



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BLC:EEIb1769988

14 August 2019

Black Economy Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: blackeconomy@treasury.gov.au

Dear Sir/Madam,

Cash payment limit - draft legislation

The Law Society of NSW appreciates the opportunity to comment on the explanatory materials and draft legislation to implement the economy-wide cash payment limit. We also appreciated the opportunity to participate in a recent stakeholder roundtable discussion as part of this consultation. The Law Society's Business Law Committee contributed to this submission.

The Law Society has previously expressed its support for the introduction of an economy-wide cash payment limit as part of a strategic suite of recommendations set out in the Black Economy Taskforce Final Report¹ ("Final Report"). We recognise that from a practical perspective this measure alone is unlikely to be effective in preventing individuals and businesses from participating in the black economy. We note that it forms part only of a strategic response set out in the Final Report² and we encourage the Government to implement the remaining outstanding high priority recommendations as soon as practicable.

As a general comment, the penalty provisions of the Currency (Restrictions on the Use of Cash) Bill 2019 ("Bill") as currently drafted are extremely broad. While we acknowledge that the aim of the legislation is to deter black economy activity, we question whether introducing criminal offences for breach is proportionate, particularly where there is no need to prove underlying criminal conduct.

Our comments on the draft Bill and explanatory materials are set out below.

¹ Law Society of NSW, 'Introducing an economy-wide cash payment limit', submission to Treasury, 3 July 2018, accessed at: <https://www.lawsociety.com.au/sites/default/files/2018-09/Letter%20to%20Treasury%20-%20Introducing%20an%20economy-wide%20cash%20payment%20limit%20-%202018%20July%202018.pdf>

² Black Economy Taskforce, Treasury (Commonwealth), *Black Economy Taskforce Final Report- October 2017*, 5-6.

The Bill

Clause 2 Commencement

The timeframe for the introduction of the measure (1 January 2020 for most entities) should be extended to accommodate concerns raised from industry about needing to expend significant time and costs changing their systems to comply with the measure. Given that this measure casts an extremely wide net, it is imperative that public awareness is raised in relation to these changes and their commencement.

Clause 3(1)

Clause 3(1) states the object of the Act is to “prevent the use of cash in **economic** activities to prevent scrutiny from regulators” (emphasis added). The Note to that provision then goes on to state that “Examples of **illicit** activities include...” (emphasis added). The use of those terms is inconsistent. The term 'economic activities' is not otherwise defined in the Bill.

Exposure Draft Explanatory Materials- Currency (Restrictions on the Use of Cash) Bill 2019 (“EM”)

Paragraph 1.28 Physical elements

The reference to a 'series' of payments is not defined and the guidance on what will constitute a series of payments is inadequate. Is the term 'series' designed to mirror references to a 'series of activities' in GST law? (e.g. the definition of an 'enterprise' talks about a series of activities in s 9-20 of the *A New Tax System (Goods and Services Tax) Act 1999*). It is not clear on the face of the materials provided. Further, the example at 1.28 of the EM dealing with cash instalments to purchase a car seems unreasonable.

Paragraph 1.77 Transitional measures

The transitional measures are inadequate. Paragraph 1.77 of the EM is particularly concerning. Hypothetically, two entities may have entered into a contract requiring a series of payments to be made in cash (the total of which exceed \$10,000) prior to 1 January 2020, but some of the payments are contracted to be made after that date. If this measure were to be imposed as currently drafted then the parties would be required to breach the contract in order to avoid committing a criminal offence.

Exposure Draft Explanatory Materials- Currency (Restrictions on the Use of Cash- Excepted transactions) Instrument 2019 (“Instrument EM”)

The Instrument EM on page 4 includes an example about an individual who sells their car to another individual, and reasonably expects the other individual to have acquired the car for private use, being expected to 'undertake reasonable inquiries such as searching the ABR'. We do not consider that this is a reasonable inquiry expected of a lay-person (who potentially has never heard of the ABR). The legislation should not be so broad as to capture scenarios like the one in this example.

Other comments

Penalties

The proposed cash payment limit introduces four new criminal offences and makes it a criminal offence to:

1. Make or accept a cash payment from another entity
2. Make or accept a payment from another entity that is part of a series of payments that are made for a supply or as a gift,

where the payment is or includes an amount of cash that equals or exceeds the \$10,000 cash payment limit.

The maximum penalties for breach of these provisions is two years' imprisonment and/or 120 penalty units (see below in relation to corporations). We suggest that there should be reconsideration of these penalties in cases where there is no underlying criminal activity. In such cases, a civil penalty is more appropriate.

The explanatory documents and summary sheet all state that the maximum penalty is '120 penalty units'. This is correct in terms of what is stated in the legislation, but corporations are subject to five times the maximum penalty amount applicable to a natural person under s 4B of the *Crimes Act 1914*. This proviso is stated at 1.38 of the EM but is not located elsewhere. It is important that a note be included in the legislation because this increases the corporate penalty to $120 \times 5 \times \$210$ (per penalty unit) = \$126,000, which is arguably excessive given the absence of any proof of underlying criminal/illicit conduct by the corporation.

Valuation mechanism

Much of the legislation hinges on what is prescribed by the Minister (e.g. the valuation mechanism to convert the value of the payment into Australian dollars). Given this information is not yet available we cannot comment on whether the methods prescribed by the Minister are appropriate.

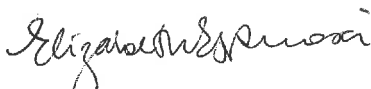
Self-reporting

If an entity inadvertently commits an offence under the legislation by virtue of it being the maker of a payment (or series of payments) constituting a supply, there is no self-reporting mechanism in the legislation or any provisions allowing the entity amnesty for its voluntary disclosure. There should be some amnesty mechanism inserted as well as provision for an applicable regulator to enable a report to be made.

Once again, we thank you for the opportunity to comment.

If you have any questions in relation to this submission, please contact Liza Booth, Principal Policy Lawyer, on 02 9926 0202 or liza.booth@lawsociety.com.au.

Yours faithfully,



Elizabeth Espinosa
President