

EXPOSURE DRAFT EXPLANATORY MATERIALS

Currency (Restrictions on the Use of Cash) Act 2019

Currency (Restrictions on the Use of Cash) Rules 2019

The *Currency (Restrictions on the Use of Cash) Act 2019* (the Act) establishes the cash payment limit and makes it an offence to make or accept a payment or series of connected payments in cash in excess of this limit.

Section 20 of the Act provides that the Treasurer may, by legislative instrument, make rules prescribing matters required or permitted by this Act to be prescribed by rules or necessary and convenient to be prescribed for the purposes of the Act.

Subsections 12(5) and 13(3) of the Act provide that the offences for breaching the cash payment limit do not apply to payments of a kind specified by the rules, or payments made or accepted in circumstances specified by the rules. As a result, it is a defence to these offences should it be shown that a payment that would otherwise breach the cash payment limit is of a kind specified or occurred in circumstances that have been specified.

Section 9 of the Act provides that the rules may prescribe how to work out the value in Australian currency of an amount of foreign currency or digital currency.

The purpose of the *Currency (Restrictions on the Use of Cash) Rules 2019* (the Rules) is to specify kinds of payments and circumstances in which certain payments are made or accepted for the purposes of subsections 12(5) and 13(3) and therefore not subject to the cash payment limit.

Broadly, the payments not subject to the cash payment limit are:

- payments related to personal or private transactions (other than transactions involving real property);
- payments that must be reported by an entity under anti-money laundering and counter-terrorism legislation, provided, broadly, the entity with a reporting obligation complies (or is reasonably expected to comply) with their obligations under that legislation;
- payments made or accepted by a public official in the course of their duties where it is necessary for the payment to be made in cash for the performance of those duties and payments made or accepted by Australian government agencies where the payment is foreign currency produced for a foreign government;
- payments that only equal or exceed the cash payment limit because the payment is part of a transaction involving collecting, holding or delivering cash and this is undertaken in the course of an enterprise of collecting or delivering cash (i.e., providing cash-in-transit services);

- payments that only equal or exceed the cash payment limit because payment is or includes an amount of digital currency; and
- payments that occur in exceptional situations where no alternative method of payment could reasonably be used.

The purpose of the Rules is also to provide that the value of an amount of digital currency or foreign currency should be worked out consistent with the methods prescribed by the Commissioner of Taxation from time to time under subsection 9-85(2) of the *A New Tax System (Goods and Services Tax) Act 1999*.

Further details of the rules are set out in Attachment A.

There are no conditions specified in the Act that need to be satisfied before the power to make the instrument may be exercised.

The instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

This instrument commences on 1 January 2020 – the day when the offences in the Act also commence.

Details of the Currency (Restrictions on the Use of Cash) Rules 2019

This attachment sets out further details of the *Currency (Restrictions on the Use of Cash) Rules 2019* (the Rules).

Preliminary

Section 1 – Name of Rules

This section provides that the title of the instrument is the *Currency (Restrictions on the Use of Cash) Rules 2019*.

Section 2 - Commencement

This section provides that the instrument commences on 1 January 2020.

Section 3 - Authority

This section provides that the instrument is made under the *Currency (Restrictions on the Use of Cash) Act 2019* (the Act).

Section 4 - Definitions

This section defines the meaning of a number of the terms used in the instrument.

These terms are discussed further in the context of the relevant provisions in which they are used.

Valuing Cash

Sections 5 and 6 – Working out the value of foreign currency and digital currency in Australian currency

These sections provide that, under the power provided in section 9 of the Act, the value in Australian currency of an amount of digital currency or foreign currency is to be determined in the same manner as the manner determined by the Commissioner of Taxation, from time to time, by legislative instrument under subsection 9-85(2) of the *A New Tax System (Goods and Services Tax) Act 1999*.

Currently, the Commissioner of Taxation has determined separate methods for determining the value of foreign currency and digital currency in the *Goods and Services Tax: Foreign Currency Conversion Determination 2018* and the *Goods and Services Tax: Digital Currency Conversion Determination 2019*.

For foreign currency, this method is broadly to multiply the amount of foreign currency by the entity's particular exchange rate on the conversion day, expressed as Australian dollars per unit of foreign currency. An entity's particular exchange rate for a day can be the rate published by the Reserve Bank of Australia or a foreign

exchange organisation on that day or an agreed rate set at on an arm's length basis in the agreement under which the transaction takes place, as chosen by the entity. The conversion day is generally the earlier of the day on which the payment is made or the date of the invoice.

For digital currency, this method is broadly to multiply the amount of digital currency by the entity's particular exchange rate on the conversion day, expressed as Australian dollars per unit of digital currency. An entity's particular exchange rate can be the rate published by a digital currency exchange or website, or an agreed rate set at on an arm's length basis in the agreement under which the transaction takes place, as chosen by the taxpayer, if the relevant exchange rate is quoted in Australian currency. If the exchange rate is not quoted in Australian currency, the value of the digital currency must be determined using the relevant rate for the day in the a foreign currency and then this amount must be converted in an amount of Australian currency for the same day using the method set out in the *Goods and Services Tax: Foreign Currency Conversion Determination 2018*. The conversion day is generally the earlier of the day on which the payment is made or the date of the invoice.

The methods specified by the Commissioner of Taxation are flexible and straightforward to apply while also providing certainty about the value of amounts to entities making or accepting payments. They ensure entities that have adopted reasonable practices are not penalised solely because of unanticipated changes in exchange rates.

Using existing methods that are already familiar to businesses minimises any additional burden on business and consumers. Using the methods as made from time to time ensures that the approaches remain consistent and that any improvements made to the determinations are adopted. For most payments covered by the cash payment limit, businesses would already be required to apply these determination by the Commissioner of Taxation to fulfil their GST obligations in relation to the payment.

Excepted transactions

Section 7 – Personal or private transactions

The first exception to the cash payment limit is for payments relating to personal or private transactions. This includes:

- payments solely for supplies or acquisitions that are *not* made in the course of an enterprise;
- payments that are made or received by an entity in circumstances where that entity reasonably believes that the payment is solely for supplies or acquisitions that are *not* made in the course of an enterprise;
- payments that are made as or as part of a gift, if neither the giver or the recipients make or receives the gift in the course of an enterprise; and
- payments that are made or received by an entity as a gift (or part of a gift) in circumstances where that entity reasonably believes that the payment is *not* made or received in the course of an enterprise.

Enterprise has the same broad meaning as in the *A New Tax System (Goods and Services Tax) Act 1999*. An entity will be undertaking an enterprise if, for example, it carries on a business (or in the form of a business), offers real property for rent, is a charity, political party (or candidate) or other recipient of gifts that are deductible for income tax, operates a superannuation fund or is the Commonwealth, a State or a Territory or an entity established for public purposes under an Australian law.

Effectively, the only circumstances in which an entity will not be carrying on an enterprise is where the entity is acting in a wholly private or personal capacity. The purpose of this exception is to exclude these private activities occurring outside a commercial or regulatory context, such as private gifts (but not donations to regulated entities such as charities), inheritances and occasional private sales of assets (for example, the private sale of a used car).

The first case in which this exception applies is based on the actual nature of a payment (whether for a supply or as a gift). In this case the exception applies based on the objective nature of a payment and protects both the entity making the payment and the entity accepting the payment.

The second exception is based on the reasonable belief of the entity about the circumstances of the payment (whether for a supply or as a gift). This means that if an entity reasonably, but incorrectly believes, that the other party to a transaction is not acting in the course of an enterprise then the exception to the cash payment limit will apply to the payment for that entity, and that entity only.

For example, if an individual sells their car to another individual reasonably believing the other individual has acquired the car for private use after undertaking reasonable inquiries such as searching the Australian Business Register, then the exception applies, even if this belief is incorrect as the other individual had in fact acquired the car for use in a business they are carrying on.

In general, whether a belief is reasonable will depend on the circumstances of the transaction and the parties. However, a reasonable belief must be a belief about the facts – it does not protect an entity ignorant of the law or of the legal implications of facts.

As this exception is connected to the belief of the relevant entity about the other party the exception may apply to a party making the payment, but not the entity accepting the payment, or vice versa. While a party may be reasonably unaware about the circumstances of another entity, it is unlikely that it would ever be reasonable for an entity to be unaware that the entity is itself acting the course of an enterprise.

Section 8 – AML/CTF reporting entities

The second exception to the cash payment limit is for payments made or accepted in circumstances in which an AML/CTF entity is required to provide a threshold transaction report under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, among other things, establishes a reporting regime under which AML/CTF reporting entities that provide designated services must report details about cash payments they receive

of \$10,000 or more in what is referred to as a threshold transaction report. Significant civil and criminal penalties apply to entities that fail to correctly report transactions.

Designated services under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* are listed in section 6 of that Act. Among other things, designated services broadly include financial services such as accepting deposits, payments made as a withdrawal and foreign currency exchange.

However, this exception does not apply to a payment made or accepted by an entity if the relevant AML/CTF reporting entity was required to be enrolled on the Reporting Entities Roll and the entity either was that AML/CTF reporting entity or knew, reasonably suspected or reasonably should have known that the AML/CTF reporting entity involved in the transaction was not so enrolled.

As this requirement is connected to the knowledge or suspicion of the relevant entity about the other party, it can result in a transaction being a specified transaction for only one of the parties to the transaction – the entity that is not the AML/CTF reporting entity.

This ensures that this exception does not apply in relation to entities that are not complying with their obligations under the AML/CTF reporting regime, while at the same time ensuring that entities that deal with such entities in good faith are not penalised.

The purpose of the cash payment limit is to prevent the use of cash to avoid creating records about economic activity. To the extent the transaction is subject to the rigorous AML/CTF reporting regime, it does not give rise to these concerns. This exception recognises this, and effectively permits the use of cash in this context where appropriate records are generated and reports are made to regulatory authorities.

Section 9 – FTR reporting entities

The third exception to the cash payment limit is for payments made or accepted in circumstances in which an entity is required to provide a report on the transaction under subsection 7(1) or 15A(1) of the *Financial Transaction Reports Act 1988*.

The *Financial Transaction Reports Act 1988* preceded the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and, among other things, established a regime under which certain entities are obliged to report on transactions they engage in that involve cash payments of \$10,000 or more.

The entities required to report under the relevant provisions of the *Financial Transaction Reports Act 1988* was once wide, but has been greatly reduced by the replacement of reporting obligations under the *Financial Transaction Reports Act 1988* with reporting obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. The remaining entities with FTR reporting obligations are solicitors, motor vehicle dealers that are involved in the provision of insurance and some entities that deal with travellers cheques.

Consistent with the exception for transactions involving AML/CTF reporting entities, the exception does not apply to a payment for an entity if that entity knew, reasonably suspected or reasonably should have known that the report of the transaction was not going to be provided as required under the *Financial Transaction Reports Act 1988*.

As also discussed in relation to the exception for AML/CTF reporting entities, generally only one party to the transaction will be covered by the exception, to ensure

that entities failing to comply with their reporting obligations are not protected while not penalising other entities dealing with them in good faith.

Consistent with the exception for transactions subject to AML/CTF reporting, this exception that the FTR reporting gives rise to records of transactions, and permits the use of cash in context given these records and the provision of reports to regulatory authorities are sufficient to address the integrity concerns.

Section 10 – Public officials and Australian government agencies

The third exception relates to payments made or accepted where this is necessary for certain public purposes. It covers two distinct types of payments. One of these types is payments made or accepted by public officials where the public official reasonably believes both that making or accepting the payment or payments is done in the performance of their duties under an Australian law and that it was necessary that the payment be made or accepted in cash for the proper performance of these duties (which cannot merely to satisfy a debt owed to a Government).

Public official is used with its ordinary meaning, consistent with its use in the *Public Governance, Performance and Accountability Act 2013* and elsewhere in Commonwealth law. It includes officials of the Commonwealth, State, Territory and local governments.

For the exception to apply, the official must reasonably believe that the payment is both made in the course of their duties and that it is necessary to make or accept the payment as cash to fulfil their duties.

While the payment must be made in the course of the public official's duties, it is not a requirement that the performance of the duty must be mandated; it is sufficient that making or accepting a payment falls within the range of those matters that an official may undertake in the course of the duties. However, it is not sufficient that a payment may be made or accepted in the course of those duties – it must be necessary that the payment involve cash or cash must be the only reasonable payment method in the circumstances.

These requirements will be satisfied if, for example, the official's function involves the distribution of notes or the sale of coins as an employee of the Reserve Bank of Australia or the Royal Australian Mint – as the function of these entities involves the production and distribution of cash. It would also be satisfied if the official was a police officer making the payment in the course of an undercover operation where using an alternate payment method would compromise the effectiveness of the operation.

This exception applies to these transactions that involve a public official whether or not the public official is formally one of the parties to the transaction. For example, in some cases a payment made be formally made to an Australian government agency rather than to an official on behalf of the agency. However, it does not matter if the payment is made to or accepted by the agency or the official – the involvement of the official is sufficient to satisfy the requirements of the exception.

The requirement cannot be satisfied if an official merely made or accepted a payment of cash for a debt owed to a government even if the payment was required by law. While such payments may be required, it is not considered necessary that the payment be made in cash having regard to the objects of the Act.

In general, whether a belief is reasonable will depend on the circumstances of the transaction and the parties. However, a reasonable belief must be a belief about the facts – it does not protect an entity ignorant of the law or of the legal implications of facts.

This exception ensures that the public officials undertaking functions requiring the making or accepting cash payments are not generally affected by the cash payment limit in carrying out their duties under law. This exception also prevents the possibility of a conflict of laws arising.

The second type of excepted payment is payments from Australian government agencies of foreign currency produced for or on behalf of a foreign country.

This ensures that government agencies involved in the production of physical currency for other countries are not affected by the cash payment limit when providing the currency that has been manufactured. Such transactions must involve cash and generally do not give rise to integrity risks. Further, as the transactions involve government agencies, any integrity risks that arise can be managed in other ways.

Section 11 – Cash in transit

The fourth exception is for payments that only exceed the cash payment limit because of a payment that occurs in the course of the movement or delivery of an amount of cash, where the payment is an incident of the transport of the cash rather than consideration or a gift.

It is not clear that the movement of physical currency involves a payment. However, as it is not possible to confirm this for all potential arrangements for the transport of physical currency, this exception has been included for the avoidance of doubt.

Effectively, the exception ensures that the offences relating to the cash payment limit do not apply to transactions merely because the transactions involve the movement of physical currency from one place to another with the use of a specialised courier. These sorts of payments that may occur when physically moving cash are not relevant to the black economy as they do not involve use of cash as consideration.

This exception does not apply to the extent that the transaction would be in breach of the cash payment limit for other reasons, such as the consideration for the transport being a cash payment of more than \$10,000.

Section 12 – Digital currency

The fifth exception is for payments that only exceed the cash payment limit because the transaction involves a payment that is or includes an amount of digital currency.

The exception means that only the amount of physical currency in the payment is relevant for working out if the payment exceeds the cash payment limit.

Digital currency is a new and developing area in the Australian economy. Unlike physical currency, it does not have a firmly established regulatory framework or industry structure. This makes it difficult to apply the cash payment limit in a way that would not largely prevent the use of digital currency in Australia or significantly stifle innovation in the sector. At this same time, there is little current evidence that digital currency is presently being used in Australia to facilitate black economy activities.

Given this, the Government has decided, for the present time, to effectively carve digital currency out from the cash payment limit.

This position will remain under ongoing scrutiny to ensure that the exemption for digital currency payments remains appropriate in light of the current use of digital currency in the Australian economy.

Section 13 – No alternative payment method

The final exception is for payments that form part of a transaction for which cash is the only payment method available for reasons beyond the reasonable control of any of the parties to the transaction and for which it not reasonable to delay payment.

Whether a choice by an entity not to use or offer a non-cash payment method or to accept a delay in payment is reasonable, must be considered in light of the objects of the Act (to protect the integrity of Commonwealth legislation by preventing the use of cash to avoid regulatory scrutiny).

Given this. The exception is only expected to apply in exceptional circumstances. It is increasingly unusual for no other payment method to be available, where this is not the result of a choice by one of the parties. It is also increasingly unusual for no non-cash payment method to be available without involving unreasonable costs (recognising the costs associated with dealing with large amounts of cash).

It is even more unlikely that it would not be reasonable for the parties to agree to delay payment until a reasonable non-cash payment method was available, noting that the value of the transaction must equal or exceed \$10,000.

For a delay in payment to be unreasonable it must be necessary for the transaction to proceed before an alternative payment method could be made available. In most cases, the timing of payment is not critical for reasons beyond the control of both parties to the transaction. A delay does not become unreasonable merely because it may result in one of the parties to the transaction changing their mind about proceeding with the transaction or choosing instead to enter into a similar transaction with someone else.

Effectively, the circumstances in which this exception can apply are limited to cases involving significant and prolonged disruptions to communications and transport infrastructure.