

Exposure Draft Introducing an Economy-Wide Cash Payment Limit

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The NSW Young Lawyers Business Law Committee (**Committee**) makes the following submission in response to the Exposure Draft legislation introducing an economy-wide cash payment limit of \$10,000.

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

NSW Young Lawyers Business Law Committee

The Committee comprises of a group of approximately 1,600 members interested in all aspects of business law who have joined together to improve their own knowledge of business law and foster increased understanding of this area in the profession. The Committee reviews and comments on legal developments across corporate and commercial law, banking and finance, superannuation, taxation, insolvency, competition and trade practices.

Summary of Recommendations

This submission is intended to provide broad comments on the Committee's views of the Exposure Draft legislation introducing the economy-wide cash payment limit policy. It builds on the submission dated 29 June 2018 previously lodged by the Committee¹ in respect to the Government's proposed response measures to the Black Economy Taskforce Final Report.²

1. The Committee does not support the measure.
2. The Committee accepts that the policy goal of combatting the black economy, money laundering and terrorism financing is of great importance to the Australian community.
3. However, while commendable in principle, the Committee is of the view that the measure proposed will not meaningfully address these issues in a practical sense nor have the explanatory materials (listed in the below under 'Introduction') afforded legitimate reasons to criminalise the relevant behaviour in the absence of underlying serious criminal conduct.
4. The policy intent must be clarified and consistent across all explanatory materials issued by Treasury.
5. Cash is legal tender and the restriction proposed by the cash payment limit is unjustified.
6. The Committee considers that the unintended negative consequences of the cash payment limit will outweigh the anticipated benefits to law enforcement authorities. The Committee considers the measure casts too wide a net.
7. The Committee considers the measure to be impractical to properly enforce, while increasing regulatory compliance costs for legitimate businesses, particularly smaller businesses.
8. The lack of protections and adequate defences for self-reporting or otherwise legitimate entities is of concern to the Committee.
9. The Committee does not consider that those individuals and businesses undertaking illegal activities will be deterred by the measure and will continue to participate in the black economy. The measure further fails to cover the use of cash in low-value transactions, which affect a greater proportion of the Australian population.

¹ Leah Serafim and Ravi Nayyar, NSW Young Lawyers Business Law Committee, Submission to the Treasury, *Introducing an Economy-Wide Cash Payment Limit* (29 June 2018).

² Black Economy Taskforce, *Black Economy Taskforce: Final Report* (Report, October 2017).

10. The Committee considers that the funds allocated to the measure should be reallocated to bolster existing powers and resourcing of regulatory and law enforcement agencies to deliver greater value to the community than the implementation of the recommended cash payment limit.
11. In the event the measure is adopted, the Committee:
 - a. Recommends that the cash payment limit offences should not be criminalised or, if criminalised, that there is underlying conduct amounting to a serious (existing) criminal offence.
 - b. Recommends the commencement date be extended, and adequate transitional measures be inserted in the legislation, to accommodate the significant and costly change businesses (particularly in the travel and services industries) will be required to make to their systems to comply with the measure.
 - c. Recommends the nomination of one or more regulatory authorities to take responsibility for any self-reporting entities or entities seeking assistance to comply with the measure.

Introduction

The Government announced the introduction of an economy-wide cash payment limit of \$10,000 as part of the 2018-19 Budget, applicable to all payments made to businesses for goods and services from 1 July 2019 (see below regarding the change to the start date). Transactions in excess of this amount would need to be made using the electronic payment system or by cheque. The Committee lodged a submission dated 29 June 2018 in respect of the proposed measure.

The current Exposure Draft legislation and explanatory materials available on the Treasury website comprise:

1. Currency (Restrictions on the Use of Cash) Bill 2019 Exposure Draft (**ED Bill**);
2. Currency (Restrictions on the Use of Cash) (Consequential Amendments and Transitional Provisions) Bill 2019 Exposure Draft;
3. Currency (Restrictions on the Use of Cash – Excepted Transactions) Instrument 2019 Exposure Draft;
4. Explanatory Materials on the Currency (Restrictions on the Use of Cash) (Consequential Amendments and Transitional Provisions) Bill 2019 and Currency (Restrictions on the Use of Cash – Excepted Transactions) Instrument 2019 Exposure Drafts (**ED EMs**); and
5. Summary page outlining the above.

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

1. make or accept a payment from another entity (as defined); or
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 remainder of the payment(s) must be made electronically or by cheque.

Exempt transactions include all cash deposits or withdrawals from a bank account with an authorised deposit-taking institution, exchanging foreign currency and all consumer-to-consumer transactions such as selling a second-hand car but exclude real property transactions.

The maximum penalty is two years' imprisonment and/or 120 penalty units (multiplied by five for corporations pursuant to section 4B of the *Crimes Act 1914* (Cth)).

The materials provide that the start date for the legislation will be 1 January 2020 and from 1 January 2021 for most AUSTRAC reporting entities (who will no longer need to report threshold transactions to AUSTRAC).

Unless otherwise stated all references to '\$' in this submission are to Australian Dollars.

Policy behind the measure

There is an overwhelming lack of consistency in exactly what the intended policy underlying the cash payment limit is. The Exposure Draft materials variously describe the policy as being:

1. that non-cash forms of payment are “more convenient” for consumers and businesses;³
2. to mitigate the risk that large, anonymous cash payments may be used to facilitate money laundering and terrorism financing through avoiding the creation of an audit trail;⁴
3. to send a strong signal to the community that it is not acceptable to avoid tax and other obligations by paying with cash,⁵ and to drive people away from cash as a means of payment;
4. because enforcement agencies find it “difficult or impossible” to prove the nature of the transaction when parties transact in cash;⁶
5. to prevent the use of cash in “economic” activities to avoid the scrutiny of regulatory authorities;⁷ and
6. to give those uncomfortable about making or receiving payments in cash an opportunity to decline to use this method of transacting.⁸

The Committee agrees with the proposition that the black economy, particularly cash transactions, are characterised by anonymity and an arguable lack of accountability for breach of taxation laws and the criminal offences of money laundering and terrorism financing. In many cases the use of cash may cloak

³ Exposure Draft Explanatory Materials, Currency (Restrictions on the Use of Cash) Bill 2019 (Cth) [1.6].

⁴ Exposure Draft Explanatory Materials, Currency (Restrictions on the Use of Cash) Bill 2019 (Cth) [1.8].

Note the error in the drafting of this paragraph, which should state “...used **to** facilitate money laundering...”.

⁵ Summary page “Quick Facts”.

⁶ Exposure Draft Explanatory Materials, Currency (Restrictions on the Use of Cash) Bill 2019 (Cth) [1.48].

⁷ Currency (Restrictions on the Use of Cash) Bill 2019 (Cth) s 3(1). The Note to the subsection alternately refers to “illicit” activities, as opposed to the term “economic” activities in subsection 3(1).

⁸ As discussed at the Treasury Stakeholder Roundtable meeting on 7 August 2019.

underlying illicit operations involving serious criminal offences as well as potential terrorist conduct. Participants in the black economy perpetuate a cycle of disregard for the imperative of the identification and disruption of financial crime (including tax evasion), as well as the role of regulatory enforcement in Australian society.

Concerns about the Exposure Draft legislation and materials

The Committee, however, has significant concerns about the proposed cash payment limit measure, including:

1. Whether the measure undermines the rule of law and civil liberties;
2. Whether the measure can be properly enforced;
3. Whether the measure is in fact effective in preventing the underlying 'cash economy' behaviours that Treasury seeks to change; and
4. Short timeframe for the introduction of the measure.

Undermining civil liberties

Cash as legal tender

As correctly identified at paragraph 1.4 of the EM, Australian currency is legal tender. It is largely assumed by the public that they have a right to transact in the established accepted form of currency in Australia.

From a business perspective, not only do electronic transactions cost more to undertake, but there is a greater risk of online fraud, identity theft and failure for money to clear an account. Cash provides a stable and immediately effective mechanism by which businesses can transact. The number of EFTPOS systems' outages in recent years reinforces the role of cash as a fallback mechanism for payments.⁹

The Committee considers that the cash payment limit is an unnecessary curb on the liberty to use cash for legitimate transactions. To criminalise the mere act of making or accepting legal tender, in the absence of underlying conduct that causes harm to society (such as money laundering or terrorism financing), is unacceptable. This is also considered below.

⁹ See eg Stephanie Chalmers and Michael Janda, 'Payments at Retailers, Including Woolworths, Hit by Telstra Outage; ATMs, EFTPOS Affected', *Australian Broadcasting Corporation* (News article, 12 July 2019) < <https://www.abc.net.au/news/2019-07-11/telstra-outage-takes-down-atms-eftpos/11300926>>.

The Committee further notes that no amendments are proposed to be made to either the *Currency Act 1965* (Cth) nor the *Reserve Bank Act 1965* (Cth) as part of the suite of changes required to be made to accommodate the cash payment limit.

Criminal offence not warranted

The Committee submits that criminalising the conduct targeted by the cash payment limit measure is unwarranted.

Firstly, the proposed measure is unnecessary since there are already clear criminal prohibitions for financial crimes such as foreign bribery, terrorism financing and money laundering.¹⁰ The Committee questions what value a further criminal prohibition would add in terms of helping the law enforcement and intelligence communities disrupt criminal and terrorist activity when they have a number of existing legal authorities to leverage. In particular, the Committee draws the Treasury's attention to the *Criminal Code Act 1995* (Cth) s 400.8(3)(c), which criminalises the dealing in relation to money or property *of any value* with a fault element of *negligence* 'as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires)'. This is a very broad prohibition which can be used to prosecute a wide variety of black economy activity; instead of the proposed measure that does not discriminate between conduct otherwise constituting a financial crime and that which does not.

In the event the cash payment limit is enacted, the Committee submits that breaching the limit should be confined only to a civil (and not criminal) penalty with monetary repercussions. While the Committee acknowledges Treasury's position that introducing the cash payment limit is designed to 'deter' certain behaviours, the Committee considers that there is no justification for the imposition of a criminal offence where that offence does not require proof of any underlying criminal conduct. Criminal offences should not, as a rule, be imposed lightly.

Further, important aspects of the ED Bill, such as a full suite of available defences and important aspects of proving strict liability elements, hinge on what is prescribed by the Minister. For instance, the valuation mechanism to convert the value of the payment into Australian Dollars is dependent on the Minister, which could have serious implications for the travel industry. Given this information is not yet available the Committee cannot comment on whether the methods prescribed by the Minister are appropriate.

The proposed extraterritorial operation of the ED Bill is even more problematic. By providing for the offences to have extraterritorial effect pursuant to "category B" of the *Criminal Code*, any Australian citizen or company will be exposed to criminal punishment for accepting cash payments anywhere in the world –

¹⁰ *Criminal Code Act 1995* (Cth) s 70.2, divs 103, 400.

regardless of its legality where it occurs . The Committee submits that it is unjustified and inappropriate for Australia to seek to regulate commercial practices that occur entirely overseas.

Enforcement mechanisms

Further to the above comments, the Committee considers there to be significant omissions in the Exposure Draft materials in that:

1. no regulator or authority is specifically responsible for administering the proposed measure;
2. an entity will self-incriminate if it is to attempt to report its breach of the cash payment limit to a regulator; and, equally
3. because no one regulator is responsible then entities do not have access to guidance or resources to assist them in the transition to electronic transacting nor to either report others in breach of the rules or to self-report.

The Committee considers these omissions need to be resolved if the measure is introduced.

Effectiveness of the measure

Practical realities

The Committee believes that the cash payment will not, in practical terms, be effective in preventing or deterring individuals and businesses from participating in the black economy. The Committee's reasons for this position were extensively explained in its previous submission to Treasury.¹¹

It is understood that one of the policy objectives of the cash payment limit is to target serious crime such as money laundering and terrorism financing. The Committee believes such operations will continue to flaunt the law and use cash as their preferred method of transacting and that the existing criminal offences should be applied to these operations.

If, on the other hand, the policy objective is in fact to change everyday Australians' perception of cash as a tool to avoid taxation obligations, then the measure is again ineffective because low-level transactions are not caught by the rules.

¹¹ Leah Serafim and Ravi Nayyar NSW Young Lawyers Business Law Committee, Submission to the Treasury, *Introducing an Economy-Wide Cash Payment Limit* (29 June 2018).

Fails to target the real black economy

The Committee reminds the Treasury of the inherent difficulty of measuring black economy activity.¹² Lynch and Nayyar consider that ‘any estimates of the size of the shadow economy involve a degree of speculation, given the criminal world’s inherent opaqueness’.¹³

The policy basis for the proposed measure thus seems flawed, given that the activity it seeks to target is rather amorphous and liable to simply change so as to avoid the impact of the ED Bill. In such circumstances the effect of the ED Bill is likely to principally fall upon otherwise legitimate persons and businesses, while potentially strengthening ‘negative perceptions of regulatory risk and fairness among compliant businesses, potentially even driving them to align themselves closer to the black economy’.¹⁴ If that occurs, then regulators and law enforcement agencies lose the visibility they had of such businesses and the ability to help them maintain their compliance.¹⁵

Also, the stated purpose of the legislation is to change people’s perception that cash can be used to circumvent the tax system and law enforcement authorities. However, a majority of people will be dealing with low-value transactions unaffected by the ED Bill in any event.

The Committee does not consider this measure truly combats the major segments of the black economy that a majority of Australians deal with on a day-to-day basis, being the retail sector and small business enterprises.

The Committee also questions why, if the proposed measure is enacted, Section 5 of the Draft Currency (Restrictions on the Use of Cash—Excepted Transactions) Instrument 2019 (Cth) would exempt ‘payments relating to personal or private transactions’ from the operation of the proposed measure. The purpose of this provision is defined as ‘to exclude these private activities occurring outside a commercial or regulatory

¹² Black Economy Taskforce, *Black Economy Taskforce: Final Report* (Report, October 2017) 23.

¹³ Nathan Lynch and Ravi Nayyar, *Exploring the Dark Economy: The Mystery of Australia’s A\$76 Billion Cash Mountain* (Thomson Reuters Regulatory Intelligence Article, March 2019) 4,

¹⁴ Leah Serafim and Ravi Nayyar, NSW Young Lawyers Business Law Committee, Submission to the Treasury, *Introducing an Economy-Wide Cash Payment Limit* (29 June 2018) 8.

¹⁵ See eg Leah Serafim and Ravi Nayyar, NSW Young Lawyers Business Law Committee, Submission to the Treasury, *Introducing an Economy-Wide Cash Payment Limit* (29 June 2018) 6.

context, such as private gifts (but not donations to charities), inheritances and occasional private sales of assets (for example, the private sale of a used car).¹⁶

The Committee considers such an exemption to be flawed. It excludes arguably sizeable amounts of black economy activity, not least since the mentioned sales of assets can be used to integrate criminal proceeds as part of their laundering and/or that an Australian Business Number is not necessary to commit financial crimes. The Committee's views also stem from its reading of the threshold transaction reporting obligation of AUSTRAC reporting entities - *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 43 ('*AMLCTF Act*') does not vary their responsibilities as per whether the threshold transaction is 'personal or private' or not. Similarly, the *AMLCTF Act* s 41 does not vary the suspicious matter reporting obligation for AUSTRAC reporting entities nor any of the indicators in that section for assessment of whether a matter is suspicious as per whether the threshold transaction is 'personal or private' or not.

For the avoidance of doubt, the Committee does not consider that it is appropriate to prohibit cash payments at all. However, the \$10,000 cash payment limit in combination with the abovementioned exemption will significantly limit the ED Bill's efficacy for its stated purpose, such that its real effect is likely to fall largely upon law-abiding citizens who should not be targeted.

Timeframe for introducing the measure

Commencement date

The timeframe for the introduction of the measure (1 January 2020 for most entities and from 1 January 2021 for most AUSTRAC reporting entities) should be extended to accommodate industry and business concerns about needing to expend significant time and costs changing systems to comply with the measure.

While Treasury's summary page on the measure states the introduction of the cash payment limit "*will not impose additional reporting requirements on businesses and consumers*", it clearly creates significant compliance costs for businesses (particularly small businesses, the travel industry and remittance organisations).

A longer start date is especially imperative if Treasury does not propose to create any budget for educating the community about the change. Given the measure casts an incredibly wide net it would be sensible to ensure Australians are aware that their behaviours in fact need to change.

¹⁶ Exposure Draft Explanatory Materials, Currency (Restrictions on the Use of Cash—Excepted Transactions) Instrument 2019 (Cth) 4.

Transitional measures

The Committee considers transitional measures in the ED Bill are inadequate. Paragraph 1.77 of the EM states:

...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.

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 in its current form then the parties would be required to breach the contract in order to avoid committing a criminal offence.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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