SUBMISSION

REVIEW OF THE AUSTRALIAN GOVERNMENT COST RECOVERY GUIDELINES

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About ASFA

ASFA is a non-profit, politically non-aligned national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation funds, their trustees and their members. We focus on the issues that affect the entire superannuation industry. Our membership, which includes corporate, public sector, industry and retail superannuation funds, plus self-managed superannuation funds and small APRA funds through its service provider membership, represent over 90% of the 12 million Australians with superannuation.

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1. Introduction

The Association of Superannuation Funds of Australia (ASFA) would like to provide this submission to the Review of the Australian Government Cost Recovery Guidelines.

The review is welcome as it becomes apparent that government departments are increasingly undertaking costs recovery activities for a variety of reasons.

Noting that a whole-of-government working group has been established with government entities who undertake cost recovery activities and has apparently been working on the review for a considerable period of time, we welcome the decision to consult with the external parties who are directly impacted by the cost recovery decision of government entities.

We note that the purpose of the review is to inform the development of revised whole-of-government Guidelines on cost recovery activities and that specifically views are being sought on:

- the best method/s to consult with non-government users on specific cost recovery activities (e.g. this currently occurs through a Cost Recovery Impact Statement (CRIS);
- what information non-government users need in relation to specific cost recovery activities;
- how to report on specific cost recovery activities; and
- any other views non-government users may have in relation cost recovery activities [sic]

While each of the above points will be commented on, our primary focus will be on the last dot point and specifically on the process followed in determining whether or not a specific cost recovery activity should be undertaken or is merited, a lack of transparency in determining what costs are to be recovered, a lack of independence in determining the veracity of the amounts to be recovered and a lack of transparency and accountability with respect to amounts recovered.

ASFA has concerns over what appears to be an increasing tendency of government departments to recover their regulatory costs from consumers of their services. Significantly, this change in funding arrangements has, from an external perspective, been without an accompanying requirement to provide a public analysis of why a levy is appropriate from a public benefit perspective. Additionally, there has been an absence of proper acknowledgment of the direct cost that regulation has already imposed on those entities or due regard for whether the regulation provides a broader public good which is more appropriately funded from consolidated revenue. These later concerns have most recently been raised by ASFA in submissions with respect to Cost Recovery Impact Statements released by AUSTRAC.

2. General comments

The requirement on *Financial Management and Accountability Act 1997* (FMA Act) agencies and *Commonwealth Authorities and Companies Act 1997* (CAC Act) bodies to comply with formal government cost recovery guidelines is designed to improve the consistency, transparency and accountability of Commonwealth cost recovery arrangements and to promote the efficient allocation of resources.

The Guidelines reflect a set of Government adopted key principles including the following which ASFA considers particularly relevant to this review:

- Cost recovery should not be applied where it is not cost effective, where it is inconsistent with government policy objectives or where it would unduly stifle competition or industry innovation.
- Any charges should reflect the costs of providing the product or service and should generally be imposed on a fee-for-service basis or, where efficient, as a levy.
- Portfolio Ministers should determine the most appropriate consultative mechanisms for their agencies' cost recovery arrangements, where relevant.
- All agencies with significant cost recovery arrangements will need to prepare Cost Recovery Impact Statements (CRIS). A CRIS will not be required where a Regulation Impact Statement (RIS) that also addresses cost recovery arrangements against these guidelines has been prepared.
- Agencies are to review all significant cost recovery arrangements periodically, but no less frequently than every five years.

We note that a basic requirement of both a CRIS and an RIS is to transparently document how an agency's fees and charges comply with the cost recovery policy and demonstrate that charges reflect the cost of providing the product or service.

We further note in the Overview of the Guidelines the use of the word 'should' with respect to use of the Guidelines and that this is defined as requiring compliance with as a matter of good practice. Of concern to ASFA is the apparent absence of a sanction for those departments which choose to not adhere to the Guidelines when proposing new costs recovery arrangements or when amending or reviewing existing cost recovery arrangements.

In this context we note the intention of the Australian Prudential Regulation Authority to, in 2012-13, merge its current levy review process with the development of a comprehensive Cost Recovery Impact Statement (CRIS). While welcoming the announcement of the CRIS process we note that this is with respect to an annual supervisory levy which has been imposed since 1998 and which has presumably been subject, since 2002, to the Guidelines' requirement to review cost recovery arrangements no less than every five years.

3. Specific comments

3.1 The best method/s to consult with non-government users on specific cost recovery activities

The Guidelines set out a four step process for assessing cost recovery:

Stage 1 Initial Policy Review

Stage 2 Design and Implementation

Stage 3 CRIS Process

Stage 4 Ongoing Monitoring

ASFA considers that, in addition to considering the best method/s to consult with non-government users on specific cost recovery activities, consideration needs to be given to when such consultation should take place.

When should consultation take place?

Under the current guidelines, the most significant consultation with non-government users appears to be at stage 3, the CRIS process. That is, the non-government users that will be impacted by the cost recovery activity are generally only consulted once the initial decision to recover costs has been made and the initial design and implementation decisions have been made.

Effectively, despite the Guidelines expectation that an agency will understand both the purpose of an activity and who benefits or creates the need for the activity, there appears to be no expectation on the agency to test their understanding with those who will bear the cost. The absence of a requirement for such a consultation process removes the opportunity for the validity of the policy decision to be tested and counter views to be considered. In doing so the Policy Review process risks failing to recognise and consider that, particularly in the case of regulatory levies, regulation itself imposes a cost on those being regulated and that regulation may deliver a public benefit to some degree. Where a public benefit is delivered, ASFA considers it necessary to separately consider where the benefits of regulation lie and the extent to which regulatory costs should be shared between the 'public' and the consumers of the regulatory services (i.e. the entities being regulated).

There is a need for this initial Policy Review process to be both transparent and inclusive and appropriate consultation with non-government stakeholders, as a starting point, would appear to be essential.

The Stage 1 Policy Review process also gives rise to another threshold question: Where the cost recovery process relates to the regulation of entities, in addition to having insight into how the levies are calculated should those entities have an entitlement to have input into what regulatory services are delivered? Arguably if the regulated entities are to pay for the regulation service then regulating agencies should be obliged to consult with their clients with respect to the mutual expectations of both parties.

Recommendation:

That the Policy Review stage include a requirement that the agency's assessment that a cost recovery arrangement is appropriate be tested with non-government users through a consultation process.

What consultation methods should be used?

ASFA sees merit in a range of consultation methods being adopted during each stage of the consultation process. The scope and extent of consultation should necessarily vary with the perceived degree of impact of the proposed cost recovery and the degree of understanding of the agency of the potential impacts of cost recovery.

In the early stage consideration should be given to consulting on a confidential basis with or through industry associations where those exist. A face-to-face meeting would support open communication of views and a shared understanding of the challenges faced by both parties.

Once sufficient understanding and knowledge had been gained to support the initial decision making process, consultation through the release of consultation papers would appear the most effective and efficient process.

Following receipt of comments, further face to face consultations could be held where this was deemed necessary prior to finalising the cost recovery position.

We note that in Stage 3: Cost Recovery Impact Statement process, the Guidelines state that the preparation of the CRIS 'should involve an appropriate level of consultation with stakeholders, where appropriate.'

From our experience, this has been implemented by way of an agency preparing and issuing a draft CRIS for comment. This seems counter to the Guidelines requirement that "(w)here stakeholder consultation mechanisms exist, the agency preparing the CRIS document could utilise these mechanisms to consider cost recovery arrangements. That is, the Guidelines appear to suggest consultation as part of the process of creating the CRIS, not merely as part of the review process once a draft CRIS has been developed.

Recommendation
That the consultation process:

- involve non-government users of the service
- be included in all stages of the decision making process
- utilise a variety of methods including direct face-to-face confidential consultations on significant cost recovery proposals

Recommendation
That the Guidelines make clearer the expectation that consultation with stakeholders is required at all stages of the preparation of a CRIS and not just once the agency has prepared an exposure draft.

3.2 Information non-government users need in relation to specific cost recovery activities

For there to be confidence in the cost recovery process it is important that there is a high degree of transparency of both the policy rationale for the cost recovery and the determination of the amounts to be recovered and the recovery process. ASFA considers it is not sufficient for an agency to rely on internal government processes for sign-off on the policy decision, the amount to be recovered or the basis on which the amount was determined.

Where costs are to be recovered from non-government users, those users should be entitled to a reasonable level of detail as to how those costs were arrived at. Whilst recognising that agency costs in delivering a product or service would generally be higher than those of the private sector, sufficient information should be provided by the agency about the scope of activities included in the cost recovery calculations and the cost allocated to those activities.

Without such a degree of transparency there is no assurance that the costs have not been 'padded' with the revenue to be redirected to other agency activities.

This requirement for sufficient detail should also apply to a CRIS and an RIS, given that a CRIS is not required where an RIS has been prepared for the Office of Regulation Review.

Stage 2 of the cost recovery process set out in the Guidelines, Design and Implementation sets out a series of key principles for the calculation and allocation of costs. It sets out cost definitions and approaches to calculating capital costs and specifies that cost recovery arrangements should reflect efficient costs and be transparent.

On transparency, it states that this 'is a key means of improving the efficiency and accountability of agencies' and that it requires agencies to articulate clearly their broad objectives and to explain how their approaches to cost recovery (including costing systems) contribute to those objectives.

The Guidelines suggest agencies, in order to meet their transparency obligations:

> … should adopt costing models sufficiently detailed to allow the Parliament, the Government and, where relevant, stakeholders to analyse their production costs.

Further:

> Agencies should develop clear costing models detailing actual costs, and how those costs relate to prices and be able to provide information on how capital costs are calculated and how capital costs and overheads are allocated among products.

This level of detail is required should the validity of fees be challenged and an agency needs to demonstrate that the fees are authorised by legislation. That is, that the fee is not considered excessive and therefore a tax.

ASFA supports this approach and suggests that as this level of detail is required by the Guidelines then, unless the information is commercial in confidence, it should be disclosed in full to consumers of the goods and services.

A recent example where ASFA considers the level of detail was less than appropriate is the collection of the SuperStream component of the APRA Supervisory Levy.

The information presented to APRA regulated superannuation entities with respect to the payment of $467,109,000 in levies over 7 years to cover the costs of the three departments (ATO, Department of Industry, Innovation, Science, Research and Tertiary Education and Treasury) consisted of a four line table listing the high level deliverables with the costs split between IT costs and non-IT costs.

The consultation on the cost recovery was limited to how the money was to be levied, with no consultation on either the appropriateness of the levy or the level of quantum to be collected.

ASFA notes that APRA levies are adjusted by over and under-collected levies from prior periods. ASFA considers that such a mechanism should be built into all levy cost recovery determination processes in order to maintain the integrity of an entity's levy funding mechanism.

Recommendation:
To ensure a high degree of confidence in the cost recovery process, agencies should be required to provide sufficient information to enable a transparent evaluation by users of the basis of the cost recovery, the appropriateness of the quantum to be recovered and the correct attribution of any amounts recovered.

The information should be consistent with the level of detail required by the Stage 2: Design and Implementation process.

3.3 How to report on specific cost recovery activities

Where cost recovery is used there should be a requirement for the agency's annual financial statements to provide sufficient detail of the cost recovery arrangements to permit an objective observer to gain a degree of comfort that the monies collected were appropriately expended.

Specifically, ASFA recommends that the Guidelines require the agency, as part of Stage 4: Ongoing Monitoring to provide to non-government users both the costing information used in Stage 2: Design and Implementation and details of actual amounts expended and collected. ASFA does not consider it sufficient or appropriate that such assurances should depend on the possibility of an Australian Audit Office review.

Recommendation:
To ensure a high degree of confidence in the cost recovery process agencies should be required to provide sufficient information to enable a transparent evaluation by users of the correct attribution of any amounts recovered.

The information should be consistent with the level of detail required by the Stage 2: Design and implementation process

3.4 Any other views non-government users may have in relation cost recovery activities.

The introduction to the Guidelines lists 14 key principles underpinning the Australian Government's policy of recovering the costs, by way of fees and charges, related to the provision of government goods and services (including regulation) to the private and other non-government sectors of the economy.

Principle 1 states that:

> Agencies should set charges to recover all costs of products or services where it is efficient to do so, with partial cost recovery to apply only where new arrangements are phased in, where there are government endorsed community service obligations, or for explicit government policy purposes.

Part of the rationale for cost recovery is to improve the efficiency with which Australian Government products and services are produced and consumed and to improve equity by ensuring that, amongst other things, those who create the need for regulation bear the costs.

Section 1 of the Guidelines, Policy review, sets out some key matters that an agency should consider when determining which of an agency's objectives are relevant to the activities or products being considered for cost recover. First of these is:

- understand the purpose of the activity and who benefits or creates the need for the activity

ASFA considers that this is fundamental to the whole question of cost recovery and is concerned that the matter is not further addressed in the guidelines.

With regulatory activities there appears to be an assumption that because an activity is regulated, then those who are being regulated have created the need for regulation and therefore should bear the cost of regulation. The process then moves on to consider who the costs of regulation should be distributed among the consumers of the regulatory service.

ASFA does not think that the question on who should bear the cost of regulation is necessarily quite that clear cut.

In 2.1 above we set out our concern that despite the Guidelines expectation of an agency that it will understand both the purpose of an activity and who benefits or creates the need for the activity, there appears to be no expectation on the agency to test their understanding with those who will bear the cost.

The absence of such a requirement means that the agency's assumption as to who has created the need for, and thus should bear the costs of, regulation is never tested. Equally untested is the question of who benefits from the regulatory activity and to what extent.

The Policy Review process as set out in the document also fails to recognise, particularly in the case of regulatory levies, that regulation itself imposes a cost on those being regulated and that most regulation delivers a public benefit to some degree. In such cases, it would appear to be desirable that the cost recovery process consider where the benefits of regulation lie and the extent to which costs should be shared between the 'public' and the entities being regulated.

By way of example, the AUSTRAC Supervisory Levy is imposed to recover AUSTRAC's costs of supervising the compliance of certain regulated entities with the requirements of the *Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Act 2006*.

The AML/CTF Act was introduced as part of Australia's international obligations as a member of the international Financial Action Task Force (FATF). The FATF has issued 40 Recommendations to guide international action against money laundering, and 9 Special Recommendations on Terrorist Financing. These recommendations set the international standard for AML/CTF regimes. Australia is a founding member of the FATF.

The information provided by the regulated entities under the AML/CTF Act is used by AUSTRAC to undertake investigative and law enforcement work to combat financial crime and prosecute criminals in Australia and overseas.

Under the AML/CTF Act financial institutions and certain other entities have been required to introduce an extensive array of expensive process to ensure that Australia is meeting its international obligations. The regulatory regime has not provided the regulated entities with any commercial advantage over non-regulated entities and the regulator has not provided any 'services' other than enforcement reviews and information on compliance.

In its 2010/11 annual report AUSTRAC reported:

> Among the most significant results attributable to the use of our intelligence were the

> 1,619 cases investigated by the Australian Taxation Office during 2010–11, which resulted in $241.11 million in additional tax assessments being raised.

That is, AUSTRAC, which will be funded by its regulated entities in the 2012-13 financial year to the tune of approximately $32 million, delivered $241 million of revenue to the Australian Government in 2010-11 based on information provided by those regulated entities. This raises the following questions:

- Did the regulated entities create the need for regulation or was this created by the Government's need/desire to engage internationally on AML/CTF matters?
- Who benefits from the regulation – the regulated entities which existed and operated effectively without this level of regulation or the Australian public through the increased tax revenue generated through the provision of data to Australia's financial intelligence unit?
- In determining the need of cost recovery what recognition was given to the not-inconsiderable establishment and ongoing compliance costs imposed on the regulated entities by the AML/CTF Act?
- In determining the quantum to be levied what consideration was given to the public benefit delivered by Australia's compliance with its FATF obligations?

ASFA considers that these are the types of questions that should have been considered and answered at the Policy Review stage. In the absence of evidence to the contrary one can only comment that the Policy Review process for the introduction of the AUSTRAC levy failed the initial Guideline requirement to:

> - understand the purpose of the activity and who benefits or creates the need for the activity

The Stage 1 Policy Review process also gives rise to another threshold question; Where the cost recovery process relates to regulation of entities, in addition to having insight into how the levies are calculated should those entities have an entitlement to input into what regulatory services are delivered? Arguably regulating agencies should be obliged to consult with their clients with respect to the mutual expectations of both parties.

> **Recommendation:**
> That the Guidelines be expanded to provide more detailed guidance on an appropriate assessment process for determining whether, on a holistic view, cost recovery is appropriate.

ASFA suggests that to achieve this, the Stage 1 Initial Policy Review section of the guidelines should be expanded to create an obligation on departments to provide a public analysis of why a levy is appropriate from a public benefit perspective. This statement should provide an assessment of the economic and social benefits of the cost recovery exercise. It should also acknowledge the impact of the exercise. For example, in the case of a levy on a superannuation fund, the assessment should include an assessment of the impact on member account balances.

A general concern that ASFA has with the consultation processes as they currently exist and as set out in the current Guidelines is that they seem to have a hollow ring to them. That is,

to comply with the guidelines a government agency merely needs to go through the motions and there are no sanctions applied where the Guidelines are ignored.

In the absence of formal governance arrangements for specific levies (such as ASFA has advocated with respect to the SuperStream levy), non-government users do not have an avenue to challenge the decision to undertake cost recovery, the method of cost recovery or quantum of costs to be recovered. ASFA considers that there is a strong public interest argument that some form of Independent Ombudsman is necessary to provide an avenue for those who are subject to the cost recovery exercise to be able to appeal a cost recovery process or a levy determination. The Ombudsman could be given legislative powers to examine a Department's processes and records and determine whether cost recovery was appropriate in the first place but also whether it was appropriately administered. If the Ombudsman finds that it wasn't then a decision could be made that amount recovered are to be re-paid to those concerned.

> **Recommendation:**
> That the Review's report on the Guidelines considers the need for a review process that is external to the agency, such as an ombudsman arrangement.

Another concern of ASFA is that while the cost recovery guidelines focus on cost recovery, when costs are recovered by way of a levy those levies appear to be in large part a payment in advance of costs being incurred. This occurs with the APRA and AUSTRAC levies where levies are collected during a financial year with respect to the agency's budget for that year. This will also apply to the new SuperStream levy.

Where costs are collected in advance, there would appear to be no incentive for an agency to spend less than it has estimated. In the absence of an external review arrangement, there is also no incentive for agencies to operate in the most efficient manner. With such cost recovery arrangements, it would appear essential that the Stage 4: Ongoing Monitoring process is robust so that over collections can be identified and redressed.

Currently, the Stage 4: Ongoing Monitoring process suggests agencies should (i.e. best practice) introduce monitoring mechanisms to assist it to, amongst other things:

- Obtain feedback so it can adapt its approaches to cost recovery in response to changing circumstances, and
- Ensure fees and levies are based on efficient and transparent costs.

Agencies with significant cost recovery arrangements 'should have adequate mechanisms in place to promote consultation with stakeholders'.

However, this raises once again the issue that these are only guidelines and there are no sanctions against non-compliant agencies, no recourse to a review process for non-government users and no absolute requirement that fees and levied are based on efficient costs. That is while Stage 4 states that agencies "should … ensure … levies are based on efficient …costs' the use of 'should' relegates the requirement to one of sound practice.

Additionally, there does not appear to be absolute requirement for agencies to identify circumstances where costs have been over recovered and to either return those collections or recognise those over collections in future cost recoveries. This is particularly the case when cost recovery applies to only a part of an agency's total costs.

Further, it appears that at the moment there is no incentive for agencies to spend less than they estimate. This raises the question as to whether the cost recovery guidelines should apply the Government's own productivity principles to levies. That is, as the Government often budgets for a productivity dividend (which basically means that Governments have to find savings each year), the same principle should apply to levies raised by an agency.

Recommendation:
That the Guidelines separately address the situation where agencies recover costs in advance.

Recommendation:
That the Guidelines strengthen the role of non-government users in Stage 4: Ongoing Monitoring.

Recommendation:
That the Stage 4: Ongoing Monitoring requirement be change from 'should' to 'must'. That is, the agency must introduce effective ongoing monitoring mechanisms.

Recommendation:
That consideration is given to applying the Government's productivity dividend process to fees and levies.

The final concern of ASFA is that the Guidelines do not reduce the incentive of governments in tight fiscal circumstances to push levies onto those who are least able to complain. As things stand, one can see a future Government contemplating imposing a fee on taxpayers to lodge their tax return as they have created the regulatory requirement by earning income.

ASFA suggests that the Review's final report should address the question as to whether, as part of the annual budget, the Government should produce a consolidated statement on all its fees and levies so that the public can get a picture of how much the Government is raising through off-Budget mechanisms. This would create a mechanism to enable comparison over years so that there was transparency if Governments tried to gradually increase levies over time.

Recommendation:
That the Government annually produce a consolidated statement on all fees and levies.

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If you have any queries or comments regarding the contents of our submission, please contact Robert Hodge on 02 8079 0806 or via email on rhodge@superannuation.asn.au.

Yours sincerely

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