
CURRENCY (RESTRICTIONS ON THE USE OF CASH) BILL 2019

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

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

<i>Abbreviation</i>	<i>Definition</i>
AML/CTF Act	<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>
Bill	Currency (Restrictions on the Use of Cash) Bill 2019
Consequential Amendments Bill	Currency (Restrictions on the Use of Cash)(Consequential Amendments) Bill 2019
Criminal Code	Criminal Code in the Schedule to the <i>Criminal Code Act 1995</i>
FTR Act	<i>Financial Transaction Reports Act 1988</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>

Chapter 1

Restricting the use of cash

Outline of chapter

- 1.1 This Bill introduces offences for entities that make or accept cash payments of \$10,000 or more.
- 1.2 This ensures that entities cannot make large payments in cash so as to avoid creating records of the payment and facilitating their participation in the black economy and undertaking related illicit activities.

Context of amendments

Cash in Australia

1.3 Cash traditionally consists of Australian currency – broadly notes and coins issued by the Commonwealth of Australia – and foreign currency – notes and coins issued by other jurisdictions, generally for use in those jurisdictions. The issue of notes and coinage by any other entity in Australia is generally illegal (see section 44 of the *Reserve Bank Act 1965* and section 22 of the *Currency Act 1965*).

1.4 Australian currency is generally legal tender in Australia – see section 16 of the *Currency Act 1965* and section 36 of the *Reserve Bank Act 1965*. While entities may specify or accept other non-monetary forms of payment for a debt, absent any such specification or acceptance, only payment in Australian currency will validly discharge a debt (see section 9 of the *Currency Act 1965*). Foreign currency is not legal tender in Australia, but can still be used as a form of monetary payment if this is agreed between the parties.

1.5 That said, despite this status, cash is increasingly being replaced with various forms of electronic non-cash payments. These most commonly involve the use of debt or credit arrangements facilitated by banks and other payment system providers which, whilst generally designated in Australian currency, are forms of contractual arrangement between parties.

1.6 These alternative payment methods are often more convenient for consumers or businesses. They also generally offer significant regulatory benefits as they typically create clear records of transactions. Many of these non-cash payment systems are subject to regulatory

oversight by the Reserve Bank of Australia using its broad powers under the *Payment System (Regulation) Act 1998*, the *Payment Systems and Netting Act 1998* and the *Reserve Bank Act 1965*.

1.7 That said, some forms of electronic payment more closely mirror physical currency. In particular, crypto-currencies and other digital currencies are generally unregulated and do not create clear records of transactions in a form that can easily be used to identify the parties to a transaction.

1.8 To mitigate the risk that large, anonymous cash payments may be used for facilitate money laundering and terrorism financing, businesses that provide certain services must report cash payments for goods and services of \$10,000 or more under the AML/CTF Act. This includes businesses that provide financial services, deal in bullion and provide gambling and digital currency exchange services. Similarly, a person entering or departing Australia must declare amounts of physical currency of \$10,000 or more (see section 53 of the AML/CTF Act).

The report of the Black Economy Taskforce

1.9 The Final Report of the Black Economy Taskforce recommended the Government introduce a \$10,000 cash payment limit for transactions between businesses and individuals.

1.10 In its response to the Report in the 2018-19 Budget, the Government announced that it would introduce a cash payment limit for such transactions with effect from 1 July 2019. This was recently extended to 1 January 2020 in the 2018-19 Mid-Year Economic and Fiscal Outlook.

Summary of new law

1.11 The Bill creates new offences that apply if an entity makes or accepts cash payments with a value that equals or exceeds the cash payment limit. However, the offence does not apply if the payment is made in the course of a transaction of a kind specified by the Treasurer by legislative instrument.

1.12 The cash payment limit is \$10,000. The Treasurer may specify how to work out the market value of an amount of foreign or digital currency in Australian dollars.

1.13 The Bill also provides rules, similar to the rules that apply in the context of the taxation law, about the consequences that apply when the offence is committed by an entity that is not a legal person.

Detailed explanation of new law

1.14 This Bill establishes the cash payment limit of \$10,000. *[Clause 7]*

1.15 To give effect to this limit it also establishes new offences for entities that make or accept cash payments that equal or exceed the cash payment limit.

1.16 Two of the offences apply if an entity makes or accepts a cash payment or series of payments, with strict liability applying to the circumstances of the payment including cash in equal to or exceeding the cash payment limit. That is, the offences are committed regardless of whether the entity intended or was reckless about whether the payment or series of payments included cash that equalled or exceeded the cash payment limit. The other two offences apply if the entity intended or was reckless about making or accepting such a payment or a series of payments.

1.17 The offences apply in all external territories. *[Clause 5 of the Bill]*

1.18 The Bill binds the Crown in all its capacities, but does not make the Crown liable to be prosecuted for an offence. *[Clause 4 of the Bill]*

Strict liability offences

Physical elements

1.19 The first strict liability offence applies if an entity makes or accepts a payment that is or includes an amount of cash that equals or exceeds the cash payment limit. *[Subclause 10(1) of the Bill]*

1.20 The offence applies to all entities, within the meaning of the ITAA 1997. Entity includes, among other things, individuals, bodies corporate, bodies politic, trusts and partnerships.

1.21 When an entity makes or accepts payment is a question of fact to be determined using the ordinary meaning of the terms.

1.22 A payment consists or includes cash if cash is provided as part of the payment. Cash is defined as physical and digital currency within the meaning of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. It includes notes and coins that are legal tender and circulated as a medium of exchange in Australia or a foreign jurisdiction and digital tokens that have similar characteristics. *[Paragraph 10(1)(c) and the definition of 'cash' in clause 7 of the Bill]*

1.23 While digital currency is included in the definition of cash, given ways in which digital currency is presently used in Australia, it is expected that the Treasurer will exempt most transactions involving digital currency for the cash payment limit.

1.24 The value of the cash provided is to be determined at the time of the payment. This value is its value as currency; to the extent cash may have value other than as a medium of exchange this is not relevant (for example, a collectable coin). Some payments may involve an amount of foreign currency or digital currency. The Treasurer may determine rules about how to work out the value of such cash payments in Australian dollars. *[Clause 8 of the Bill]*

1.25 Allowing rules to be determined by legislative instrument is necessary to ensure that appropriate rules can be made to provide certainty for entities across the range of foreign currencies for which this is needed.

1.26 The second offence applies in the same circumstances as the first, except that you do not look to assess whether the payment itself equals or exceeds the cash payment limit, but you instead look to assess a series of payments that relate to a supply or are a gift and determine if, as a result of the payment, the amount of cash provided in the series of payments equals or exceeds the cash payment limit. *[Subclause 10(5) of the Bill]*

1.27 To constitute a series of payments, the payments must be for the same supply or part of a single gift. It is not sufficient that the payments occur between the same parties, even if they occur on a regular basis, where distinct things are supplied.

1.28 Example of a series of payments include the purchase of a car by instalments– all of the payments relate to the one supply (the car). An example of payments that do not constitute a series are monthly payments of rent – each payment is for the use of the property for a different period.

1.29 ‘Supply’ is defined as having the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999*. This means it includes ‘any supply whatsoever’. There has been considerable judicial scrutiny of the meaning of supply in the context of the *A New Tax System (Goods and Services Tax) Act 1999*, much of which is outlined in the ATO’s Goods and Services Tax Ruling GSTR 2006/9. *[The definition of ‘supply’ in clause 6 of the Bill]*

Fault elements

1.30 There are two different fault elements required for the physical elements of these two offences: intention and strict liability.

1.31 To commit these two offences the entity must have intended to make or accept a payment. If an entity inadvertently makes or accepts a payment, without knowing or being aware of what they are doing, then they have not committed the offence. For the second offence, the entity must also have intended that this payment was a payment for a supply or made as a gift.

1.32 However, strict liability applies to in relation to the amount of the payment and whether it is cash. Effectively, once an entity makes or accepts a payment for a supply or as a gift, the entity commits the offence if the payment includes cash of an amount that is equal to or in excess of the cash payment limit, whether or not the entity was aware that the payment included this amount of cash. *[Subclauses 10(2) and (4) of the Bill]*

1.33 The defence of mistake of fact is available in relation to these elements. If an entity can demonstrate, after consideration, that it mistakenly but reasonably believed that a payment did not include an amount of cash that was equal to or exceeded the cash payment limit then they will have not committed the offence.

1.34 The application of strict liability to these elements of the offences is necessary for the offence to have its intended effect of deterring the use of large cash payments. Payments are often routine or automated and can often be made or accepted without particular consideration, which can make demonstrating any level of intention problematic. Applying strict liability to making or accepting a cash payment effectively places a duty on entities to take reasonable steps to ensure they do not make or accept such a payment, which is necessary for the ban to be effective.

Geographic application

1.35 Both strict liability offences are subject to category B extended geographical jurisdiction. Broadly, under standard geographical jurisdiction this means that the offence will not apply unless either conduct or a result of the conduct constituting the offence occurs in Australia or on board an Australian aircraft or ship, or the offence is ancillary to another offence for which that was the case. Under category B extended jurisdiction, the offences will also apply if the entity is an Australian citizen or body corporate, or, if the offence is also contrary to the law of the jurisdiction in which it is committed, a resident of Australia. *[Subclause 10(6) of the Bill]*

1.36 In most cases the offence will apply appropriately under standard geographical jurisdiction, as either the payment or the result of the payment (the supply) will occur in Australia. However, the extension ensures that entities that are closely linked to Australia cannot escape the application of the rules by arranging for payment and supply to take place outside of Australia.

Penalty

1.37 The maximum penalty for both strict liability offences is a fine of 60 penalty units. *[Subclauses 10(1) and (4) of the Bill]*

1.38 However, under section 4B of the *Crimes Act 1914*, the maximum penalty for a corporation is increased to five times the amount

for a natural person. The maximum penalty for this offence for a body corporate would therefore be 300 penalty units.

Mental element offences

1.39 The remaining two offences apply in the same circumstances as are set out above and all of the physical elements of the offences are the same. However, strict liability is not the fault element for any of the physical elements of the offence. Instead, the fault element for the circumstances of the payment including an amount of cash and the total amount of the cash payments equalling or exceeding the cash payment limit is the standard fault element for circumstances under the Criminal Code: recklessness. *[Clause 11 of the Bill]*

1.40 This means that an entity will only commit these offences if the entity knew or was conscious that there was a real risk that the payment would result in the total amount of cash paid or received equalling or exceeding the cash payment limit.

1.41 The maximum penalty for these offences is also greater – 120 penalty units or 2 years imprisonment or both. *[Subclauses 11(1) and (2) of the Bill]*

1.42 This higher penalty reflects the greater level of culpability involved in deliberately or recklessly breaching the cash payment limit. Unlike the strict liability offences, which operate to ensure compliance with the limit, the mental element offences apply to penalise entities that have consciously and deliberately decided to risk violating the cash payment limit.

1.43 Both mental element offences are also subject to category B extended geographical jurisdiction for the reasons outlined in paragraphs 1.34 and 1.35. *[Subclause 11(4) of the Bill]*

Defences

1.44 All of the offences provide that the offence does not apply to a payment if either the payment is one that the Treasurer has specified by legislative instrument. The offences also do not apply to the making or acceptance of a payment in circumstances specified by the Treasurer by legislative instrument. *[Subclauses 10(5) and 11(3) of the Bill]*

1.45 It is expected that exceptions will be created for payments in transactions in which neither party is acting in the course of a business or other enterprise and certain payments that are subject to reporting obligations under the AML/CTF Act – see the exposure draft at www.treasury.gov.au/consultation. Please note that consequential amendments are also to be made to that Act to ensure the reporting regime

interacts appropriately with the new offences. See paragraphs 1.67 to 1.73 for details of these consequential amendments.

1.46 Allowing kinds of transactions to be made exempt from the cash payment limit by legislative instrument ensures that there is flexibility in the regulatory regime to accommodate new kinds of transactions. Given the serious nature of the proposed offences, it is important to ensure that swift changes can be made to accommodate new kinds of transactions in which the use of cash is necessary or appropriate.

1.47 The Bill permits the Treasurer to either exempt a payment in its entirety or instead to exempt only the making or acceptance of a payment in particular circumstances. This reflects that there are both classes of payment that it may be appropriate to wholly exempt (such as payment occurring outside the course of an enterprise) and cases where it may be appropriate to exempt the party making a payment but not the party accepting the payment (or vice versa) because of the particular circumstances of that party (for example, a party may have been misled by the other party and reasonably believed that the payment was not made or accepted in the course of an enterprise).

1.48 A defendant bears an evidential burden to establish the possibility that their use of cash of an amount equal to or above the cash payment limit relates to a transaction of a kind specified by the Treasurer. The defendant, as one of the parties to the transaction, is readily able to assess the nature of the transaction because the details of the transaction are peculiarly within the knowledge of the parties. This is in contrast to the position of enforcement agencies, which would find it difficult or impossible to prove the nature of the transaction and enforce the offences should the parties to the transaction choose to withhold information.

1.49 The general defences set out in Part 2.3 of the Criminal Code can also apply to the cash payment limit offences.

Entities

1.50 This offences applies to all entities. Entities is defined in the same way as in the ITAA 1997. It includes both legal persons, such as individuals, bodies corporate and bodies politic, as well as certain associations, structures and arrangements, such as partnerships, trusts, unincorporated associations, superannuation funds and approved deposit funds. *[Clauses 10 and 11 of the Bill]*

Determining the criminal responsibility of entities that are not legal persons

1.51 The Bill provides that, in working out if an entity that is not a legal person has committed an offence, the entity is treated as if it was a body corporate. The Bill also specifically provides that the rules in

Division 12 of the Criminal Code for determining corporate criminal liability apply to an entity as is it were a body corporate. *[Subclauses 12(1) and (2) of the Bill]*

1.52 Broadly, this means that an entity that is not a legal person will commit the physical element of an offence if it is committed by an employee, agent or officer of the entity acting with the actual or apparent scope of their employment or authority.

1.53 For this purpose, an entity (the first entity) is taken to be an agent, employee or officer of another entity if the first entity is acting on behalf of the other entity or is carrying on activities such that a reasonable person would consider that they would be an agent, employee or officer of the second entity were that entity a body corporate or similar to the activities of an agent, employee or officer of a body corporate. *[Subclauses 12(3) of the Bill]*

1.54 Under Division 12 of the Criminal Code, a fault element other than negligence relating to a physical element will be attributable to an entity if that entity has authorised or permitted the commission of the offence. This authorisation may be implied or tacit as well as express. One manner in which such authorisation may be given is through the actions of the body or entity exercising the executive authority of the entity.

1.55 A fault element of negligence is attributable to such an entity in the same way it applies to individuals. Negligence may arise even where none of the individuals involved in the offence was negligent if the conduct of the entity was negligent when viewed as a whole.

Liability of other entities for offences committed by an entity that is not a legal person

1.56 To the extent an entity is not a legal person, they cannot be the subject of legal proceedings. To address this, the Bill provides that if an offence is committed by an entity that is not a legal person, another entity or entities (being broadly the entity has control over the actions of the first entity), will be taken to commit that offence. *[Clause 13 of the Bill]*

1.57 The table below sets which entity is taken to commit an offence when the offence is committed by a particular type of entity.

If an offence is committed by an entity that isthe offence is taken to have been committed by...
an unincorporated association or body	each member of its committee of management.
a partnership	each of the partners.
a trust	the trustee of the trust, or, if the trust

	has more than one trustee, by each of the trustees.
a superannuation fund	the trustee of the fund, or, if the fund has more than one trustee, by each of the trustees. However, if a fund does not have a trustee, the offence is taken to have been committed by the entity or entities that manage the fund.

[the table in subclause 10(1) of the Bill]

1.58 In some cases in which an offence committed by one entity (the first entity) is taken to be committed by another entity (the second entity), the second entity may also not be a legal person.

1.59 In this case, the same rules apply again, so the offence is also taken to have been committed by the other entities specified in the table in relation to the second entity. For example, if a trust is taken to commit an offence because the trust is a partner in the partnership that committed the offence, the trustee of the trust would also be taken to commit the offence.

1.60 It is a defence for a person that is taken to commit an offence because of this provision to demonstrate that the person was not in any way involved in the commission of the offence. *[Subclause 10(2) of the Bill]*

1.61 Involvement can either be:

- aiding, abetting, counselling or procuring the offence; or
- being knowingly concerned in or party to any act or omission.

1.62 Effectively, this ensures that a person who was in a position to have control over the actions of an entity, but neither knew nor was involved in the commission of a criminal offence by that entity will not be guilty of an offence.

1.63 Structuring this provision as a defence is appropriate as it is based on the knowledge and state of mind of the defendant, which is peculiarly within the knowledge of the defendant and would be difficult or impossible for the prosecution to ascertain.

1.64 The Bill also provides that, when sentencing a legal person who has been convicted of an offence under this Bill, if the person was taken to commit the offence because of the actions of another entity that is not a legal person, the court may take into account the financial circumstances of that other entity, and any fine may be enforced against the assets of that entity. *[Clause 14 of the Bill]*

1.65 This ensures that the courts can ensure that any penalty appropriately punishes the entity that has directly committed the offence. It also ensures that the entity that committed the offence cannot escape a penalty through altering its management arrangements (for example, a fine will still be enforceable against the assets of a trust even if the trustee is a corporate trustee that does not seek to be indemnified).

1.66 For avoidance of doubt, the Bill makes clear that the fact the financial circumstances of an entity cannot be determined should not prevent the imposition of a fine on a person and these provisions do not affect the general rule subsection 16C(1) of the *Crimes Act 1914* the severity of the sentence for any federal offence must be appropriate in all of the circumstances of the offence. *[Subclauses 14(4) and (5) of the Bill]*

Consequential amendments

1.67 The Consequential Amendments Bill implements consequential amendments to the AML/CTF Act and the FTR Act in response to the Bill.

1.68 The Consequential Amendments Bill provides a new definition in the AML/CTF Act - notifiable transaction. A notifiable transaction means a transaction involving the transfer of money, digital currency or property, where the total amount transferred is not less than a threshold amount specified in the regulations for that transaction. *[Schedule 1 to the Consequential Amendments Bill, item 2]*

1.69 If a reporting entity provides a designated service to a customer and the provision of the service involves a notifiable transaction, then that entity must provide a report to the Australian Transaction Reports and Analysis Centre (AUSTRAC) CEO in the approved form, containing such information as specified in the AML/CTF Rules. The report must be submitted within 10 business days after the day on which the transaction took place. Failure to submit the notifiable transaction report will be a civil penalty provision. *[Schedule 1 to the Consequential Amendments Bill, item 7]*

1.70 The Consequential Amendments Bill also amends the definition of threshold transaction so that it only relates to the transfer of physical currency, where the total amount transferred is not less than \$10,000. This includes transacting in a foreign currency, where the amount transferred is not less than the equivalent of \$10,000 Australian dollars. *[Schedule 1 to the Consequential Amendments Bill, item 3]*

1.71 To give effect to an economy-wide cash payment limit, the mandatory threshold transaction reporting obligation will be removed for all reporting entities (other than those engaging in the exempt services) regulated under the AML/CTF Act. This will prevent these entities from

being required to report payments of \$10,000 or more as they cannot legally receive such payments.

1.72 The cash payment limit will not apply to transactions where an authorised deposit-taking institution accepts deposits or pays out withdrawals. Exempting these entities will be necessary for the public to have a legitimate way of moving large amounts of cash into and out of the financial system. Further, a reporting entity that provides foreign currency exchange services regulated under the AML/CTF Act will also be exempt as this service inherently involves cash. These entities will continue to submit threshold transaction reports when they engage in transactions involving an amount not less than \$10,000. *[Schedule 1 to the Consequential Amendments Bill, item 6]*

1.73 The Consequential Amendments Bill also removes reporting obligations under the FTR Act for significant cash transactions. *[Schedule 1 to the Consequential Amendments Bill, item 20]*

Guide materials and general provisions

1.74 The Bill includes provisions establishing the structure and object of the legislation and also sets out appropriate guidance materials for the new offences and related provisions. *[Clauses 1, 3, 6 and 9 of the Bill]*

Application and transitional provisions

Offences and general provisions

1.75 These offences commence from 1 January 2020. *[Clause 2 of the Bill]*

1.76 This means that they apply to conduct occurring on or after that day.

1.77 The offences do not apply to conduct that occurs before that time. However, if a payment or series of payments is made after that time, it is not a defence to the new offences that the payment or payments may have been made under an agreement made before that time.

1.78 The Bill also provides that, except in the event of express inconsistency, it does not exclude or limit the operation of any other law of the Commonwealth, a State or a Territory. *[Clause 12]*

1.79 This makes clear that the passage of this law is not intended to affect the operation of other laws that may regulate or restrict the use of currency.

Consequential amendments

1.80 The amendments made by Schedule 1 to the Consequential Amendments Bill commence one year after the Bill. *[Clause 2 of the Consequential Amendments Bill].*

1.81 The amendments to the FTR Act apply to transactions that occur after the commencement of the Consequential Amendments Bill. *[Schedule 1 to the Consequential Amendments Bill, item 20]*

1.82 The amendments to the AML/CTF Act apply to conduct occurring on or after the day that Schedule 1 to the Consequential Amendments Bill commences. *[Schedule 1 to the Consequential Amendments Bill, item 21]*

1.83 The consequential amendments made to the AML/CTF Act do not apply to conduct that occurs before that time. However, if a payment or series of payments is made after that time, it is not a defence to the new offences that the payment or payments may have been made under an agreement made before that time.

1.84 The twelve month delay in the consequential amendments means that these entities will continue to be subject to their existing reporting obligations and exempt from the cash payment limit over that period (due to the expected exemption for transactions subject to threshold transaction reporting obligations – see paragraphs 1.44 to 1.48). This transitional period will allow these entities, which deal with high volumes of cash, to make changes to systems and processes to ensure they can comply with the cash payment limit.