

Chapter 5

SUSPECT TRANSACTION REPORTS

Introduction

5.1 Suspect transaction reporting was the subject of a large amount of comment and criticism in evidence provided to the Committee. The requirement to report such transactions was criticised on the basis that the legislation was dangerously subjective and vague; that it imposed an undue responsibility upon bank staff; that reporting was costly; and that it was grossly intrusive upon personal privacy. These issues will be discussed in this chapter.

Statutory Requirement

5.2 Section 16 of the FTR Act provides that where a cash dealer is a party to a transaction and has reasonable grounds to suspect that information it has concerning the transaction may have value for certain purposes related to taxation or criminal law the cash dealer must, as soon as practicable after forming the suspicion, prepare a report of the transaction and communicate it to the Director of AUSTRAC. The transaction need not be in cash, and may be of any value. The required suspicion is that the information concerning the transaction:

- may be relevant to an investigation of tax evasion, actual or attempted;
- may be relevant to investigation of, or prosecution for, a Commonwealth or Territory offence; or
- may assist in enforcement of the Commonwealth's legislation providing for the confiscation of criminal assets.

5.3 Having made a suspect transaction report, a cash dealer must, if able to do so, give further information requested by the Director of AUSTRAC or by the AFP, NCA, ATO or Customs. The extent of the obligation to provide 'further information' under subsection 16(4) of the FTR Act was a matter of dispute in evidence provided to the Committee.

Reasonable Suspicion Test

5.4 The trigger for the requirement to lodge a suspect transaction report - that the cash dealer has reasonable grounds to suspect - was the subject of considerable discussion and criticism in evidence given to the Committee.

5.5 AUSTRAC has provided a guideline for cash dealers to assist them in determining whether or not a suspect transaction report should be lodged. This guideline states that:

The suspicion relates to a transaction considering all the circumstances of the transaction. As a general principle, any transaction which causes a cash dealer to have a feeling of apprehension or mistrust about the transaction considering:

- its unusual nature or circumstances or
- the person or group of persons with whom they are dealing

and based on the bringing together of all relevant factors including knowledge of the person's or persons' business or background (as well as behavioural factors) should be reported as a suspect transaction.¹

5.6 This guideline is based upon an analysis of a number of cases such as *Queensland Bacon Pty Ltd -v- Rees* (1966) 115 CLR 266, a bankruptcy case concerning voidable preferences, and *Hussein -v- Chong Fook Kam* [1970] AC 942, a case concerning police power to arrest a person on 'reasonable suspicion' that the person has been involved in an offence.

5.7 VCCL argued that the principles distilled from this case law were not relevant in guiding a decision to lodge a report under section 16 of the FTR Act². In relation to the Queensland Bacon case VCCL argued that the legal subject matter (the mental state of a creditor towards a potential bankrupt) was too far removed from the suspicion required under section 16 for the remarks to be of any assistance in interpreting section 16 of the FTR Act³.

¹ AUSTRAC (then CTRA) Information Circular No. 1 Section 5.

² Submission No. 12, (VCCL) pp. 19-23.

³ *ibid* pp. 20-21.

5.8 In relation to the Hussein case VCCL pointed out that suspicion alone would rarely justify an arrest because of the countervailing force that if a police officer institutes proceedings without prima facie proof he or she will run the risk of an action for malicious prosecution. No such countervailing force operates to check the power to lodge a suspect transaction report under section 16.⁴

5.9 The AUSTRAC guideline also referred to the decision in *Holmes -v- Thorpe* [1925] SASR 286 where Angas Parsons J said (at p. 291):

The gradation in mental assent is 'suspicion' which falls short of belief, 'belief' which approaches to conviction, and 'knowledge' which excludes doubt.

5.10 VCCL commented on this case that the critical element of Angas Parsons J's decision was that the three categories (suspicion, belief and knowledge) were mutually exclusive. Applying this to section 16 would mean that if a cash dealer *believed* or *knew* that a customer was engaged in illegal activity the cash dealer would be in breach of its duty of confidentiality if it lodged a suspect transaction report.⁵

5.11 The Committee has noted that, in any event, the decision in *Holmes -v- Thorpe* that the three categories are mutually exclusive is regarded as 'discredited'. In *Raynal -v- Samuels* (1974) 9 SASR 264 at p. 268 the Court (Hogarth ACJ, Walters and Jacobs JJ) stated:

In *Holmes -v- Thorpe* the judgment of *Angas Parsons J* seems to us to have proceeded on the now discredited basis that the evidence disclosed that the police witness had information as a result of which he *believed* that the goods had been stolen or unlawfully obtained, and that belief was different from suspicion.⁶ (Emphasis in original.)

⁴ *ibid* p. 22.

⁵ *ibid* pp. 23-25.

⁶ *ibid* p. 268.

5.12 Similarly, in *Fisher -v- McGee* [1947] VLR 324, at pp 327-328 Herring CJ commented that the views of Angus Parsons J 'can, I think, no longer be regarded as an accurate statement of the law.'

Number of Reports Lodged

5.13 The requirement to report suspect transaction reports commenced on 1 January 1990. The number of reports lodged to 31 March 1993 is as follows:

Table 5.1 Total Number of Suspect Transaction Reports

1 January 1990 - 30 June 1991	8,135
1 July 1991 - 30 June 1992	4,582 ⁷
1 July 1992 - 31 March 1993	3,362 ⁸
TOTAL	16,079

5.14 These reports were lodged, in the main, by the four major trading banks. In more detail⁹, the break up of the number of suspect reports lodged according to type of cash dealer is as follows:

⁷ Submission No. 13, (AUSTRAC) p. 27.

⁸ AUSTRAC Updated Statistics. Document tabled by the Director, AUSTRAC at the Committee's public hearings in Sydney on 8 June 1993.

⁹ *ibid.*

Table 5.2 Breakup of Number of Suspect Reports

Suspect reports	1 Jan 90-30 June 91	1 July 91-30 June 92	1 July 92-31 March 93	Total
Major banks (Big 4)	3,726	2,080	1,631	7,437
Other Banks	2,496	1,183	939	4,618
Other Cash Dealers	1,913	1,319	792	4,024
Total	8,135	4,582	3,362	16,079

How Is the Data Used by Law Enforcement Agencies?

5.15 The Committee was informed that suspect transaction reports had provided the bulk of the law enforcement and revenue successes attributable to the FTR Act to date. ATO gave evidence that 'apart from suspect transaction reports, ATO results from using other types of AUSTRAC information have been minor.'¹⁰ In fact, suspect reports account for 90 per cent of the tax results attributed to the use of AUSTRAC data.¹¹ ATO stated that the results have been achieved 'mainly through the follow-up of suspect transaction reports which identified, in the majority of cases, tax evasion activities the ATO was unaware of. Therefore, almost all of these results represent extra revenue the ATO may not otherwise have collected.'¹²

5.16 The results, in the form of enhanced tax recoveries, stemming from the use of AUSTRAC data are discussed in more detail in chapter 12 which discusses the cost and benefit of the legislation. However, as most of the tax recoveries are attributable to the use of suspect transaction reports the tax results will be discussed here in summary form.

¹⁰ Submission No. 43, (ATO) p. 6.

¹¹ *ibid* p. 15; evidence (Mr Mitchell) p. 236.

¹² Submission No. 43, (ATO) p. 6.

5.17 ATO provided figures showing the tax recoveries attributable to the use of AUSTRAC data to be as follows¹³:

5.3 Total of Tax Recoveries

Branch Office	1991	1992	1993	Total since 1 July 90
SA				
Adelaide	293,477	1,389,831	289,728	1,973,036
QLD				
Brisbane	884,895	682,921	1,747,147	3,314,963
Chermside			78,367	78,367
Upper Mt Gravatt			2,518	2,518
Townsville		536,946	4,508	541,454
ACT				
Canberra	268,211	851,270	257,406	1,376,887
NSW				
Chatswood	337,396	621,447	124,944	1,083,787
Parramatta	43,789	1,174,206	2,184,684	3,402,679
Penrith	1,029	469,673	42,435	513,137
Sydney CBD	3,887	1,072,059	700,361	1,776,307
Sydney South	713,142	305,502	2,228,117	3,246,761
Bankstown			646,569	646,569
Newcastle	12,818	114,236		127,054

¹³ Submission No. 43, (ATO) p. 33.

VIC				
Albury Wodonga		685,250	323,277	1,008,527
Dandenong	94,246	1,361,509	246,415	1,702,170
Melbourne	633,515	2,987,705	1,889,642	5,510,862
Moonee Ponds	184,793	148,377	268,397	601,567
Box Hill			193,115	193,115
Moorabbin			358,123	358,123
TAS				
Hobart		430,061	1,806,145	2,236,206
WA				
Perth	54,471	407,533		462,004
Cannington			47,845	47,845
Northbridge			6,970	6,970
TOTAL	\$3,525,669	\$13,238,526	\$13,446,713	\$30,210,908

5.18 Approximately \$27m of this total amount is claimed to be attributable to the use of suspect transaction reports. However, the usage by ATO of suspect report data as shown by the table above is somewhat patchy in that more than two-thirds of the recoveries are sourced in NSW and Victoria. ATO attribute this to the facts that 14 of the organisation's 22 branch offices are in NSW and Victoria and to the relative size of those economies¹⁴. The following table correlates the ATO performance on a State basis¹⁵:

¹⁴ ibid p. 6.

¹⁵ ibid pp. 6-7.

5.4 ATO Performance on State Basis

State	% of AUSTRAC results	Distribution of suspect transaction reports
NSW	37%	37%
VIC	32%	27%
QLD	14%	16%
WA	2%	10%
SA	7%	8%
TAS	8%	2%

The Blockey Report

5.19 During 1992 AUSTRAC commissioned a report from a consultant, F G Blockey and Associates, on the use and value of suspect transaction reports. The substance of the consultant's report is set out in the AUSTRAC submission to the Committee.¹⁶ The report indicated some general matters of interest, including the following. (Further observations are set out in the AUSTRAC submission):

- Most of the reports do not result in any direct action. Less than 10 per cent of reports result in any immediate law enforcement or taxation enquiry, however some of those left untouched in the first instance are taken up later on when they are related to other facts such as significant cash transactions by the same or a related person;
- The use of reports by ATO for auditing tax evaders has been more pronounced in certain regional offices, notably Brisbane, Melbourne, Albury and Adelaide.

¹⁶ Submission No. 13 (AUSTRAC) pp. 71-91.

5.20 The consultant noted that utilization of the reports by ATO varied from region to region, apparently depending upon the methods used to target tax evasion, how individuals see the best way of going about their audit task and the types of tax audit work in a region. The consultant noted that:

some ATO Branch Offices are interrogating the whole AUSTRAC database without relying on [suspect transaction reports]. Results obtained from information in Significant Transaction Reports are not included in any of the above figures ... All things being equal, the level of return to the ATO from AUSTRAC data should increase as the database use by the ATO increases.¹⁷

Scope Of The Obligation To Report Suspect Transactions

5.21 One aspect of the obligation to report suspect transactions which attracted much attention in the evidence provided to the Committee was the ambit of the reporting obligation. In particular, it was suggested that the obligation was too vague and subjective. In its place, it was argued, the obligation to report should turn on more objective criteria.

5.22 VCCL examined the various guidelines which have been issued by AUSTRAC to assist cash dealers with their obligation to report a transaction if the cash dealer has 'reasonable grounds to suspect that information that the cash dealer has concerning the transaction' may be relevant to the investigation of a Commonwealth offence, or to possible tax evasion or the enforcement of the *Proceeds of Crime Act 1987*. VCCL concluded that:

the task of reducing to some legislative or quasi-legislative form the circumstances in which a person should form a reasonable suspicion of illegal activity is hopeless and futile.¹⁸

And VCCL again:

[Section 16] is egregiously wide and uncertain. It turns bank tellers into snoops threatening their employers with criminal sanctions if they do not report the

¹⁷ Submission No. 13, (AUSTRAC) p. 81.

¹⁸ Submission No. 12, (VCCL) p. 31.

merest suspicion of any illegal activity, however minor. It bases this obligation on a subjective and inappropriate test. In its attempts to give some meaningful content to the reasonable suspicion test of s.16, the Agency has called for reports of much innocent behaviour and probably induced numerous breaches of banker-customer confidentiality.¹⁹

5.23 The Privacy Commissioner was also critical of the scope of section 16, although in less vehement fashion than VCCL. The Commissioner felt that the scope of section 16 was very wide and required inexperienced bank staff to make complex judgments which are usually made by police officers or investigators with training in these matters.²⁰

5.24 The Blockey report included some preliminary analysis on the reasons for suspicion that led to the filing of reports. Table 1 sets out the result of aggregating the reasons for suspicion into broad categories for the three years in which reporting has occurred.

5.25 This report was itself the subject of further analysis by AUSTRAC's banking consultant, Mr John Wiseheart. Mr Wiseheart examined a sample of 500 suspect transaction reports, which he divided into three broad categories:

- cash transactions;
- non-cash transactions (other than credit applications and reviews); and
- credit applications and reviews.

Grounds For Suspicion - Cash Transactions

5.26 Some of the factors which were cited as contributing to the grounds for suspicion in cash transactions within the sample group were:

- the size of the transaction;
- the frequency of transactions and whether or not in character with a customer's business;
- changing smaller denomination notes for larger notes;
- the condition of the cash and how carried; and

¹⁹ *ibid* p. 33.

²⁰ Submission No. 41, (Privacy Commissioner) pp. 11-12.

- cashing of cheques received for work performed.

Table 5.4

Year	Offence Type									
	False Name A/C	Money Laundering	No Offence	Other Offence	State Matters	DSS ²¹ Fraud	Structuring ²²	Tax Evasion	Unemployment Benefit Fraud	
1990 [Total: 9150]	306 (3.34%)	1509 (16.49%)	468 (5.11%)	502 (5.49%)	539 (5.89%)	393 (4.3%)	379 (4.14%)	4507 (49.26%)	547 (5.98%)	
1991 [Total: 8461]	309 (3.65%)	610 (7.21%)	98 (1.16%)	555 (6.56%)	718 (8.49%)	690 (8.16%)	1176 (13.9%)	3943 (46.6%)	362 (4.28%)	
1992 [Total: 6589]	188 (2.85%)	654 (9.93%)	53 (0.8%)	366 (5.55%)	479 (7.27%)	641 (9.73%)	1007 (15.28%)	2857 (43.36%)	344 (5.22%)	
Total: 24 200	803 (3.32%)	2 773 (11.46%)	619 (2.56%)	1 423 (5.88%)	1 736 (7.17%)	1 724 (7.12%)	2 562 (10.59%)	11 307 (46.72%)	1 253 (5.18%)	

²¹ Department of Social Security.

²² ie the splitting of a transaction in order to avoid the \$10 000 threshold for the reporting of significant cash transactions. Structuring is an offence under section 31 of the FTR Act.

5.27 However the three principal factors in relation to cash were structuring the transaction to just below the reporting threshold for significant cash transaction reports (\$10 000); cash remitted overseas by telegraphic transfer or draft; and cash transactions with persons who were strangers to the branch. Structuring was a ground for suspicion in 28 per cent of the reports. Many of the reports (20 per cent) were prompted because the customer chose to reduce the amount of cash to below \$10 000 after being asked to sign a significant cash transaction report. International transfers of substantial amounts of cash accounted for 10 per cent of the reports, and cash transactions with strangers to the branch made up 6 per cent of the reports.²³

Grounds For Suspicion - Non-Cash Transactions

5.28 Grounds for suspicion for non-cash transactions included use of false names; newspaper reports relating to criminal activity; unusual appearance/behaviour of the customer; suspected fraud; visa/immigration irregularities; transfer of large balances overseas by telegraphic transfer or draft; and grounds suggesting social security fraud/cheating.

5.29 The most common of the circumstances suggestive of social security fraud was the incidence of salary or wages being credited to the account of customers known to be recipients of unemployment benefit (14 per cent of the 500 sample reports). Transactions involving large transfers of assets by persons in receipt of a social security benefit and family benefits paid to the credit of accounts of non-residents accounted for 5 per cent of the sample.²⁴

Grounds For Suspicion - Credit Applications and Reviews

5.30 Suspicion of social security fraud accounted for 12 per cent of the sample. This usually related to disclosure of income in addition to social security benefits when demonstrating ability to meet repayments in relation to housing finance or credit card applications.

²³ Submission No. 13, (AUSTRAC) Appendix 3 pp. 15-16.

²⁴ *ibid* pp. 16-17.

5.31 Admission by applicants that false income and expenditure statements, understating net profits, had been provided to the ATO prompted 6 per cent of the reports.²⁵

Proposed Modifications to Section 16

5.32 VCCL proposed three modifications to section 16:

- (i) the obligation to report illegal behaviour should be restricted to specific offences enumerated in the legislation;
- (ii) the subjective 'reasonable suspicion' test should be replaced by objective criteria requiring reports of particular kinds of behaviour described in the legislation; and
- (iii) the information produced by suspect reports should be a secondary investigative tool only, and should not be used to instigate an investigation.²⁶

5.33 The Privacy Commissioner recommended that the definition of suspect transactions should be tightened. To overcome the problem that junior staff are required to form a complex judgment the Privacy Commissioner suggested that front line staff 'should not bear direct legal responsibility for reporting suspect transactions. Many banks have instituted a two tier system where a suspicion will be examined at a more senior level before reporting. This should become mandatory, with senior officers carrying any legal responsibility.²⁷ However, the evidence provided to the Committee indicated that such a process is already adopted by most financial institutions. For example, the AFC gave evidence that:

Each financial institution would have in place a layer of management to review transaction reports before they are put through. In that, too, you would get those

²⁵ *ibid* p. 17.

²⁶ Submission No. 12, (VCCL) pp. 33-34.

²⁷ Submission No. 41, (Privacy Commissioner) p. 13.

who perhaps could be overzealous in wishing to report. But my concern is at the other end where there are those who feel very uncomfortable about it.²⁸

5.34 The Director, AUSTRAC also gave evidence to this effect:

Mr Coad - The only issue I would add is that it is not usual in an institution that the staff member at the front counter is the final arbiter as to what is filed. It will go through a filtering process which varies from institution to institution.

Senator KEMP - So if a staff member dealing with a customer were suspicious, they would refer their suspicion to the manager?

Mr Coad - Quite often that is the case. Of course, the legal responsibility to file is not against the teller; the legal responsibility to file is against the cash dealer or the bank.²⁹

5.35 Mr Coad emphasised this point when giving evidence at a public hearing in Melbourne:

Mr Coad - I say again that there is a myth that keeps being put forward that the front-line staff are the ones who file the reports. That is not correct. In most banks it goes through a series of stages. But it was suggested somewhere in the submissions that there should be some requirement on banks to have appropriate procedures inside the banks before the suspect transaction reports are filed. They do have that anyway, but if it were included in the law I do not think that would be the worst thing in the world. It could be a duty of AUSTRAC to ensure that it was there. We already do have a role to make sure they have procedures for the filing of suspect transaction reports.³⁰

5.36 Other bankers gave evidence that the existence of the managerial overlay for filtering suspect transaction reports was costly for cash dealers.³¹

5.37 The VCCL, apparently on the assumption that the filtering processes referred to above did not exist, argued that 'it was easy to envisage harassment of migrants by means of such reports in an anti-migration

²⁸ Evidence (Mr Edwards, AFC) p. 58.

²⁹ Evidence (Mr Coad) p. 59.

³⁰ Evidence (Mr Coad) p. 191.

³¹ Evidence (Mr Chapman, Westpac) p. 79.

political climate.³² The Committee is satisfied that the filtering processes already in place operate as a check on the lodgment of baseless or frivolous reports.

The Committee's Conclusions on the Scope of Section 16

5.38 The Committee is concerned that a very large, and growing, body of personal information is held in the AUSTRAC database. However, the Committee is satisfied that any attempt to narrow the collection point for the information would seriously impair, and perhaps destroy, the efficacy of the suspect transaction reporting system.

5.39 However, the Committee is convinced that more can be done to better protect the privacy interests of the community. The Committee's views on this matter are set out in Chapter 7, Privacy and Civil Liberties Issues.

Recommendation 4: The Committee recommends that suspect reporting be retained in its present form. Privacy interests should be better protected than at present by adopting Recommendations 7-10 below.

³² Submission No. 12, (VCCL) p. 28.