- 12 financial year in which the Australian Government introduced the AUSTRAC Cost Recovery Levy, the Australian Government met all the cost of AUSTRAC's funding, suggesting that its functions are public interest duties that would be undertaken even in the absence of regulation.
12. The Productivity Commission Report also noted that consideration should be given to:
 - design principles for cost recovery should include '*ensuring transparency and accountability*'; and⁸
 - the possible drawbacks of basing charges on costs that could arise because no competitive disciplines on monopoly providers of legislative regulatory functions (such as the ACCC under the TPA).⁹
13. The Productivity Commission suggested the need for clear separation of policy, regulatory and service delivery functions and that the latter be subject to governance arrangements designed to ensure:
 - clear objectives both commercial and non commercial;
 - ensure that *ad hoc* government directions are either eliminated or allowed only through transparent processes; and
 - performance monitoring and other means to achieve transparency and accountability.
14. The legislative amendments giving effect to the 2014 AUSTRAC Industry Contribution Levy provide that the funding arrangements no longer constitute a 'cost recovery' within the meaning of the Australian Government's Cost Recovery Guidelines. This leaves open the characterisation of the new funding model of the 2014 AUSTRAC Industry Contribution Levy and specifically whether it meets the indicia and operates more like a tax.
15. In relation to fees that can be charged under the *Anti- Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), section 252 (2) and (3) provide the regulations may make provision for fees payable in respect of the performance of a function or the exercise of a power by the AUSTRAC CEO. However section 252 (4) says a fee must not be such as to amount to taxation.
16. Beyond the question of characterisation, the nature of the new fees raise for consideration a bigger policy question as to whether fees paid to government can be used to generate revenue. This intention can be ascribed to the Budget papers statement about the AUSTRAC Industry Contribution:

*'The increased revenue from this measure will be redirected by Government to repair the Budget and fund policy priorities.'*¹⁰
17. Cost recovery arrangements differ from general taxation in linking the revenue raised from payers (who are deemed to create the need for regulation or derive benefit from it) in circumstances that make it appropriate for recovered funds to be directed to the funding of a specific activity.¹¹ The following statement contained in the Explanatory Memorandum to the 2011 Bills introducing the Supervisory Cost Recovery Levy, is repeated in the Explanatory Memorandum to the 2014 Bills introducing the Industry Contribution Levy:

'Reporting entities provide services that are vulnerable to exploitation for money laundering and terrorism financing purposes, creating the need for regulation by AUSTRAC. It is appropriate

⁷ *Ibid* see the section on Operational Principles at page XLIV

⁸ *Ibid* see the section on Design Principles at page XLIV

⁹ *Ibid* see page 150

¹⁰ Australian Government, 2014-15 Budget Paper No 2, Part 1: Revenue Measures relevant to the Attorney General Department available at: http://www.budget.gov.au/2014-15/content/bp2/html/bp2_revenue-02.htm

¹¹ Australian Government, Productivity Commission, *Cost Recovery By Government Agencies; Inquiry Report*; Report No 15, 16 August 2001 available at <http://www.pc.gov.au/projects/inquiry/cost-recovery/docs/report>

*that industry meet the costs of regulatory systems that ensure the integrity of their operating environment.*¹²

18. Considerable strain is placed on the concept of benefit to suggest that *reporting entities* generally derive a greater benefit from the effect of AML/CTF laws in *ensuring the integrity of their operating environment* than members of the community more generally, including the Government. *Reporting entities* as taxpayers already contribute to the funding of law enforcement activities.
19. *Reporting entities* face significant ongoing internal compliance costs in observing measures imposed by the AML/CTF laws that purport to limit their exposure to financial criminals. It is difficult to identify a logical policy basis for extending to *reporting entities* financial liability for the development of Government policy or indeed the AUSTRAC's financial intelligence work.
20. In terms of the beneficiaries of AUSTRAC's intelligence work, the 2013-14 AUSTRAC Annual Report indicates that AUSTRAC information directly assisted its partner agencies as follows:
 - The Australian Tax Office used AUSTRAC information to *identify suspected tax avoidance* in 20,931 ATO cases that resulted in raising \$358.3 million in tax assessments;
 - The Department of Human Services' Centrelink program used AUSTRAC information in 321 *Centrelink reviews* resulting in annualised savings of \$5.7 million; and
 - AUSTRAC information *contributed to 260 significant investigations* conducted by law enforcement, intelligence, human services, regulatory and revenue partner agencies.
21. Successive AUSTRAC Annual Reports confirm that the ATO, Department of Human Services and law enforcement agencies (domestic and international) are the predominant and most frequent users of AUSTRAC information. It follows then that since the introduction of funding arrangements based on cost recovery was received poorly, to now charge *reporting entities* for services that AUSTRAC provides to such government departments at no cost, could reportedly prove damaging for the FIU's relationship with the private sector, particularly since *reporting entities* cannot be described as the sole, primary or predominant users or beneficiaries of AUSTRAC's financial intelligence work.¹³
22. For the AML/CTF regime to be funded in accord with user-pays principles, consideration should perhaps be given to having those government departments to whom AUSTRAC provides (at no cost) information and financial intelligence products (such as the ATO and the Federal Police) contribute to the cost of funding AUSTRAC's intelligence work.

Recommendations

23. The Law Council submission to the Statutory Review of the AML/CTF Regime, expressed concern about the impact of the cost of regulatory compliance with the AML/CTF Regime on smaller *reporting entities*. The Law Council notes that funding arrangements pursuant to the AUSTRAC Industry Contribution Levy do not alleviate the impact of such compliance costs. However, to the extent that many *reporting entities* that were also subject to the AUSTRAC Supervisory Cost Recovery scheme, will not be subject to the AUSTRAC Industry Contribution Levy; the net result is that leviable *reporting entities* under the AUSTRAC Industry Contribution scheme will effectively now be subsidising the non-leviable *reporting entities*. While acknowledging the Government's attempt to relieve the administrative burden on smaller organisations of the AUSTRAC Industry Contribution, AUSTRAC activities, particularly those of

¹² Parliament of the Commonwealth of Australia, House of Representatives, *Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy Amendment Bill 2014* and the *Australian Transaction Reports and Analysis Centre Supervisory Cost Recovery Levy (Collection) Amendment Bill 2014*. Explanatory Memorandum available at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2F5334_em_s_54ca0099-2ed4-4a8f-8c2e-6f4831d8f7b8%22

¹³ D Lynch, *The poisoned chalice: Is 'regulation for profit' the way of the future?* University of New South Wales, Faculty of Law; Centre for Law, Markets and Regulation, Published online 22 May 2014 available at <http://www.clmr.unsw.edu.au/article/accountability/regulatory-design/poisoned-chalice-regulation-profit-way-future>

the financial intelligence unit should ideally be funded by organisations that present the greatest risk.

24. Given that AUSTRAC information reportedly assists in the recovery of substantial funds, consideration should be given to requiring end users and beneficiaries of AUSTRAC information to contribute to the cost of the AUSTRAC industry contribution. For example, the 2013-14 AUSTRAC Annual Report indicates that AUSTRAC information directly led the Australian Tax Office identifying suspected tax avoidance that resulted in raising \$358.3 million in tax assessments. This is far in excess of all of AUSTRAC's \$60 million annual expenditure.
25. The funding model of the AUSTRAC Industry Contribution Levy creates uncertainty about future costs particularly as the Government will not contribute to AUSTRAC's funding by 2017. Consideration should be given to appropriate control measures that could ensure that regulation is cost effectively provided.
26. The proposed independent review of the 2014 AUSTRAC Industry Contribution Levy in four years cannot be expected to promote efficiencies or provide appropriate or sufficient oversight. When the 2011 AUSTRAC Supervisory Cost Recovery was introduced, the then Senator George Brandis sought an amendment requiring a mandatory review of the levy after two years:

'(it) would be to review the levy calculation methodology to conduct consultation with industry participants including small and micro businesses about the cost of complying with the levy'¹⁴

Consideration should be given to conducting a review of the impact and operation of the 2014 AUSTRAC Industry Contribution including meaningful public consultation at least every two years.

Should you require any further information please do not hesitate to contact Carole Caple , Senior Lawyer on 02 6246 3737 or carole.caple@lawcouncil.asn.au.

Yours faithfully



MARTYN HAGAN
SECRETARY-GENERAL

¹⁴ Australian Financial Review, *Govt Levy to Recover Money Laundering Costs*, 21 June 2011 available at http://www.afr.com/p/national/govt_levy_to_recover_money_laundering_RD1E2vumVJIXriuMfTbFM