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TREASURY LAWS AMENDMENT (BLACK ECONOMY TASKFORCE  
MEASURES NO. 1) BILL 2017

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EXPOSURE DRAFT EXPLANATORY MATERIALS



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# ***Glossary***

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The following abbreviations and acronyms are used throughout this explanatory memorandum.

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
ATO	Australian Taxation Office
Bill	Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2017
Commissioner	Commissioner of Taxation
CCA 1995	<i>Criminal Code Act 1995</i>
TAA 1953	<i>Taxation Administration Act 1953</i>
TPRS	Taxable Payments Reporting System



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# **Chapter 1**

## ***Electronic Sales Suppression Software***

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### **Outline of chapter**

- 1.1 Schedule 1 to the Bill prohibits the creation, distribution and possession of sales suppression tools in relation to entities that have Australian tax obligations. Schedule 1 also prohibits the use of electronic sales suppression tools to incorrectly keep tax records.
- 1.2 All legislative references in this Chapter are to the TAA 1953 unless otherwise stated.

### **Context of amendments**

- 1.3 The black economy is a significant, complex and growing economic and social problem. In 2012, the Australian Bureau of Statistics estimated that the black economy in Australia could be as large as 1.5 per cent of Australia's gross domestic product, or around \$25 billion.
- 1.4 In response to this problem, the Government established the Black Economy Taskforce, chaired by Mr Michael Andrew AO. In its Interim Report the Taskforce noted that a range of trends, vulnerabilities and other considerations suggest the black economy could be larger today.
- 1.5 In May 2017, the Government released the Black Economy Taskforce's Interim Report which contained a number of initial recommendations, based on the experience of foreign jurisdictions, extensive consultation with stakeholders and anecdotal evidence the taskforce had received.
- 1.6 The prohibition on sales suppression technology and software was announced in the 2017-18 Budget as part of the Government's acceptance of recommendations for immediate action from the Black Economy Taskforce's Interim Report.
- 1.7 Transaction data recorded by modern point of sales (POS) systems are a key component of business' sales and accounting systems. This data is particularly important for tax audit purposes as it provides a contemporaneous record of transactions against which accounts and tax returns can be audited.
- 1.8 The importance of the records kept by POS systems has led to the development of tools ('electronic sales suppression tools') to suppress

or falsify records of transactions resulting from these systems to facilitate tax evasion.

1.9 Currently, the taxation law contains a variety of offences as well as civil and administrative penalties relating to record keeping and tax evasion. These include penalties for providing false or misleading information to the Commissioner of Taxation (Division 284 in Schedule 1) and incorrectly keeping records with the intent of misleading the Commissioner (sections 8L and 8T). The Criminal Code contained in Schedule 1 to the CCA 1995 also contains offences relating to forgery and providing false documents to the Commonwealth.

1.10 Although these offences may apply to entities that use electronic sales suppression software to incorrectly keep records, the current maximum penalties for the offences are not high enough to adequately reflect the seriousness of using a tool with a principle function of misrepresenting an entity's tax position.

1.11 The manufacture of electronic sales suppression tools may be captured under the CCA 1995 under the offence for possessing, making or adapting a device for making forgeries (section 145.3 of the CCA 1995)

1.12 However these provisions require either an intention that the device will be used to commit an offence of forgery or only apply to Commonwealth documents. These requirements can be difficult to satisfy in the case of electronic sales suppression tools.

1.13 Electronic point of sale records are generally not Commonwealth documents (for the purposes of the CCA 1995, Commonwealth document means, broadly, a document purporting to be made by a Commonwealth entity or official – see section 143.3 of the CCA 1995). Even where an electronic sales suppression tool that was developed overseas is used to falsify records that are kept for Australian tax purposes, it may be difficult to demonstrate that the tool was made or supplied specifically with the intention of defrauding the Commonwealth, rather than other jurisdictions.

## **Summary of new law**

1.14 Schedule 1 to the Bill introduces amendments to deter the use and distribution of electronic sales suppression tools. To achieve this outcome, the amendments create specific offences in relation to the:

- production and supply of electronic sales suppression tools; and



- the possession or use of such tools by entities that are required to keep or make records under an Australian taxation law.

1.15 Entities that would otherwise commit an offence in relation to an electronic sales suppression tool are entitled to a defence from the relevant offences if the purpose of their production, supply, possession or use of the tool is to deter the use or distribution of electronic sales suppression tools.

1.16 Administrative penalties also apply to the production or supply, and possession or use of electronic sales suppression tools.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>It is an offence to produce or supply an electronic sales suppression tool. The penalty for this offence is 5 years imprisonment, 5,000 penalty units, or both.</p> <p>Entities that produce or supply an electronic sales suppression tool are also liable to an administrative penalty of 60 penalty units.</p>	No equivalent.
<p>It is an offence for entities that are required to keep or make records under an Australian taxation law to possess an electronic sales suppression tool. The penalty for this offence is 2 years imprisonment, 500 penalty units, or both.</p> <p>Entities that are required to keep or make records under an Australian taxation law that possess an electronic sales suppression tool are also liable to an administrative penalty of 30 penalty units.</p>	No equivalent.
<p>In addition to the existing offences, it is also an offence for entities that are required to keep or make records under an Australian taxation law to use an electronic sales suppression tool to incorrectly make or keep such</p>	<p>There are various offences related to incorrectly keeping records that are required to be kept under an Australian taxation law.</p>

<p>records.</p> <p>The penalty for this offence is 3 years imprisonment, 1,000 penalty units, or both.</p> <p>Entities that are required to keep or make records under an Australian taxation law that use an electronic sales tool to incorrectly make or keep such records are also liable to an administrative penalty of 60 penalty units.</p>	
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## Detailed explanation of new law

1.17 Schedule 1 to the Bill introduces Subdivision BAA into the TAA 1953.

1.18 The object of this Subdivision is to deter the use and distribution of tools to manipulate or falsify electronic point of sale records to facilitate tax evasion. *[Schedule 1, item 2, section 8WAA]*

1.19 The amendments achieve this objective by introducing new offences for the manufacture, supply and possession of electronic sales suppression tools.

1.20 Administrative penalties for these actions are also inserted into Division 288 in Schedule 1.

## Electronic sales suppression tools

1.21 A critical element of each of the new offences and penalties is the term ‘electronic sales suppression tool’. This term is used by the amendments to describe the various tools that can be used to manipulate or falsify electronic point of sales records.

1.22 The starting point for the definition of ‘electronic sales suppression tool’ is that it is a device, software program or other thing, or any part or combination of such things. *[Schedule 1, item 2, section 8WAB]*

1.23 For simplicity, the various things captured by the definition of electronic sales suppression tool are collectively referred to in general terms as ‘tools’.

1.24 The reference to a part or a combination of devices, programs or other things enables the definition to distinguish between a legitimate sales system and particular features that are introduced for the purposes of manipulating or falsifying records. For example, a modification to a device or standard business software could fall within the definition of

electronic sales suppression tool even if the device or program itself does not. Under the broad definition, otherwise compliant point of sales systems may be manufactured with some component or feature which is an electronic sales suppression tool that will also be caught by the provisions.

1.25 To be an electronic sales suppression tool, a particular tool must also have certain capabilities and functions in relation to particular records.

1.26 Firstly, the tool must be capable of ‘falsifying, manipulating, hiding, obfuscating, destroying, or preventing the creation’ of certain records. *[Schedule 1, item 2, paragraph 8WAB(a)]*

1.27 These capabilities go to the heart of the issue with sales suppression technology in facilitating the misreporting of actual sales figures. In this respect, the focus on ‘capability’ is specifically intended to avoid the need to demonstrate actual use in respect of a particular record in order for a tool to be an electronic sales suppression tool.

1.28 Although ‘capability’ is a necessary condition, for a tool that has such capability to be an electronic sales suppression tool, a reasonable person must also be able to conclude that its ‘principal function’ is to ‘falsify, manipulate, hide, obfuscate, destroy, or prevent’ the creation of certain records. *[Schedule 1, item 2, paragraph 8WAB(b)]*

1.29 This principal function test operates in conjunction with the capability requirement to ensure that the definition does not extend to an ordinary system or specific features of a system that could be used to erase, hide or manipulate records. This aspect of the test takes into account the context of a particular tool to exclude ordinary and legitimate features of point of sales systems from the definition, even those which are capable of abuse with some effort.

1.30 The records that an electronic sales suppression tool must be capable of affecting are ones that are required to be kept or made under a taxation law and that are created by a system that is or includes an electronic point of sale system. *[Schedule 1, item 2, paragraph 8WAB(a)]*

1.31 The reference to a system that is or includes electronic point of sales systems ensures that the definition focusses on tools that affect or modify a business’ sales or accounting systems. The data that is produced by these systems can either create an entity’s tax records or provide input into its tax records, and is particularly important for tax audit purposes as it provides a contemporaneous record of transactions against which accounts and tax returns can be audited.

1.32 The requirement for a tool to be capable of affecting a record can be satisfied where a tool directly affects a record that is required to be

kept, as well as where a tool affects the inputs that are used in creating such records. For example, a tool that removes records of individual sales would satisfy the requirement about falsifying records that an entity is required to keep to the extent that those records rely on aggregated sales figures.

1.33 The types of records that a tool must have the capability of affecting are those records that an entity is required to make or keep under a taxation law. In this respect, the term ‘taxation law’ takes on its general meaning from the TAA 1953, which includes any Act or legislative instrument of which the Commissioner has general administration, subject to a modification to exclude the *Excise Act 1901*.

### **Example 1.1 – records that must be kept under a taxation law**

Megan operates a retail business that specialises in catering equipment. Megan is required by law to keep records that explain all of her sales transactions.

Megan uses an electronic point of sale system that records her sales data. Although there is no legal requirement for this sales data to be kept in the form that it is kept, Megan uses the aggregate sales data to satisfy her record keeping obligations.

If Megan was to use a tool to modify or delete these individual sales transactions, the use of that tool would also affect the records that she is required to keep. As such, a tool of this kind would fall within the definition of an ‘electronic sales suppression tool’.

1.34 Consistent with that definition and with other offences related to record-keeping in the TAA 1953, these amendments do not extend to the records that an entity is required to keep under the *Excise Act 1901*. In the context of these amendments, it is not necessary to extend the rule about electronic sales suppression tools to records required to be kept under the *Excise Act 1901* because sales suppression does not affect the liabilities that an entity has in respect of excise (this is because excise is levied on manufacture rather than sale).

1.35 Schedule 1 to the Bill also makes a consequential amendment to the dictionary in subsection 995-1(1) of the ITAA 1997 to insert the definition of ‘electronic sales suppression tool’. Although this definition is introduced into the TAA 1953, it is also used in the amendments that are made to Schedule 1 to the TAA 1953, which relies on the definitions in the ITAA 1997. This approach ensures that the definitions in each part are directly linked.

## **Production and supply of electronic sales suppression tools**

1.36 The amendments make it an offence for a person to manufacture, develop, or publish an electronic sales suppression tool, and

to modify such a tool to facilitate or enhance its capacity. The penalty for this offence is 5 years imprisonment or 5,000 penalty units, or both [*Schedule 1, item 2, paragraph 8WAC(1)(a)*]

1.37 The amendments also make it an offence for a person to supply, make available for use, or provide a service involving the use of an electronic sales suppression tool. The penalty for this offence is 5 years imprisonment or 5,000 penalty units, or both [*Schedule 1, item 2, subsection 8WAC(2)*]

1.38 Each of these offences focuses on the production and supply of electronic sales suppression tools. The various actions are ones that can be undertaken by entities that seek to facilitate the use of sales suppression technology. These offences are consistent with the fact that, with the exception of the circumstances covered by the applicable defences, there are no legitimate reasons for an entity to produce, manufacture or supply an electronic sales suppression tool.

1.39 The penalties for these offences are severe because they relate to intentional and systematic fraud and tax evasion. The amount of the applicable fine is also aligned with the penalties for promoters of tax exploitation schemes. These penalties are subject to section 4D of the *Crimes Act 1914*, meaning that the specified amounts are the maximum penalties that can be imposed.

1.40 Both offences are subject to strict liability. [*Schedule 1, item 2, subsection 8WAC(4)*].

1.41 This means that it is not necessary to establish fault if a person has produced, supplied, or modified an electronic sales suppression tool, or provided a service in relation to such a tool. Strict liability is appropriate in these cases because the primary function of an electronic sales suppression tool is to facilitate tax evasion. If a person does produce, supply or provide a service involving such a tool, they will not commit an offence if they can show they have made an honest mistake of fact satisfying the requirements of the defence under section 9.2 of the CCA 1995.

1.42 Similarly, the offences do not require any knowledge about the intended or actual use of an electronic sales suppression tool. This approach ensures the offences apply regardless of whether the manufacturer or supplier knows or intends that the electronic sales suppression tool will be used in relation to records that are required to be kept under Australian taxation law.

1.43 Entities that would otherwise commit an offence for producing or supplying an electronic sales suppression tool are entitled to a defence if the purpose of their production or supply was to deter the use or

distribution of electronic sales suppression tools. This defence is explained in further detail below.

1.44 Under the CCA 1995, entities that assist in the commission of an offence to manufacture or supply an electronic sales suppression tool may also be liable to be charged with the offence. Under section 12 of the CCA an entity that aids, abets, counsels or procures the commission of the offence are liable to be charged with the offence.

***Extended geographical jurisdiction offences for production and supply***

1.45 The offence for manufacturing or modifying an electronic sales suppression tool applies to offences committed outside of Australia if the electronic sales suppression tool is used at any time to modify records that an entity is required to hold under an Australian taxation law. [*Schedule 1, item 2, subsection 8WAC(5)*]

1.46 The offence for the supply of an electronic sales suppression tool, or the provision of a service involving such a tool, also applies to offences outside of Australia if the tool is supplied or made available for use to an entity that is required to keep records under an Australian taxation law. In such circumstances it does not matter if the entity that is required to keep the records is the person who uses the tool – what is relevant is that the use was in respect of the records that the entity was required to keep. [*Schedule 1, item 2, subsection 8WAC(6)*]

1.47 The extension of the offences in this manner ensures that overseas manufacturers, suppliers and producers are able to be held responsible for their role in facilitating the evasion or fraud in relation to Australian tax obligations.

1.48 This extension is achieved through the application of section 15.4 of the CCA 1995 (extended geographical jurisdiction – category D) to the offences, and is justified because of the connection between the recipient of the supply or provision and their Australian tax obligations.

**Example 1.2 - manufacture and supply of an electronic sales suppression tool outside of Australia**

Luke, a software developer in Iceland, develops an electronic sales suppression tool that alters point of sales transactions by removing them entirely from an entity's sale records. He advertises the tool for sale online and it is purchased by Hans, who owns a bar in Perth, Australia.

Hans installs the electronic sales suppression tool on the point of sales registers at his bar and uses the tool to modify his transaction records.

Even though Luke is not in Australia, he has committed an offence by manufacturing an electronic sales suppression tool that is used to

modify records that are required to be kept under Australian taxation law.

Luke has also committed the offence of supplying an electronic sales suppression tool to a person, and because he has supplied it to a person that has record-keeping obligations under Australian taxation law the offence applies to him despite his geographical location.

## Possession of electronic sales suppression tools

1.49 Currently, a person who acquires or possesses an electronic sales suppression tool does not commit an offence unless it can be shown that they actually falsified a record that they are required to keep or make under a taxation law. As electronic sales suppression tools are specifically designed to fraudulently modify or prevent the creation of such records, the application of such tools in respect of records can be difficult to detect. This is despite the fact that their principal function is, by definition, to be used in this way.

1.50 The amendments address this gap in the law by making it an offence for a person who is required to keep records under a taxation law to acquire, possess or control an electronic sales suppression tool without a reasonable excuse. The penalty of this offence is 2 years imprisonment or 500 penalty units, or both. [*Schedule 1, item 2, subsection 8WAD(1)*]

1.51 The acquisition, possession or control of an electronic sales suppression tool is a serious offence that involves someone holding a thing that can only be used for the purposes of tax evasion or fraud. Therefore, the maximum penalty for the offence is 2 years, consistent with the maximum penalty for keeping inaccurate records with the intention of misleading the Commissioner.

1.52 Similarly, the maximum penalty is aligned with the penalty for creating or distributing electronic sales suppression tools, but scaled down appropriately to account for the fact that an offence in respect of possession relates to the conduct of one entity, whereas supply and manufacture can facilitate the conduct of multiple entities.

1.53 As with the offences for producing or supplying an electronic sales suppression tool, the penalties for possession are subject to section 4D of the *Crimes Act 1914*, meaning that the specified amounts are the maximum penalties that can be imposed.

1.54 The offence in relation to possession of an electronic sales suppression tool is an offence of strict liability. [*Schedule 1, item 2, subsection 8WAD(3)*].

1.55 This means it is not necessary to prove fault in determining whether a person has committed an offence for possessing an electronic sales suppression tool. Strict liability is appropriate in this case because

electronic sales suppression tools do not serve a purpose other than fraud and tax evasion. Entities should therefore take steps to ensure that a tool that they acquire for the purposes of keeping records is not an electronic sales suppression tool.

1.56 As with the offence for production and supply, a person will not commit an offence for possessing an electronic sales suppression tool if they can show they have made an honest mistake of fact satisfying the requirements of the defence under section 9.2 of the CCA 1995.

1.57 Pursuant to section 12 of the CCA, an entity that assists in the commission of an offence for possessing an electronic sales suppression tool may also be charged with the offence.

### **Incorrectly keeping records using an electronic sales suppression tool**

1.58 The amendments make it an offence for a person who, with the use of an electronic sales suppression tool, has incorrectly kept, made or altered a record that they are required to keep under a taxation law. The penalty for this offence is 3 years imprisonment, 1,000 penalty units, or both. [*Schedule 1, item 2, section 8WAE*]

1.59 This new offence applies in conjunction with the offences under taxation law related to record keeping, specifically sections 8L, 8Q, 8T of the TAA 1953 and section 382-5 in Schedule 1 of the TAA 1953. However, the penalty for this new offence is intentionally far greater than the penalties for those offences, reflecting the fact that there are no legitimate reasons for an entity to use an electronic sales suppression tool in keeping or making records.

1.60 For this offence to apply in respect of an entity that is required to keep or make records, the relevant records must have been incorrectly kept, made or altered with the use of an electronic sales suppression tool. In contrast to the offence for possession, this element of the offence means that actual use of the tool is required. This requirement is appropriate given that the penalty for the offence is greater than, and can be applied in conjunction with, the offence for possession.

1.61 However, it is not necessary for the actual use of the tool to be undertaken by the entity whose records are incorrectly kept, made or altered. In certain circumstances, it could be that a third party is the one that applies the tool in respect of a person's records. In such cases, the person that is required to keep or make the records is the entity that has committed the offence in respect of their records (however, the entity that actually used the records may have also committed an offence for possessing an electronic sales suppression tool, or for providing a service involving such a tool).



### **Example 1.3 - incorrectly keeping records using an electronic sales suppression tool**

Brenda is the owner of a homewares retail business operating out of two premises in suburban Melbourne.

Her business uses a networked point of sale system that allows her to monitor transactions in real-time and meet her business and taxation reporting requirements.

Brenda receives ongoing technical support from Stuart, a representative of the POS manufacturer. Stuart advises Brenda that, for a fee, he can provide a service that will remotely delete transactions from Brenda's sales records, or even erase, purge or destroy the hard drive those records are stored on. To perform this service, Stuart advises Brenda that she must give him permission to remotely access her system, and tell him which transactions she wants removed.

Brenda accepts Stuart's offer and arranges for him to delete specified records of transactions at the conclusion of each week's trading. Stuart provides the service by gaining remote access to Brenda's database and employing the use of a software-based sales suppression tool to amend the records.

By acquiring Stuart's services, Brenda has committed the offence of incorrectly keeping records using a sales suppression tool. This is because she has kept, made or altered the records 'with the use of' the tool even though the actual use is undertaken by Stuart.

Stuart has also committed offences for providing a service involving the use of an electronic sales suppression tool and for possessing such a tool.

1.62 As with the other offences involving electronic sales suppression tools, a person will not commit an offence for possessing an electronic sales suppression tool if they can show they have made an honest mistake of fact satisfying the requirements of the defence under section 9.2 of the CCA 1995.

1.63 Pursuant to section 12 of the CCA, An entity that assists in the commission of an offence for possessing an electronic sales suppression tool may also be charged with the offence.

### **Defence against offences involving electronic sales suppression tools**

1.64 A person does not commit an offence in relation to an electronic sales suppression tool if the conduct that is undertaken in relation to the tools is for the purpose of preventing or deterring tax evasion, or for enforcing a taxation law. [*Schedule 1, item 2, subsections 8WAC(3), 8WAD(2) and 8WAE(2)*].

1.65 As per subsection 13.3(3) of the *Criminal Code 1914*, an entity seeking to rely on this defence bears the evidential burden in proving that the purpose for which they undertook the relevant conduct.

1.66 These defences are available to entities that have legitimate reasons for undertaking particular conduct in respect of an electronic sales suppression tool. The purposes that are permitted by this defence are consistent with the overall objects of Subdivision BAA, which as noted above is to deter the use and distribution of electronic sales suppression tools.

1.67 It is intended that these defences be available to entities such as researchers who make and develop tools for the purpose of assisting law enforcement authorities (for example, who develop counter-tools or tools designed to provide better information about the technology operates). Similarly, the defences are intended to provide protection to whistle-blowers that alert authorities to the existence or use of electronic sales suppression tools, as well as to authorities that confiscate such tools or develop or use them for law enforcement purposes.

#### **Example 1.4 - defence for manufacturing and supplying an electronic sales suppression tool**

Emily is an independent contractor that has been engaged by the Australian Federal Police to develop an electronic sales suppression tool to help law enforcement authorities understand the operation of such tools, before they conduct undercover operations.

Emily develops an electronic sales suppression tool and provides a copy of it to the Federal Police so they can conduct training exercises.

Although Emily has manufactured an electronic sales suppression tool, possessed the tool and supplied it to law enforcement authorities, she has not committed any offences because her conduct was ultimately undertaken for the purpose of preventing the use of electronic sales suppression tools, through her assistance to the Australian Federal Police.

#### **Administrative penalties for prohibited conduct**

1.68 Administrative penalties also apply to the conduct that is prohibited by the various offences introduced through Subdivision BAA.

1.69 Such penalties apply to an entity that manufactures, modifies, supplies or installs an electronic sales suppression tool. The penalty for such conduct is 60 penalty units. [*Schedule 1, item 3, subsection 288-125(1)*]

1.70 Administrative penalties also apply to an entity that is required to keep or make a record under a taxation law and that acquires, possesses or controls an electronic sales suppression tool. The penalty for such conduct is 30 penalty units. [*Schedule 1, item 3, subsection 288-130(1)*]

1.71 An entity is also liable to an administrative penalty if they are required to keep or make a record under a taxation law, and they keep, make or alter such a record with the use of an electronic sales suppression tool in a way that results in the record being incorrectly kept or not being made or kept. The penalty for such conduct is 60 penalty units. [Schedule 1, item 3, section 288-135]

1.72 Consistent with other administrative penalties that overlap with criminal offences, section 8ZE applies to these administrative penalties and excludes any liability for the administrative penalty in the event of criminal prosecution being commenced.

1.73 Existing administrative penalties relating to a failure to keep records or provide documents are generally 20 penalty units. However, in the case of these offences, the amount of the applicable penalty units reflects that the relevant conduct in respect of an electronic sales suppression tool is more serious given that the conduct relates to systemic tax evasion.

1.74 Although a specific defence does not apply in respect of these administrative penalties, the Commissioner is able to use the general powers available to remit administrative penalties where the circumstances make it appropriate to do so.

1.75 Administrative penalties also apply to an entity that aids, abets or counsels another entity in undertaking conduct that would result in an administrative penalty for the production, supply or possession of an electronic sales suppression tool. The amount of the administrative penalty is the same as the penalty that would apply for the primary conduct. [Schedule 1, item 3, subsections 288-125(2) and 288-130(2)]

1.76 The specific extension of administrative penalties to entities that aid, abet or counsel another entity reflects the automatic extension of criminal charges to ancillary offences under section 12 of the CCA 1995 (that is, offences for aiding or abetting the commission of a primary offence).

1.77 To ensure consistency with the offences that are introduced through Subdivision 8BAA, the various references to records that are required to be kept or made under a 'taxation laws' in respect of these administrative penalties are limited so that they do not apply to records that are required to be kept under the *Excise Act 1901*. [Schedule 1, item 3, paragraph 288-125(1)(b), 288-130(1)(a) and 288-135(1)(a)]

1.78 These carve-outs reflect the fact that electronic sales suppression tools are not relevant to the record keeping requirements under the *Excise Act 1901*, as excise is levied against manufacture rather than sales.

## Application and transitional provisions

1.79 The amendments in Schedule 1 apply from the date of commencement (being the day after the Act containing Schedule 1 receives the Royal Assent).

1.80 However, the offence for possession of an electronic sales suppression tool, as well as the associated administrative penalty, does not apply to an entity if:

- the entity acquired the electronic sales suppression tool or right to use the tool before 7.30pm on 9 May 2017;
- as soon as practicable after commencement, the entity notifies the Commissioner in the approved form of the acquisition or possession of the electronic sales suppression tool; and
- the entity complies with any direction of the Commissioner to deal with the tool in a particular way by the earlier of the date specified in the Commissioner direction, or 6 months after the amendments commence.

*[Schedule 1, item 5(1)]*

1.81 These transitional arrangements are introduced to provide persons with the opportunity to avoid committing an offence for possessing an electronic sales suppression tool that was acquired before the measure was announced in the 2017-18 Budget. The transitional relief only applies in respect of the offence and related administrative penalty for possession. It does not extend to the use of such a tool in respect of records that occurred after the Act containing these amendments receives the Royal Assent.

1.82 Similarly, although a person will not commit an offence relation to an electronic sales suppression tool in respect of use that occurred prior to the commencement of the amendments, a person that uses an electronic sales suppression tool in keeping or making records may nevertheless have committed one or more of the existing offences related to incorrectly keeping records.

### **Example 1.5 - transitional application for possession of an electronic sales suppression tool**

Elizabeth owns and runs a hairdressing salon. In January 2017 Elizabeth purchased an electronic sales suppression tool through a friend and has been in possession of it since then.

She uses the electronic sales suppression tool to modify her transactions for the month of June 2017. The law banning the

development, supply and possession of electronic sales suppression tools commences in early 2018.

Elizabeth notifies the Commissioner in the approved form that she is in possession of an electronic sales suppression tool, a few weeks after the law commences. The Commissioner instructs her to remove the tool within a month of receiving the notice, which she does.

Elizabeth has not committed an offence for possession of an electronic sales suppression tool because of the transitional application.

However, Elizabeth may have committed an offence under existing law such as incorrectly keeping records, recklessly incorrectly keeping records or incorrectly keeping records with intention of deceiving or misleading, and may be liable for the penalties associated with those offences.

## **Chapter 2**

### **Third party reporting**

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#### **Outline of chapter**

2.1 Schedule 2 to the Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2017 amends the TAA 1953 to require entities providing courier or cleaning services to report to the ATO information about transactions involving contractors for courier or cleaning services.

2.2 All legislative references in this Chapter are to the TAA 1953 unless otherwise stated.

#### **Context of amendments**

2.3 The black economy is a significant, complex and growing economic and social problem. In 2012, the Australian Bureau of Statistics estimated that the black economy in Australia could be as large as 1.5 per cent of Australia's gross domestic product, or around \$25 billion.

2.4 In response to this problem, the Government established the Black Economy Taskforce, chaired by Mr Michael Andrew AO. In its Interim Report the Taskforce noted that a range of trends, vulnerabilities and other considerations suggest the black economy could be larger today.

2.5 In May 2017, the Government released the Black Economy Taskforce's Interim Report which contained a number of initial recommendations, based on the experience of foreign jurisdictions, extensive consultation with stakeholders and anecdotal evidence the taskforce had received.

2.6 In the 2017-18 Budget, the Government announced that it would adopt the initial recommendations of the Taskforce. One of the initial recommendations was to extend the operation of the TPRS to contractors in the courier and cleaning industries.

2.7 The TPRS is a transparency measure applying to the building and construction industry. It requires businesses in the building and construction industry to report payments they make to contractors for building and construction services to the ATO. Evidence suggests that this program has improved contractor tax compliance in the building and construction industry.

2.8 As a result of the success of the TPRS in the building and construction industry, the Interim Report of the Black Economy Taskforce recommended extending its operation to two other high-risk sectors: cleaning and couriers.

## Summary of new law

2.9 Entities that provide courier or cleaning services will be required to report to the ATO details of transactions involving contractors for courier or cleaning services.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Entities that provide courier or cleaning services will be required to report to the ATO details of transactions involving contractors for courier or cleaning services.	No equivalent.

## Detailed explanation of new law

### *Entity required to report*

2.10 The amendments require that entities that are providing a courier or a cleaning service to report information to the ATO about those transactions. [*Schedule 2, item 1, table items 11 and 12 of section 396-55 to Schedule 1 of the TAA 1953*]

### *Transactions that are required to be reported*

2.11 An entity providing a courier or cleaning service will be required to report information to the ATO about transactions where the entity has provided consideration (within the meaning of the GST Act) to a contractor wholly or partly for cleaning or courier services. Consideration includes any payment, or any act or forbearance, in connection with a supply of anything and any payment, or any act or forbearance, in response to or for the inducement of a supply of anything (as defined in section 9-15 of the *A New Tax System (Goods and Services Tax) Act 1999*). Usually consideration will be a monetary payment, but it may also include other forms of non-cash benefits and constructive payments.

2.12 Entities will be required to report information in the approved form to the Commissioner either annually, or at such other time as the Commissioner determines by legislative instrument.

2.13 The general rules that apply to information that must be reported under Division 396 apply to this regime. This includes that where an entity has given the Commissioner a report that they have become aware has a material error in it, they must give the Commissioner an updated report within 28 days of becoming aware of the error. Similarly, where an entity has failed to give a report, or a corrected report, to the Commissioner by the time required, an administrative penalty may be imposed (see subsection 286-75(1)). An administrative penalty may also be imposed if the report includes any false or misleading statements (see subsection 284-75(1)).

2.14 Entities are not required to report in relation to transactions where they and the entities providing cleaning or courier services are members of the same consolidated group or Multiple Entry Consolidated group. Entities are also not required to report payments under Division 12 of Schedule 1 of the TAA 1953 (PAYG withholding payments) under the TPRS as those payments are subject to their own reporting regime within that Division.

2.15 This is consistent with the exceptions that apply to transactions that are required to be reported by the building and construction industry.

*Definitions of a courier or cleaning service*

2.16 The terms ‘courier’ and ‘cleaning’ are not defined, and are intended to take their ordinary meaning.

2.17 A courier service is intended to include any service where an entity collects goods from and delivers them to another place. These goods may include parcels, packages, letters, food, flowers or any other goods. The goods may also be transported by a number of different means, including by car, truck, van, motorcycle, motorised scooter, bicycle or other means of transportation.

2.18 A cleaning service is intended to refer to any service where a structure, vehicle, place, surface, machinery or equipment has been subject to a process in which dirt or similar material has been removed from it. Some examples of this include office cleaning, road sweeping or street cleaning, swimming pool cleaning, park and facilities cleaning, or cleaning for certain types of cultural or sporting events.

2.19 The Commissioner may exempt entities from their reporting obligations under the third party reporting regime. For example, the Commissioner may exempt a class or classes of entity from reporting information when the information is not necessary to assist the



Commissioner. Alternatively, a particular entity may be exempted based on specific circumstances that may impact on that entity's ability to report in a particular year.

## **Application and transitional provisions**

2.20 The amendments in Schedule 2 will commence on the first day of the first quarter to commence after the day the amendments receive Royal Assent. *[Clause 2]*

2.21 These amendments will apply to consideration that is provided on or after 1 July 2018, whether under an existing ongoing arrangement or otherwise, and regardless of the time the supply occurred and the service is provided. However, it does not apply where the entity is merely liable to provide consideration prior to 1 July 2018, if no consideration is provided on or after 1 July 2018. *[Schedule 2, item 2]*