SWIFT INSTITUTE

SWIFT INSTITUTE WORKING PAPER NO. 2015-002

REGULATORY FOCUS ON COMPETITION AND INNOVATION IN PAYMENTS SERVICES

Does regulation aimed at encouraging competition and innovation conflict with requirements for KYC, AML, etc.? Are the two sides compatible? An exploratory case study of Australia

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PUBLICATION DATE: 20 FEBRUARY 2017

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An exploratory case study of Australia

Abstract

The main objective of the research is to determine whether Australian regulation, aimed at encouraging competition and innovation, conflicts with requirements for Know Your Customer (KYC), Anti-Money Laundering (AML) and privacy protection.

Given the convergence of the Australian regulatory frameworks with those in Europe and North America (and reference to Australia by regional partners such as New Zealand), there is value in assessing the scope and significance of regulatory conflicts in this country. There is also value in identifying differing perceptions on the part of its policymakers and administrators. To our knowledge, the issue has not been addressed in academic literature. The theoretical frameworks of 'responsive regulation' and 'regulatory governance' provide the lens for this exploratory research.

As a result of our investigations, a disjoint was noted between the authorities that implement the AML/CTF (anti-money laundering and counter terrorism financing) legislative regime and those that implement privacy, innovation and competition legislation, for example:

- While the AML/CTF legislation is an international regime; privacy, innovation and competition laws typically have a national jurisdiction, giving rise to a disjoint since such laws vary as per the imperatives of the jurisdiction.
- Within the AML/CTF itself the compliance may vary across jurisdictions, for example, the non-Islamic (or conventional) banks in Malaysia have very high compliance culture compared to the Islamic banks.
- Similarly, a jurisdiction may unfairly apply competition law. For example, China unfairly targeted foreign companies under competition law as per the 2014 report of the US China Business Council.
- Though the AML/CTF regime was created to prevent and control money laundering and financing of terrorism, jurisdictions have differing interpretations of what constitutes money laundering or what is considered to be actions leaning towards 'terrorism'.

- As national legislation on anti-money laundering has been framed following the international standards set by the Financial Action Task Force (FATF), some jurisdictions are lax when it comes to implementation thereof.
- Reporting institutions in Australia felt that the high compliance cost of AML/CTF legislation affected their competitiveness.

The disjoint often creates a scenario of multiplicity in reporting to various authorities, affecting efficiency and effectiveness, and increasing costs to all players. These issues become particularly important as over 70% of the reporting entities under the AML/CTF regime are small business enterprises employing less than 20 people (AUSTRAC, 2013, p.2) and this disjoint, therefore, increases their costs unnecessarily. Consequently, countries need to do a thorough study of these competing legislations and ensure that the disjoint is avoided. However, though KYC and AML legislation will inevitably impact competition, it cannot be said that KYC/AML laws and competition laws per se are in conflict.

Currently we do not have an indicator/evidence-based system to measure the ground-level impact of implementing the AML/CTF regime, hence, there is a question mark over the efficacy of this elaborate regime 'which undermines its credibility and relevance' (Yepes, 2011, p.1). Industry, academics and the policy-makers need to develop key indicators that demonstrate that the regime has led to a reduction in money-laundering/terrorism financing offences or the magnitude thereof.

1. Introduction

The United Nations Office on Drug and Crime (UNODC, 2016, p.1) defines money laundering as 'the method by which criminals disguise the illegal origins of their wealth and protect their asset bases, so as to avoid the suspicion of law enforcement agencies and prevent leaving a trail of incriminating evidence'. The International Monetary Fund (IMF, 2015) notes that money laundering can undermine the integrity and stability of financial institutions and systems, discourage foreign investment and distort international capital flows.

As a result of mounting international concern about money laundering, the Financial Action Taskforce (FATF) was established in 1989 as an inter-governmental body mandated to set standards and develop policies to combat money laundering and later, terrorist financing. Although not legally binding, the FATF Recommendations have influenced the AML/CTF laws and policies of many countries to such an extent that countries seek to align their AML/CTF laws and policies to conform to the FATF Recommendations.

The FATF Recommendations and the raft of international agreements that followed, provide the framework for Anti-Money Laundering legislation enacted by countries over the years. Important among these are the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (UN, 1988), also known as the Vienna Convention, and the *United Nations Convention against Transnational Organised Crime 2000* (UN, 2000), also known as the Palermo Convention. Together these provide a basis in international law for States (countries) to criminalise money laundering activities related to the proceeds of crime.

The Palermo Convention expanded the money laundering offence that States were required to enact, to include the proceeds of organised crime and other predicate offences. It requires States to: freeze, seize and confiscate proceeds of crime (and related assets), and provide other States with mutual legal assistance – including the extradition of persons — for money laundering-related crimes.

Also relevant to the FATF Recommendations is the United Nations (UN, 1999) *International Convention for the Suppression of the Financing of Terrorism 1999* (Terrorism Financing Convention) and United Nations (UN, 2011) Security Council Resolutions 1267 (1999) and

1373 (2001). Under the Terrorism Financing Convention, States are required to criminalise the provision or financing of terrorism, terrorist organisations, or terrorist acts (Article 2, paragraph 1). Under UN Security Council Resolution 1267 (1999), States were required to freeze funds and other financial resources derived or generated from property owned or controlled (directly or indirectly) by the Taliban or its associated undertakings (Article 4(b)).

UN Security Council Resolution 1373 (2001) further developed the obligations on States imposed under UN Security Council Resolution 1267 (1999) by requiring States to: prevent, suppress and criminalise the financing of terrorist acts (Article 1(a) and (b)); freeze assets and the economic resources of terrorists, terrorist organisations and entities directly or indirectly associated with them (Article 1(c)); prohibit funds and assets from being made available to persons, organisations and entities owned or controlled by persons that commit, facilitate or participate in the commission of terrorist acts (Article 1(d)); provide assistance, including obtaining evidence, in criminal investigations or criminal proceedings connected with the financing of terrorist acts (Article 2(f)).

The extent to which States actually implement these international requirements is determined by the extent at which they are assessed by the FATF and its associated FATF-style regional bodies. As Walters et al. (2011: iii) explain: 'Despite the normative approach taken in the FATF-GAFI Recommendations, the specific legislative and procedural responses taken by individual countries have differed in many respects'. The FATF Recommendations establish an international regime that supports the UN's efforts in combating money laundering and terrorism financing. In its assessment of States' compliance with the FATF Recommendations, States are assessed against whether they have implemented measures consistent with the requirements in the Conventions and the UN Security Council Resolutions discussed above.

No international regime similar to the AML/CTF regime exists to maintain international competition.

While attempts are being made for the international harmonisation of economic regulation as stated in the scholarly work of Nakagawa (2011), competition laws typically operate within national boundaries. The anti-money laundering legislation set out above is an excellent example of international harmonisation. Modern competition law has evolved to promote

and maintain competition in the domestic market. The political, cultural and legal diversity of countries impedes international harmonisation of competition laws.

Over the years, however, several steps have been taken towards harmonisation through international competition agreements. Within the European market, for example, Bronitt et al. (1995, p.315) state: 'Competition law is an important means by which the integration of the European market is fostered and secured'. Through the World Trade Organization (WTO), barriers to trade that impede competition between countries are addressed. Bilateral Free Trade Agreements and Investment Treaties may also serve to regularise competition policy among trading nations. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) plus bilateral/multilateral free trade agreements such as the Trans-Pacific Partnership Agreement (TPPA) are further examples that specifically relate to agreements between Australia and other countries such as the US or New Zealand. However, the global harmonisation of competition law on the lines of the FATF initiative for the AML/CTF regime is yet to be seen. Taylor (2006, p.221) summarises the situation as follows: 'There are a number of 'loopholes' (deliberate or not), that arise in the international regulatory matrix'.

To regulate foreign anti-competitive practices, countries began by using domestic competition law on an extraterritorial basis. The US China Business Council Report (2014), for example, found that many issues plague competition in China. Furthermore, firms may try to take advantage of arbitrage opportunities in jurisdictions that have under-regulation or lax regulatory enforcement (for example, competition among off-shore financial centres). On the other hand, over-regulation may adversely affect legitimate competition. 'In this manner, while competition law remains essentially national, competition issues have become increasingly international, creating a regulatory disjunction' (Taylor, 2006, p.:1).

A disjuncture between KYC and AML legislation (essentially internationally harmonised), on the one hand, and competition and privacy legislation (essentially domestic in nature), on the other, can arise in several ways.

First, the application of the FATF's AML and KYC requirements varies across jurisdictions. The real estate agents, professional accountants and jewellers, for example, are governed by the Laws of Malaysia (2002)'s *Anti-Money Laundering, Anti-Terrorism Financing and*

Proceeds of Unlawful Activities Act 2001 (Act 613) (AMLATF), yet are outside the scope as per the AUSTRAC (of Australia's AML/CTF legislation consisting of *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)* and *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No.1) (as amended) (Cth).* More contentiously, central actors such as lawyers are covered by the regime in the United Kingdom, but not in Australia. Countries may also differ in the extent to which they choose to follow the FATF Recommendations. The FATF's mutual evaluation reports of countries' compliance with the FATF Recommendations, for example, point out a number of areas in which particular countries have not implemented FATF's Recommendations.

Second, the competition law and policy within one particular jurisdiction may conflict with that jurisdiction's own AML/CTF legislation, but this may not be the case in other jurisdictions.

Third, the competition/privacy law in one jurisdiction could conflict with that in other jurisdictions. The US China Business Council Report (2014), for example, found China unfairly targeted foreign companies under competition law, it lacked due process and transparency during competition reviews, had long and uncertain timeframes for merger and acquisition reviews, and also included factors other than 'competition' in competition assessments. These conflicts are depicted in Figure 1.

To study all of the dimensions of global legislative conflicts would require relevant country expertise in these laws and a deep analysis of how they impact on domestic competition issues. An international study of such magnitude would require considerable resources. However, a study of the conflicts that could potentially arise in the AML/CTF and competition legislation within Australia is feasible and provides valuable international insights for the reasons set out below.

We consider that Australia provides an appropriate pilot for such a country-level case study since: Australia is an important member of the global community. The Australian Government's Department of Foreign Affairs and Trade (DFAT) found that 'Australia's prosperity is more connected than ever to development in the global economy. Our trade with the world is equivalent to 42% of our GDP – a number that has not dropped below 25% since 1900' (DFAT, n.d.). The amount of foreign investment in Australia is at a record high

of AUD $2.8 trillion, while Australia's investments around the world total AUD $2.0 trillion (2014). Australia has the world's 5th highest GDP per capita and it has the 12th largest economy. To sustain this performance requires strong international engagement" (DFAT, n.d.). Consequently, Australia's future is probably more dependent than most countries upon the international regulation of money laundering. Anti-Money Laundering and Competition Legislation assume importance in the context of 'economic diplomacy' that Australia pursues. While general diplomacy is about peace, economic diplomacy is about prosperity. A strong and robust financial system is obviously the sine-qua-non. The Anti-Money Laundering and Competition legislations, therefore, assume a central place in this overall policy framework.

For these reasons, we focus in this report on the AML/KYC, competition and privacy laws and policies as they currently apply and operate within Australia. Many Australian businesses operate internationally across multiple jurisdictions (for example, financial services) and will, for this reason, be confronted with issues concerning the application and impact of multiple legislative regimes on their enterprises. The international experience of some respondents in this study who have such an exposure is evident in their responses below (bolded) to specific research questions.

We begin with the salient features of the competition and AML/CTF legislation in Australia.

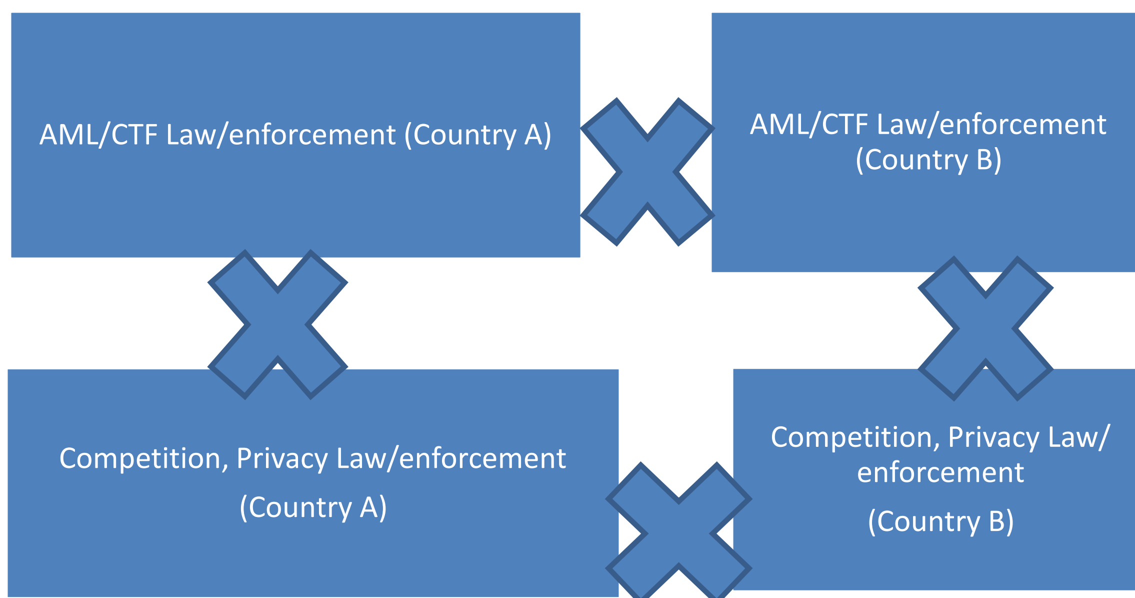

Fig. 1: Areas (indicated by x sign indicates) where possible conflicts in legislations could arise

2. Competition Law and Policy, AML/CTF legislation and Privacy Law in Australia

The Competition Policy Review (Harper Review) Issues Paper (CoA, 2014, p.8) defines competition as ‘a process by which rival businesses strive to maximise their profits by developing and offering goods and services to consumers on most favourable terms’. The purpose of competition regulation policy is to ‘protect, enhance and extend competition’ (CoA, 2014, p.9). A sound competition policy is expected to produce outcomes that include competitive prices and better consumer choices, which leads to a better standard of living. It involves the ‘identification and removal of unwarranted barriers and impediments to competition’. In Australia, the *Competition and Consumer Act 2010* (Cth) (austlii, n.d.) contains the core elements of competition regulation. It is complemented by sector-specific statutes regarding the regulation of particular industries (for example, banking, insurance, telecommunication, and pharmaceuticals). Competition policy is given effect on a distributed basis founded on co-regulation (that is, strong industry involvement in policymaking and implementation through industry codes) and a range of regulatory bodies that include the Australian Competition & Consumer Commission (ACCC), the National Competition Council and Australian Prudential Regulation Authority (APRA).

Innovation in Australia is fostered through a diffuse framework centred on strong intellectual property laws (progressively being extended through free trade mechanisms such as the proposed TRIPS and TPPAs). Innovation is also based on the expectation that the removal of regulatory constraints will encourage investment by businesses in a truly competitive market. The removal of such constraints has been identified as particularly important by the large-scale Financial Services Inquiry (known as the Murray Inquiry - 2015). However, it has the potential to conflict with: the demands for strengthening the robustness of the financial system post-Global Financial Crisis; the interests of dominant actors (for example, regulatory capture by incumbent banks and financial network providers that use compliance requirements to exclude market entrants); national intelligence/law enforcement agency expectations regarding easier access to data about financial services customers; and consumer pressure for fundamentally greater privacy protection (which is being increasingly shaped by benchmarking against EU mechanisms such as the Article 29 Working Party).

Australia’s AML and KYC regulatory requirements are found in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act) and the *Anti-Money*

Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No.1) which establish a risk-based regulatory framework requiring businesses that provide 'designated services' to identify their customers and conduct customer due diligence examinations of their customers' financial activities (commonly referred to as Know Your Customer or KYC). Such businesses are obliged to: implement AML/CTF programs that identify, mitigate and manage the level of money laundering and terrorism financing (ML/TF) risk impacting their business operations; and report to the Australian Transaction Reports and Analysis Centre (AUSTRAC) activities posing, or potentially posing, an ML/TF risk. Failure to report suspicious matters and those transactions satisfying particular criteria (transactions exceeding a particular threshold and international funds transfer instructions) is subject to criminal and civil penalties under the AML/CTF Act. As Sharman (2011, p.158) comments, the KYC obligations are 'not only one of the most important elements of the AML regime but [they are] also one of the most expensive from [the] private firms' point of view'.

Although the AML/CTF Act regime is not specifically directed towards competition, the AUSTRAC CEO is required to have regard to competition, competitive neutrality and economic efficiency (paragraphs 212(3)(d), (e) and (f) of the AML/CTF Act).

In this regard, the AML/KYC regime takes account of competition in the financial sector and seeks to address competition 'inhibitors' that can be directly or indirectly attributed to that regulatory regime. Under section 248 of the AML/CTF Act, for example, the AUSTRAC may exempt a reporting entity (or class of reporting entities) from one or more provisions of the Act. From the government's perspective, the exemption process is targeted at reducing the regulatory burden faced by an entity by providing it with a 'level playing field'. That a reporting entity must apply for an exemption, indicates that the AML/CTF Act requirements which would otherwise apply, inhibit (or at least affect) the competitiveness of the entity and the sector within which it operates.

The above analysis is supported by the survey of all businesses with reporting obligations under the Act by Walters et al. (2012). It found that many of the participants viewed 'the regulatory regime as being too onerous for the perceived level of risk that they faced'. Several submissions in 2014 to the proposed AUSTRAC Industry Contribution (levy) raised concerns about the levy (specifically) and AML/KYC requirements (more generally). They

also commented on the reduction of competition across the finance sector as a result of the perceived non-discriminatory nature of the levy and other AML/KYC obligations.

3. Literature Review

A recent international study by Thomson Reuters Accelus (2014) claimed that KYC and AML requirements have become too onerous for clients as well as for financial institutions. It noted that KYC is not a competitive advantage and bankers are looking for ways to enhance the KYC/AML paradigm so that they can focus on relationship managers and front office staff. Furthermore, as Zabey (2013), citing international practices, noted, the post-GFC focus on investor protection and the suitability regulation which requires KYC data to be linked to portfolio management has considerably increased costs.

In the Malaysian context, Rahman (2008) states that the benefits of AMLATF may not be appreciated by individual financial institutions since the benefits occur mostly at the national level in terms of creating a transparent, fair and equitable financial system which is conducive to increased competition and law abidance. In areas such as private banking where competition is fierce, a strong compliance culture is a must to avoid any possible breach of compliance requirements under AMLATF. Conflicts in competition law and AMLATF can also arise in the sphere of tax competition between, say, off-shore financial centres. Such activities 'could distort competition and can have harmful effects on the operation of fiscal regime' (OECD, 1998, p. 19).

In Australia, a review of competition law (Harper Review) was completed in March 2015, the Statutory Review of the AML/CTF Act 2006 (AGD, 2013) is expected to report shortly, and work on streamlining the financial sector and enhancing access to infrastructure is progressing as part of the National Competition Policy reforms. Those developments mesh poorly with consumer demands (Rochet & Tirole, 1996), benchmarked against EU policy and law, for substantially greater data protection.

Prima facie, from above studies one might assume that the conflict/compatibility of the two sets of legislative regimes is not an issue in the Australian context. We know, however, that several countries have raised the issue of non-compatibility of 'customer intelligence', data

protection, competitiveness and financial system robustness frameworks (Cordella & Yeyati, 2002).

Against this background, the present study seeks to develop our understanding of whether, in the Australian context, regulation aimed at encouraging competition and innovation conflicts with the requirements of AML-related legislation. We also note that the Final Report of the Harper Review (CoA, 2015) and the issues paper for the AML/CTF Act Review, discussed above, do not consider the compatibility of these legislative schemes, and nor does the Murray Inquiry (2014) of Australia's Financial System.

In our view, an understanding of these issues is significant given the integration of the Australian financial system with partners through mechanisms such as the Australia-United States Free Trade Agreement (AUSFTA), Korea-Australia Free Trade Agreement (KAFTA) and the TPPA. Accordingly the issue, though important, remains unexplored. The issue of non-compatibility in the frameworks has not been examined so far in the Australian context. Thus, we intend to fill a major research gap in the literature which is highly likely to provide impetus to similar studies in other countries, for example New Zealand, Canada and Singapore.

The theory that underpins our research is 'responsive regulation' and 'regulatory governance'. According to responsive regulation, governments need to be responsive to their regulated entities in determining whether, and the extent to which they intervene in those entities' activities. Illustrated by the use of the enforcement pyramid, responsive regulation applies a hierarchical range of sanctions and enforcement techniques to achieve the desired regulatory behaviour (Ayers & Braithwaite, 1992; Braithwaite, 2006; Mascini, 2013).

Responsive governance (also known as 'new governance' theory) further develops responsive regulation by proposing that regulators also need to consider factors that influence the regulated entity and the regulator, including: (1) the firms' own operating and cognitive frameworks (their 'attitudinal settings'); (2) the broader institutional environment of the regulatory regime; (3) the different logics of regulatory tools and strategies; (4) the regime's own performance; and (5) changes to any of these elements (Baldwin & Black, 2008; Black & Baldwin, 2010). As a result, responsive governance is viewed as more comprehensive than responsive regulation.

According to Baldwin & Black (2008, p.59), 'an important test of a regulatory theory is whether it offers assistance in addressing the challenges that regulators face in practice'. Thus, responsive governance emphasises the use of different tools and techniques depending on the situation, rather than using a single enforcement strategy for all situations. Responsive governance also stresses the importance of continually assessing and evaluating a regulation system in terms of how the system applies to regulated entities, and the overall environment affecting regulators and the regulated (Dorbeck-Jung, et al., 2010; Black, 2011). Thus, regulators need to be cognizant of the need to continually modify their practices to improve a regulatory regime.

Unlike other regulatory models, responsive governance 'provides a systematic basis for developing optimal responses to the various tasks involved in regulating and for continually assessing the efficacy of the overall regime' (Black, 2008, p.93-94).

Previous studies have applied responsive regulation in the context of Australian corporate law (Welsh, 2009; Braithwaite, 2006; Comino, 2009), the Canadian finance and securities sector (Lokanan, 2015), and the transnational regulation of media, environment and employees' rights (Ayers & Braithwaite, 1992; Braithwaite, 2006; Edwards & Wolfe, 2005; Mascini, 2013; Abbott and Snidal, 2013). On the other hand, responsive governance has been used to examine the UK's environmental and fishing regulatory regime and the 2007-09 financial crisis (Baldwin & Black, 2008; Black, 2012).

Our study considers responsive regulation, and responsive governance in particular, to be most appropriate because these theories provide a regulatory agency with a range of adaptive enforcement and compliance tools that can be adapted to meet the agency's circumstances. Responsive regulation and responsive governance also take account of the regulated entities' operating environment and the overall regulatory regime to determine how best to achieve the desired regulatory outcome. We also consider them to be useful in terms of assessing how two regulatory regimes (with multiple responsible agencies) can harmoniously co-exist or be modified to so exist. It needs to be clarified though that the purpose of the present study is not to assess the performance of the regulatory agencies implementing the KYC/AML/CTF or the competition/innovation and privacy law frameworks using responsive regulation or responsive governance. Our concern is with examining the perceptions of the reporting

entities and other stakeholders, such as law firms, to the ground-level impact of these legislative frameworks and whether they encounter any conflicting requirements in implementing them in practice frameworks.

Following from the aim of the study and the responsive regulation and responsive governance frameworks, we asked prospective respondents the questions (RQ) set out below:

RQ (1) What are the challenges faced by Australian businesses in complying with KYC, AML and privacy legislative frameworks? RQ (2) What do Australian businesses consider to be the areas of non-compatibility between the frameworks vis-à-vis competition and innovation? RQ (3) Are there differences in the non-compatibility issues in the frameworks by business type /characteristics? RQ (4) What do Australian businesses envisage to be the impact of non-compatibility of these frameworks on their businesses? RQ (5) What policy-level and industry association-level interventions/initiatives are necessary to eliminate or reduce to a minimum the areas of non-compatibility in these frameworks?

Each of the RQs contained several sub-questions while during the focus group discussion (FGD), participants were apprised of responses received from the survey and their views sought on the five broad questions set out above.

4. Data, Method and Sample

It was considered that those who had made submissions to the Statutory Review of the AML/CTF Act (2013) as well as the 2014 Harper Review on competition law (both commissioned by the Australian government), would be more interested in contributing to the study. A list of such contributors was prepared and these 424 prospective respondents were emailed the questionnaire along with the participant information form and consent letter over the course of June and July of 2015.

A total of 26 respondents (about six percent) provided a total of 51 usable responses. The response rate was better than similar AML surveys. In the KPMG Global Anti-Money Laundering Survey 2014, for example, the online survey instrument was distributed to AML and compliance professionals in the top 1,000 global banks (the precise number of

compliance officers contacted for the survey is not indicated by KPMG, but our computation shows that the response rate in that study was less than one percent[i]).

One of the major issues faced by respondents in our survey was that they had expertise in one legislative area, for example, the AML/CTF Act but not in competition-related legislation (or vice versa). Another issue was the sensitivity of the issues involved. Some participants in the AML area (for example, AML compliance officers in financial institutions or legal advisers in law firms) felt that they were not really competent to respond on legal or compliance issues involved. Given these limitations, the response received by us to our survey can certainly be considered to be adequate.

Despite these limitations, the responses received provide considerable depth of insight in the subject matter. Furthermore, we backed up the survey by holding a focus group discussion of experts who were board members of the Law Council of Australia with expertise in relevant legislations.

These provided the required rich text data on which to base our conclusion. In addition to this primary data, we analysed relevant data available from various recent reports such as the Murray Inquiry (2014), Harper Review on Competition Law (2014) and the Statutory Review of the AML/CTF Act (2013), as well as studies conducted by academic researchers and consulting firms such as KPMG's global AML survey (2014).

Data Analysis

The rich text data was analysed using qualitative data analysis procedures suggested by Miles and Huberman (1994). The rich text was read and re-read to understand the key issues on which response has been submitted. Coding and categorisation of the rich text data was completed and the major themes emerging from the data analysis were compared with the five research questions of the study. We provide below the responses received and arranged in the order of the research questions.

4.1 Challenges faced by Australian businesses in complying with KYC, AML and Privacy legislative frameworks

Key Findings

The general view that emerged from the survey of respondents and FGD to RQ (1) was that Australian businesses do face several challenges from the KYC, AML and privacy legislative regimes. The main themes that could be discerned were:

- the high cost of regulatory compliance;
- the adverse impact on the economic efficiency of the business;
- operational difficulties in complying; and
- inconsistencies in the application of regulation.

Some of the key comments of experts participating in the FGD were: (a) while AML legislation is meant to be risk-based, the minimum information requirement itself is quite high; (b) when entities are over-regulated it will certainly impact their economic efficiency and ability to grow; (c) AML is in theory principle-based but in practice it is highly rule-based; and (d) the regulatory burden is unevenly spread, with ordinary bookmakers and large banks facing the same AML requirements.

We have grouped below the responses in accordance with the above themes:

Regulatory burden

Respondents identified regulatory burden as a major issue. While the respondents did not estimate the compliance costs of KYC, AML or Privacy requirements, a recent Ernst and Young study (on behalf of the Murray Inquiry (2014)) found that the estimated cost burden of KYC alone was 'between $647 million and $1 billion to implement, with ongoing annual costs of between $299 million and $435 million' (Murray Inquiry, 2014, p.259)[ii].

A study by the Australian Bankers Association (ABA), cited in the Murray Inquiry (2014), found that 'of [the] eight major streams of regulatory reform since 2005[iii], industry project expenditure has been highest in relation to the Anti-Money Laundering and Counter-Terrorism Financing Act 2006, which includes Know Your Client (KYC) identification rules.' Furthermore, the ABA states that 'Anti-money laundering (AML) projects have resulted in an estimated $725 million in expenditure (more than three times as much as the next highest expenditure) related to the United States' Foreign Account Tax Compliance Act

(FATCA), highlighting the KYC regulatory burden and potential to reduce costs by improving identity processes.'

Another study estimated that the cost of AML/CTF 'regime to the banks in Australia would be in the order of about A$1.02 billion at 2007 prices which translates to about A$50 per person' (Sathye, 2008, p.361). Ernst and Young (2014, p. 2) was of the view that government needs to 'improve medium-term outcomes of regulatory intervention through incremental changes in how it designs and implements additional measures and how it monitors the impact (including unintended effects) of regulation that has been implemented.'

As one of the respondents explained:

> 'I am certainly concerned about growth in compliance costs (which I have limited capacity to absorb). Equally, government should be discouraged from outsourcing its enforcement and investigative functions (and related costs) to business in the name of "compliance".'

Another respondent suggested that the real compliance cost burden would be clearer if government were to:

> 'Roll AML into other compliance - generally compliance never delivers a cost saving or financial benefit. Business treats it as a burden.'

An academic respondent however, preferred to emphasise the uneven spread of the burden of compliance costs in practice:

> 'Aside from the fact that banks are better able to pass the regulatory costs on to their customers, and thus the net cost of AML regulation to banks may be quite small, general studies of regulation show that it is a proportionately greater cost on small firms than large ones. At least in Australia, banks are de facto immune from sanctions and have essentially captured the regulator. Remittance agents are a good example of small firms being disproportionately affected. If new legislation in Australia did expand coverage to real estate agents etc. the same problem would apply.'

Other respondents considered that the burden of compliance costs might be passed on to consumers or otherwise absorbed. For example:

'There is a general recognition that compliance costs are increasing and that this will generally be passed on to consumers in some form, whether through cost or availability of products.'

The Finance Brokers Association's response was in the following terms:

'We are a peak body of finance brokers. All processes of identification are done electronically so there is no burden as such and it is cost effective and fast. We have no issues in complying with AML/CTF.'

In sum, the regulatory burden of the AML/CTF regime continues to be a contentious issue and was considered by most respondents to be the main challenge faced by businesses in Australia. As one of the FGD experts stated:

'If you don't know what you are doing, then you think you are doing a very good job!"

Economic efficiency

Another theme that came to the fore was the impact of AML/CTF on economic efficiency. As one respondent stated:

'AML-CTF is like any one of a raft of other 'ground rules' that can affect economic efficiency.'

Economic efficiency of organisations is impacted by regulatory burdens such as AML/CTF. This may be particularly significant in considering the impact of compliance on the economic efficiency of Australian firms in an international context. As Nakagawa (2011, p.336) explains, regulatory discrepancies and differences between countries have been considered to be a factor impeding liberalisation as well as impairing fairness in competitive conditions.

The Australian Bureau of Statistics' (ABS, 2015) survey *Selected Characteristics of Australian Businesses 2013-14*, released in August 2015, found that:

'The most frequently reported barrier by the finance and insurance industry to general business activities and performance was "government regulation and compliance". Of the respondents, 41% identified this as a barrier, which was more frequent than any other barrier cited by any other industry' (ABS, 2015, Table H25). Importantly, in the finance and insurance industry the percentage of respondents that consider regulation

> and compliance as a barrier significantly went up from 27% (2011-12) to 41% (2013-14).'

Interestingly however, in the Global Competitiveness Report 2013-14 published by the World Economic Forum, Australia ranks 128th out of 148 countries for its excessive "burden of government regulation" (ABA, 2014, p.63). This report states, 'the quality of Australia's public institutions is excellent except when it comes to the burden of government regulation, where the country ranks a poor 128th. Indeed, the business community cites labour regulations and bureaucratic red tape as being, respectively, the first and second most problematic factor for doing business in their country.'

Ernst and Young (2014, p. 33) found that 'the changes are driven by the need to comply with international regulatory standards. Although participants agreed that AML legislation is essential, they highlighted the need for early consultation saying that: "… earlier consultation on coverage and structure would have produced more efficient regulation".'

Operational difficulties

The Australian Privacy Foundation (APF) was of the following opinion:

> 'APF considers that there would appear to be difficulties for Reporting Entities in complying with KYC requirements where customers may legitimately use different forms of name, address and other contact details for different relationships, including different relationships with the same legal entities e.g. separate accounts perhaps dating from different time periods. KYC requirements, like related identification requirements under tax, superannuation and other laws, assume that individuals have a single 'persona' with a unique 'label' – for many individuals this is simply not true, and difficulties inevitably arise from attempts to apply the false assumption.'

A law firm responded that regulatory burden leads to reporting entities finding ways to minimise the cost. The four major banks in Australia, for example, have formed a common identity verification agency to undertake KYC activities. As the respondent stated:

> 'AML compliance has spawned an entire new industry sector. The findings of the KPMG Survey 2014 confirm that the reporting community is compelled to turn to commercial search solutions to meet compliance requirements:

- Know Your Client requirements are reportedly the second costliest area of AML investment for the regulated community (after transaction monitoring systems); and
- 70 per cent of respondents use commercial lists.

Compliance costs are even more pronounced for cross border businesses. The KPMG Survey 2014 opined this is because '*opinions on regulatory approach are marked by vast regional differences* [that] *further emphasise the challenge…in establishing a globally consistent approach*.'

It is difficult to imagine how organisations might leverage KYC costs. Some organisations are finding ways to at least share the load - for example, the big four banks have created the Australian Financial Crimes Exchanges Limited as a way of saving on costs by sharing information.'

Referring to the study of scholars (Halliday et al., 2014), from University of Chicago's Centre on Law and Globalisation, one of the respondents re-stated the findings of that study as follows:

> **'…Major international banks in the UK, US and Europe have admitted to massive violations of money laundering controls over long periods, indicating that highly developed anti-money laundering systems have not worked well …**
> [However,] no credible scientific evidence has yet been presented that there is a direct relationship between installation of effective AML/CFT regimes and the IMF mandate **to produce domestic and international financial stability** …Neither is there convincing evidence…that proceeds of crime are reduced or crime itself is better controlled with anti-money laundering measures...'

One of the FGD experts stated:

> 'Many SMEs [small-medium enterprises] (for example, remittance providers) simply don't know what their obligations are under the AML legislation… even large organisations find compliance difficult [in terms of] what to talk [about to] small organisations.'

Inconsistency in legislative regimes

The APF also brought to notice the inconsistencies between the AML/CTF and privacy legislative regimes.

> 'APF considers that AML/CTF legislation is fundamentally inconsistent with the general foundation principles of privacy law in that the level of privacy intrusion into the financial affairs of all Australians required by the AML/CTF law is disproportionate to the objectives of the law. Those objectives purport to be about countering major and organised crime, including terrorism, and yet many elements of the surveillance and reporting regime extends to all individuals without any threshold of suspicion. It is also clear that there has been 'function creep' over the years to allow information collected under the AML/CTF regime to be used for a much wider range of law enforcement and revenue protection functions.'

The FGD experts stated that while AUSTRAC says privacy will be protected, the moment you mention 'terrorism' privacy goes out of the window.

In conclusion, it can be said that the general opinion of respondents was that KYC, AML and privacy legislative frameworks, as well as other regulations and enforceable obligations, are a real issue affecting businesses in Australia. It also impacts the economic efficiency of businesses. **However, it appears that given that these are international standards being implemented in Australia, businesses have accepted it.** Their concern is how to keep compliance costs under check and, consequently, they have repeatedly advocated for government reforms to focus on **making changes that are absolutely essential in the Australian context, rather than ensuring a tick-the-box harmonisation with international standards.**

4.2 Areas of non-compatibility between the AML/CTF framework vis-à-vis competition and innovation legislation

Key Findings:

The general view expressed was that as a matter of law the relevant pieces of legislation were compatible. It may be that there is a degree of fundamental conflict between KYC/AML legislation and privacy laws. However, the predominant view of respondents would seem to

accept that privacy issues will generally be subjugated in situations where there is cogent evidence of serious fraud or threats of terrorism.

Internationally, however, businesses in countries that strictly enforce the law may find it hard to compete with businesses where regulatory and enforcement authorities are less 'compliance orientated' and look the other way. Many countries passed legislation relating to AML, mainly to comply with FATF's requirements, knowing that implementation of any legislative provisions is ultimately out of their hands. The more particular responses to the email survey are set out below:

Respondents generally did not consider that there was any non-compatibility or conflict between the KYC, AML and privacy legislative frameworks and competition laws.
As one academic stated:

> 'There is no conflict between these two sets of legislation. The regulatory burden imposed by the frameworks can impact [on] competition but not [on] competition law. Furthermore, [the] high switching cost may also impact competition but again not [on] competition law.'

However, one of the leading law firms with global operations disagreed with the above views:

> 'There is conflict… it "doesn't go away", it could be minimised by making regulators talk to each other [and use of] consistent terminology would be good … but it keeps lawyers employed…'

Another respondent who is a well-regarded authority on competition law stated:

> 'Different jurisdictions may have different levels of enforcement affecting competition. Conflict could arise where competition law prohibits agreements between competitors that lessen competition and it sometimes catches cooperative arrangements within industry that may be intended for good purposes. Competition is a safeguard against corruption.'

Another legal practitioner stated:

> 'There is a minimum efficient scale in dealing with AUSTRAC's requirements but it certainly isn't at a level that itself drives industry concentration and it therefore doesn't

itself preclude workable competition. There is a competitive market for the provision of services between financial service providers with their own ability to comply directly with AML-CTF or to appoint agents to administer the 'face-to-face' part of the requirements via agency arrangements. There may be cost differences but they are not major so I doubt there is an NCP [National Competition Policy] dimension.'

The APF, however, had a different take on the issue. It stated:

> 'There is a very specific, and serious conflict between AML/CTF legislation and privacy law in relation to 'suspicious matter' reporting. Two major conflicts are involved: The criteria for reporting 'suspicious matters' are essentially subjective and involve junior staff making highly subjective judgements about customers largely without adequate expertise/training. This results in records of personal information being created and reported to AUSTRAC which in many cases will be of dubious quality, and yet which may have significant adverse consequences for the individuals concerned when accessed by one of AUSTRAC's 'partner' agencies. Individuals who are the subject of a 'suspicious matter' report normally have rights under privacy and FOI[iv] laws to be able to access and challenge personal information about them held by Commonwealth agencies [but are] expressly denied by an exemption to the FOI Act for these reports (furthermore it is an offence for a Reporting Entity to disclose to an individual that they are the subject of a 'suspicious matter' report (SMR).
>
> Information gathered under s41 of the AML/CTF Act (or which relates to s41 information and is gathered under s49 of the Act) cannot be used as evidence in court proceedings under s124 of the Act because it is 'intelligence' and therefore captured by the hearsay rule of evidence. It is true to say that banks etc. cannot tell the person who is the subject of the SMR that an SMR has been made about them due to s123 of the AML/CTF Act (tipping off offence).'

However, these conflicts are unlikely to breach privacy laws.

> 'APF accepts that these conflicts do not involve a breach of privacy laws but that is only because of the operation of specific exemptions. However, there is no doubt that the AML/CTF legislation necessarily involves actions which are inimical to the spirit of the *Privacy Act.* APF considers that significant changes to the AML/CTF legislation are required to allow greater consistency with privacy law. Our detailed

> arguments are set out in our submission to the current Review of the AML/CTF legislation (APF, 2014).'

In conclusion, it can be said that respondents expressed different opinions about the issue. While some consider there isn't any conflict or non-compatibility between KYC, AML and privacy and competition laws in Australia, the APF strongly sees a conflict between AML/CTF and privacy laws but did not comment on the competition law aspects. Some respondents are of the view that the enforcement standards may vary by country, which may have impact on the global competitive environment, but as far as the law per se is concerned, there is no conflict or non-compatibility between these two sets of laws. The banking industry association may like to take up these issues with the Australian government so that the areas of possible conflict between the two legislations are rectified.

4.3 Differences in the non-compatibility issues in the frameworks by business type/characteristics

Key Findings:

A general view was that the incidence of impact of AML legislation on small business was likely to be disproportionate compared to large business. Furthermore, most businesses such as gaming and wagering were subject to heavy regulation already. From the law firm's perspective, there will always be some tension between the lawyer's duty to their client and their obligations under AML. The latter might conceivably override the former in some situations.

Our analysis of responses does not point to any particular issue of non-compatibility or conflict between the KYC, AML and privacy legislative frameworks, and the competition law by business type. The legislative responses show that it is not an issue for the banking, wagering or insurance industries.

Some responses tending to support these conclusions were the following:

The CEO of the Australian Wagering Council stated:

> 'The survey questionnaire was sent to all members to directly respond to you. As none have responded it doesn't appear to be a particular issue bothering the wagering industry.'

In some organisations, while a particular product or service attracted AML/CTF and KYC obligations, other services or products did not attract them. Such 'inconsistencies' could be confusing to the organisation (in applying the relevant requirements) and to its customers (in providing information in fulfilment of those requirements).

The following responses are representative:

- 'Despite our salary packaging services being specifically exempted from being designated services (and therefore falling outside the AML/CTF regime), one particular aspect of those services (the supply of debit cards by our nominated financial institution) fell within the KYC obligations.'
- 'The issues your study are dealing with are important and real in the Australian environment. **I am sceptical of the scope for reform, however, given the need for Australia's AML/CTF regime to conform to international standards.'**
- 'They are not in conflict. They are just a regulatory burden. However, in some cultures, **privacy does conflict, for example [in the] Chinese culture relating to individuals higher in the social structure.** These people may not be willing to discuss their AML information.'
- 'Data storage [is] expensive…getting information for each regime to talk to the other….each regulatory regime extracts information differently, sometimes the process of extracting the information causes the information to be modified…..Their team has developed/prepared a 'computer system questionnaire', 'a tool used to deal with problems'.

In conclusion, it can be said that the issues are business-specific. While some businesses do find incompatibility between the different legislative regimes, others do not consider it to be a major issue.

4.4 The impact of non-compatibility of the frameworks on Australian businesses

Key Findings:

During the FGD the general view was:

> Within Australia there is no incompatibility between these legislative frameworks but that can't be said if you go outside of Australia. The AML regime in **Australia does differ from say the US where overzealous regulators forced remittance providers to convert as banks.**

- The legislation may, however, have a different impact on innovation depending on the rigour with which these are enforced.

Given the responses above, non-compatibility doesn't appear to be a major issue although there are a number of anomalies as pointed out by the APF.

- The AML/CTF regime in Australia contains requirements not specifically envisaged by the FATF, however, the unwillingness of AUSTRAC to permit any adjustment meant that clients were lost.
- Some respondents felt that privacy requirements need to be separated from those for KYC because it envelopes a number of different regulatory regimes, and how it is dealt with depends on information flows. AML – needs to be reported to AUSTRAC. Firms try to streamline requirements for APP/NPP[v] [Privacy] and those related to consumer finance.
- However, some respondents felt that there was a conflict in these legislative requirements especially when it comes to issues such as:
    - a. **Offshore data storage**
    - b. Data breaches, sensitive information
    - c. Large data breaches... **e.g. Sony data breach of credit card information**, 'does not come up for a couple months after the data breach has occurred…. also, credit information.'

Furthermore, **different regulatory requirements in UK and Canada, vis-à-vis Australia, creates an in-built issue for competitive neutrality, for example, while the UK/Canada AML regimes regulate real estate (agents) and lawyers, it is not the case in Australia.**

A strict implementation of AML/CTF in Australia, respondents stated, was counter-productive for innovation. Particularly those that are engaged in the innovative technology space. Not only the Australian, but also the US requirements, impact on Australian business **such as the USFATCA for example.**

Overall, the areas of conflict highlighted can be resolved by discussion and the banking industry association may like to take these up at the appropriate level with the Australian government.

Again, the issue of scale of business matters here. Small credit providers appear to be affected more by AML/CTF requirements as banks found such providers to be at risk from the perspective of terrorism financing. Some of them even had their accounts closed due to concerns by banks about **terrorist funding/AML regulation in US which impacts on Australian banking, for example, Google, Westpac.'**

A respondent raised the issue of safe harbor provisions to banks in the following terms:

> '… issue of customer due diligence and 3rd parties (unable to rely on KYC procedures undertaken by another bank), no safe harbour to banks who carry out AML/KYC (i.e. one **bank does this on behalf of another bank) ...ultimately no exemption from business liability if found in breach of US laws – penalties severe**, therefore business decision. Furthermore, there is little scope for innovations in payment systems as one of the respondents stated: '[we] also deal with payment systems; crowd funding; contract; finance technology space; new emerging technologies and businesses ... [we] undertake conflict processes – but this depends on the client and where they are based.'

In conclusion, non-compatibility did not seem to be a major issue impacting businesses in the Australian context. However, the differences in regulation in various countries by itself could create issues for competition **and be viewed as an impediment to transnational economic activities** (Nakagawa, 2011).

4.5 Minimising the areas of non-compatibility in the legislative frameworks

Key Findings:

In general:

- There could be a regulatory arbitrage involved if different jurisdictions have different implementation standards, though in the letter of the law these legislations may appear similar and in accordance with FATF guidelines.
- Industry associations need to ensure that the policy-makers of different authorities implementing the legislation concerning AML, privacy, innovations and competition, talk to each other regularly to identify areas where duplication of effort can be reduced.

We received a number of suggestions on how the regulatory authorities could assist businesses.

Some typical responses that we received were:

- AML is structured in a principles-based approach and this doesn't work well for those cultures that are used to 'black letter' regulation. AUSTRAC needs to develop a program template.
- AUSTRAC requirements are occasionally rigid and do not necessarily accommodate newer solutions or products.

The incidence of HSBC allowing a transaction that flouted the relevant legislation in the US and then paying the penalty, which could have been lower than the gain they made on the deal, was echoed by some of the respondents. The culture of focussing on business opportunities can lead to a culture of non-compliance.

Ethical financial institutions generally do not want to be associated with those engaged in illegal conduct so there is a mutuality of interest in ensuring that does not occur.
Some of the other responses were:

- 'There is a general recognition that compliance costs are increasing and that this will generally be passed on to consumers in some form, whether through cost or availability of products. Businesses do of course seek to take advantage from the additional information they have about customers and the greater need to have a single customer view.'
- Regulatory burden does acts as a barrier to entry and increases the cost of compliance.'

- Regulatory authorities need to reduce the compliance cost burden that impedes competition and make it easy for business to comply otherwise clients go to other countries.'

In conclusion, while reporting entities are doing their best to conform to the regulatory requirements, the general feeling was that the regulatory authorities may facilitate implementation by providing a template and regular feedback/guidance. Small businesses carry a disproportionately high burden compared to large businesses, making it harder for them to compete in the market place. Rising compliance cost was a big issue highlighted by respondents.

5. International dimension of this research

Internationally, there have been few studies that have examined possible conflicts and tensions between generic AML/CTF and competition regimes. In this section, we review the main studies and reports that have been published in some selected countries. The review is based on secondary data and is used here chiefly to highlight some more important areas of obvious interest raised by the findings of our Australia study. However, we consider it would be worthwhile to replicate our Australian empirical study in these countries to obtain better insights into the state of play there. The approach would need to be on a country-by-country basis concentrating on a selection of developed and developing/emerging countries.

To provide some idea of the ways in which our Australian study might provide insights into universal global problems in this area, we review the situation in three further jurisdictions below. Team members are familiar with these jurisdictions and have published in the past, research papers with academics from China and Malaysia on competition law and AML/CTF law. However, the question of possible conflict between these legislations was not the specific subject matter of those studies.

China

As already mentioned above, the US China Business Council Report (2014) states that China's more aggressive political and competitive positioning in the world has also become more pronounced recently and this too will be a relevant factor in considering the issues raised in this area. As factors other than competition can influence competition assessment in

China, the Anti-Money Laundering laws may assist both the Chinese and foreign governments in regularising their assessment of the state of competition.

It may be possible, for example, to judge business processes as posing increased ML/TF risk and thus effectively limit company's intellectual property rights. The report brings out how discrimination in enforcement could hamper competition. Such discrimination is also possible in the area of AML/CTF enforcement creating a conflict in competition between domestic and foreign firms whether these are financial institutions or otherwise. Our study demonstrates that such differentiation in foreign and domestic firms is not apparent, at least in Australia, and a fair treatment of companies under competition as well as AML/CTF laws is available.

Europe

Casu & Girardone (2009) in the context of European banking (France, Germany, UK, Spain and Italy) found that, due to progressive concentration, these countries have witnessed a lessening of competition over time. There are also significant differences between these countries in the developmental stages they have now reached. Current literature also finds monopolistic competition to be the prevalent market structure in European countries (Molyneux et al., 1994; de Bandt &Davis, 2000; Bikker & Haaf, 2002; Claessens & Laeven, 2004; Casu &Girardone, 2006).

Relevant to these findings, our study shows that larger financial institutions can use a separate agency to manage their KYC requirements, thereby reducing their costs significantly compared with smaller institutions. In so doing, these larger financial institutions can reap a competitive advantage and position themselves as monopolies.

Ruck (2015) states that banks in the UK are very cautious about providing banking facilities through technology companies. "A particular worry they have is whether they can rely on the checks the fintech companies carry out on their users." (Ruck, 2015, p.1). Consequently, innovation companies offering crowd-funding platforms can face difficulties from banks. However, such attitudes might be addressed in competition laws, which may treat this behaviour as anti-competitive. The position is different in Europe where third-party AML/KYC customer due diligence is acceptable because the liability for such 'outsourcing' remains with the bank.

In Australia too, AML/KYC customer due diligence is undertaken by a company specifically established by the major banks (Commonwealth Bank of Australia, Westpac Banking Corporation, Australia and New Zealand Banking Group, and the National Australia Bank), and is acceptable under AML/CTF legislation. The Fourth EU Directive on AML/CTF, which member countries must enact by 2017, has features similar to AMLCTF in Australia (Deloitte, 2015).

Malaysia

The legislation that governs anti-money laundering activities in Malaysia is the AMLATF. Competition issues are within the purview of the *Malaysian Competition Act 2010*. Conflict in competition law and AMLATF can arise in the sphere of tax competition between, for example, offshore financial centres. Such activities could distort competition and can have harmful effects on the operation of fiscal regime (OECD, 1998, p.19). Similarly, the study of AML/CTF implementation in Malaysia found that 'most conventional bank officers considered their organisations' compliance culture to be high or very high, while this was not found to be the case in Islamic banks' (Pok et al., 2014, p.394).

6. Conclusion

As required by the granting agency (the SWIFT Institute), this exploratory study examined whether there is any conflict between legislations aimed at encouraging competition and innovation and the Know Your Customer and other requirements under the AML/CTF Act. We emailed a survey questionnaire to over 400 respondents and held focus group discussions with experts.

We found that Australian businesses do face several challenges from the AML/KYC and privacy legislative regimes. They include: the high cost of regulatory compliance; the adverse impact on the economic efficiency of the business; operational difficulties in complying; and inconsistencies in the application of regulation. Though the AML legislation is meant to be risk-based, the minimum information required to satisfy the KYC requirements is quite high and significantly raises the cost of compliance as entities consider themselves to be over-regulated, thus adversely affecting their economic efficiency and ability to grow. Furthermore, though AML is in theory principle-based, in practice it is highly rule-based; and finally, the regulatory burden is unevenly spread, with small independent remittance agents

and large banks facing the same AML requirements. Banking industry associations need to have a dialogue with regulatory authorities so duplication is avoided and compliance can take place in a seamless manner.

We did not find any conflict or incompatibility between these legislative frameworks although the requirements of AML/KYC legislation inevitably impact upon competition. A competitive advantage that a business in a particular country may have over those in other countries due to lax implementation of AML/KYC regime in that country, is an issue that needs to be considered at an international forum such as the FATF.

It was also found that small businesses faced a disproportionate burden of AML legislation compared with large businesses. Furthermore, businesses such as gaming and wagering are already heavily regulated by state gaming regimes and AML regulation simply adds to the regulatory burden that they face. Some conflict would always occur from a law firm's perspective between the lawyer's duty to their client and their obligations under AML. Further, AML regulation might conceivably override industry-specific regulation in some situations. Given this situation, the study points to the role industry associations can play in ironing out these issues. Consideration needs to be given whether smaller financial institutions or transactions below a particular threshold could be exempt from AML/CTF related requirements. Again, this is an issue that would need dialogue with the regulatory authorities and policy-makers. The aspect of cost saving to society needs to be emphasised in such discussions.

We found that although there is no incompatibility between the AML/KYC legislation and competition legislation in Australia, this may not be the case in other countries. The AML regime in Australia does differ from the US, for example, where regulators forced remittance providers to convert to banks. However, the legislation may have differing impact on innovation depending on the rigour with which these are enforced.

The possibility of a regulatory arbitrage is involved if different jurisdictions have different implementation standards. There is no regular consultation between the different authorities that administer and implement the AML, privacy, innovation and competition legislative regimes. Consequently, one can notice duplication which could be avoided. We also

received a number of suggestions on how the regulatory authorities could assist businesses, for example, by developing a compliance template.

To summarise, it may be that there is a degree of fundamental conflict between KYC/AML legislation and privacy laws. However, the predominant view of respondents would seem to accept that privacy issues will generally be subjugated in situations where there is cogent evidence of serious fraud or threats of terrorism.

Based on the responses received, our general conclusion is as far as the laws per se are concerned, no incompatibility as such appears to exist in the Australian context. However, as the implementation of the anti-money laundering legislation may not be the same in all jurisdictions, possibilities of regulatory arbitrage exist. In certain areas such as legal advice, for example, incompatibility will arise given the duty of a law firm towards clients and regulatory obligations as and when imposed (currently anti-money laundering and counter terrorism financial legislation is not applicable to law firms unless they provide designated services and these reforms are still under the consideration of the Australian government). The burden of regulation is creating serious issues for regulated institutions in Australia as costs are escalating and the burden is disproportionate between smaller and larger financial institutions in particular. It may be noted that nearly 70% of the 13,800 reporting entities with obligations under the AML/CTF Act are small businesses with less than 20 employees; AML/CTF obligations can be viewed as posing a range of regulatory and competitive challenges to such entities in particular.

Two major points emerged from our study: (a) different authorities that implement the AML, privacy, innovation, and competition legislation need to have better and regular coordination to identify areas where duplication of effort can be reduced and (b) policy-makers need to consider how the impact of AML legislation could be measured or how compliance does assist law enforcement agencies to apprehend criminals and sympathisers of terrorist organisations. It was, however, found that though KYC and AML legislation will inevitably impact upon competition, it could not be said that KYC/AML laws and competition laws were in conflict.

Future research that analyses the interaction between AML, competition and privacy laws, and the regulatory burden of such laws, in multiple countries would be useful in determining

whether the attitudes towards such matters in Australia differ with those of the other countries.

Other key questions, such as how do we arrive at a reliable estimate of the magnitude of money laundering, how do we measure whether the regime put in place has in fact led to lessening of the quantum of money laundering, and whether the benefits outweigh the cost of the regime also require an answer. The answers to these questions will enable us to understand whether the elaborate regime put in place has in fact helped lessen the quantum of money laundering and terrorism financing in a country, and whether it is worth the cost being incurred by financial institutions in implementation thereof.

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[i] According to one estimate HSBC, one of the global banks, had 1,750 compliance officers in 2013-14. Assuming the same number in all global banks the total number of compliance officers in 1000 top global banks would amount to over 1.75 million. Of these only 317 officers responded to KPMG global survey (that is less than one percent). Our email survey was confined to only one country that is Australia. http://news.efinancialcareers.com/au-en/189083/hsbcs-compliance-binge-can-get-6-figure-compliance-job/

[ii] Amounts are in Australian dollars.

[iii] 'The other six streams were the ePayments Code, Financial Claims Scheme, Future of Financial Advice reforms, National Consumer Credit Protection Act 2009, over-the-counter derivatives reforms and privacy reforms' (Murray Inquiry, 2014:154).

[iv] Freedom of Information

[v] National Privacy Principles (NPPs) were replaced by the Australian Privacy Principles (APPs) on 12 March 2014.