



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: BLC:DH1619830

20 December 2018

Black Economy Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [Blackeconomy@treasury.gov.au](mailto:Blackeconomy@treasury.gov.au)

Dear Sir/Madam,

### **Improving black economy enforcement and offences**

The Law Society of NSW appreciates the opportunity to comment on the consultation paper "Improving Black Economy enforcement and offences". The Law Society's Business Law, Criminal Law and Privacy and Data Law Committees contributed to this submission.

#### **Question 1: Are there any other key hallmarks you think should be considered when developing new, or amending existing black economy offences and penalties?**

Greater clarity is required of what behaviours are sought to be covered by any new "black economy" offences and the gap in the coverage of existing offences. Appropriate penalties can only be determined once there is an identification of the offending behaviour which is being addressed. We understand that the consultation is looking at "mid-level" offences, but we have not been able to clarify the definition of the elements of criminality or why these behaviours are not covered by existing offences.

The prosecution of criminal offences should remain subject to certain legal safeguards.

If the creation of new offences remains under consideration, then the Law Society recommends that the Commonwealth consider adopting the Standing Council Working Group as an appropriate model to determine what offences should be criminalised. This would give the Commonwealth the benefit of input from lawyers across jurisdictions who have legal expertise to advise on this issue. In particular, the Law Society notes that unlike State jurisdictions, there is no equivalent of a Commonwealth Public Defenders' Office which can provide input from that perspective, advise on practical difficulties faced by people charged with Commonwealth offences and advocate on their behalf. Consideration should be given to engaging with experienced criminal law practitioners in further work on this project.

It is the Law Society's position that criminalising "black economy" offences, however defined, should be reserved for only high-level criminal behaviour such as fraud or evasion, which are captured in the existing legislative framework. "Mid-range" financial or tax offences are not suitable for criminal prosecution due to the nature of the offence, including the limited consequences of committing what is essentially a revenue offence, and should not be criminalised without strong justification.

Given the Government's acknowledged priority in criminalising the "black economy" behaviours is that of deterrence, Government resources would be better focused on education via proven effective marketing similar to the announcements around the Australian Taxation Office ("ATO") targeting work-related deductions earlier this year. There is insufficient evidence to conclude that expanding the criminal regime will reduce offender behaviour and achieve the desired "deterrence" effect.

**Question 2: Should the existing administrative penalties for repeat or serious tax offences be further scaled? If so, how and in what circumstances?**

There is insufficient information available for us to be able to make a recommendation on this question. Please refer to our response to Question 1 above.

**Question 2A: What are your views on introducing other tiers of administrative penalties? Is it consistent with the framework introduced in Part II?**

Please refer to our response to Question 1 above.

**Question 3: Are there other gaps in existing enforcement regimes, such as tax evasion offences under the Tax Administration Act or elsewhere, where new mid-range offences could be introduced?**

No. The current *Taxation Administration Act 1953* (Cth) ("TAA") regime is sufficiently broad.

As reflected in Question 1, tax "evasion" offences carry significant or "high" levels of criminality due to the nature of the offence and potential consequences on both revenue authorities and other taxpayers. The penalties for tax evasion are therefore proportionately high and carry a wider spectrum of civil and criminal consequences.

Enforcement of "mid-range" offences in the same or substantially the same manner is not appropriate. The taxpayer already bears the onus of proof in such cases (meaning it should not be resource intensive to the Commissioner to prove his case). The existing penalties also suitably reflect a range up to 75% of the shortfall amount in cases of "intentional disregard" for the tax law.

**Question 4: Should the requirement under section 8ZE of TAA1953, for all administrative penalties to be withdrawn where criminal proceedings are commenced against a taxpayer, be amended to suspend all administrative penalties pending the outcome of criminal proceedings?**

No. It is acknowledged that certain powers to "stay" civil penalty orders pending the outcome of criminal proceedings are already contained in the TAA where the offence comprises substantially the same conduct as the conduct in relation to the civil penalty order (see for instance section 298-95 of Schedule 1 to the TAA), such as for the tax promoter penalty laws. However, subsection (2) of that provision states that a civil penalty order must be dismissed where the entity is convicted of a criminal offence and, if not convicted, the civil penalty orders may be resumed. That is, the Government cannot double-recover against the same entity for substantially the same conduct.

Further, section 298-90 of Schedule 1 to the TAA prevents the making of a civil penalty order if an entity has already been criminally convicted of an offence that comprises substantially the same conduct.

However, strong policy reasons exist for not removing the safeguards contained in section 8ZE of the TAA. First, the process for taxpayers to bear the onus of proof in tax matters is a

costly one, so to require the taxpayer to both defend themselves in criminal matters and then a civil matter where they have not been found guilty is unjust. Second, there must be a strategic decision by the relevant authority to take the criminal prosecution route rather than seeking civil redress to ensure efficient allocation of the Commonwealth's resources.

Administrative penalties are withdrawn on the commencement of criminal proceedings because the authorities have chosen to proceed criminally not administratively. Administrative penalties should not be reinstated because the authorities have ultimately been unsuccessful in the proceedings chosen by them.

**Question 5: Which elements of serious black economy offences should reversing the onus of proof apply to?**

As a general rule, the prosecution should bear the onus of proof in criminal matters. In specific instances there may be a reversal, however this requires a consideration of the offence as a whole, the nature of the offending and the severity of punishment.

As a matter of general principle, the Law Society does not support the reversal of the onus of proof for criminal matters. Where the Government seeks to criminalise black economy offences, it must be subject to the criminal law standard of proof. That is, the onus of proof must rest with the prosecuting party and evidence must be proven beyond reasonable doubt. The Government must make its case against the accused offender.

The onus of proof is already reversed in circumstances where a black economy offence is also considered to be a breach of the tax law in civil matters.

This issue was raised during our consultation meeting on 6 December 2018 (and reflected at Chapter 13 of the October 2017 Black Economy Taskforce Final Report). It was noted that the defendant bears the onus of proof under Australia's new proposed illicit tobacco laws and that such proposed laws are applied to a standard of "reasonable suspicion" (rather than "reasonable doubt"). The Law Society considers this is not appropriate for the majority of "black economy offences" and comments that the ATO's powers in this regard are unusually broad.

**Question 6: Should the onus of proof for some elements of black economy offences be reversed and borne by the defendant instead of prosecution as recommended by the Taskforce?**

No. Refer to our response and reasons at Question 5.

**Question 7: What are the issues in reversing the onus of proof for some black economy offences?**

This is inappropriate for "mid-level" offences. The onus of proof should only be reversed where justified by the criminality of the conduct question, not simply to make prosecution easier.

**Question 8: What non-financial penalties could be considered to enhance compliance with tax law?**

Refer to our comments in Questions 1 and 3.

**Question 9: Are there any limitations, risks or unintended consequences that may result from implementing non-financial penalties?**

There remains a significant risk to taxpayers, both in terms of financial impact and on reputation, where there has been a breach of the tax law attributable to the conduct of their tax agent (i.e. the consequences of the tax agent's actions may be "sheeted home" to the taxpayer).

**Question 10: In what circumstances should a travel ban scheme apply to Australian taxpayers?**

For tax matters, the law already provides for restrictions on travel outside of Australia where there has been a criminal conviction or where ongoing criminal prosecutions are in place. It is not appropriate to extend a travel ban to non-criminal matters or broaden the existing travel ban framework.

**Question 11: Would the introduction of arrangements in Australia to prevent travel by taxpayers with large tax debts improve compliance with Australia's tax law?**

Not necessarily. If the tax debt is significant enough, then arguably such taxpayers could fall within the existing travel-ban regime i.e. criminal investigations can be commenced.

**Question 12: Is it appropriate to require additional recording keeping in relation to substantial gambling winnings or gifts?**

We suggest that this is not appropriate for one-off wins or gifts.

**Question 13: Alternatively, should the Commissioner be able to request taxpayers with substantial winnings to undertake further record keeping in relation to their gambling activities going forward (e.g. by way of written notice)?**

Taxpayers already bear the onus of proof where there are regular gambling activities to prove that such regular and recurrent activities should not be treated as assessable income.

The Commissioner should also utilise existing capabilities to request further details and request information from the gambling service provider, such as a casino, to verify the taxpayer's assertions. Similarly for gifts, there will generally be an account statement from the gift-giver against which the Commissioner will be able to verify the taxpayer's assertions.

To the extent the taxpayer is unable to recall where they received the funds, and reasonable steps taken by the Commissioner to ascertain the source of the funds from gambling service providers has not proved fruitful, then it would be appropriate to request the taxpayer maintain further records in relation to their gambling activities. However, the period of time for which the taxpayer must maintain such records should be capped and not be indefinite (e.g. for the next four years).

**Question 14: What level of increase to the civil penalties would serve as an appropriate deterrent to stop employers from engaging in sham contracting arrangements?**

The Law Society's view is that this issue is currently being very well addressed by the Fair Work Ombudsman and Fair Work Commission, as well as the work being undertaken by the ATO to pursue non-payment or underpayment by employers of the employee superannuation contributions.

**Question 15: Is the existing 'reckless' threshold for prosecuting employers involved in sham contracting appropriate? Should this legal threshold be lowered to 'reasonableness' test?**

Please refer to our response to answer 14 above. Our view is that no further action is currently required.

**Question 16: Are there any issues with providing the Commissioner with powers to access third party information for the purposes of investigating tax-related criminal offences?**

Yes, there are issues regarding clarification. Access should be reserved for the most serious offences and should not be extended to lower or middle-range offences. Further clarification and consultation regarding the nature and scope of the Commissioner's proposed powers, details of what specific third party information the Commissioner may access and which specific parties may be affected by the Commissioner's powers is required.

The impetus for this proposal appears to be the Australian Federal Police's role as gatekeeper and their limited resources. In the Law Society's view this is an appropriate brake on the use of covert compulsory acquisition of information and not a justification for the extension of powers to other agencies.

The Law Society considers that access to third party information should be reserved for the most serious offences and should not be extended to lower or middle-range offences. Information accessed should not be used for any other purpose that may extend beyond the scope of a legitimate investigation of a tax-related criminal offence within the proposed range. Any access to information held by third parties for criminal investigations should be subject to warrants or, at the very least, authorisation by a senior officer separate from the investigation.

**Question 17: What safeguards would need to be in place to protect privacy concerns and ensure that there are appropriate checks and balances?**

The issue with extending the Commissioner's powers for "lower or middle-range offences" comes back to our statement at Question 1 above regarding the definition of "black economy" offences and the "lower or middle-range" offences in particular.

The Law Society recommends that there be a principled consideration of privacy and data security issues when developing new powers. We recommend that mechanisms that strive to be "privacy-protective" including privacy impact assessments, supervision, accountability and transparency be built into any framework. These mechanisms can be enhanced by development of an appropriate regime to detect, audit, report on, respond to and guard against events that may breach the privacy of individuals both in the short term and the longer term, noting that security measures currently in place may cease being effective in the future. Methods for assessing the implications of any security breach and communicating the breach to both the general public (data subjects) and the technical, privacy and security communities are also recommended.

The Law Society suggests that the Government release an exposure draft of any proposed Bill that will impact on individual privacy for public comment and consultation prior to introducing the relevant Bill into Parliament. We recommend that the exposure draft be accompanied by explanatory material.

Further, the Law Society recommends the adoption of a regime that includes regular reporting of:

- statistics concerning information access (similar to what applies under the *Telecommunications (Interception and Access) Act 1979* (Cth);
- information of the number of occasions access to third party information was obtained;
- identification of the offences involved, and the number of convictions obtained;
- whether the material obtained was material to obtaining the conviction.

The Commissioner should also be required to comply with the principles in the *Privacy Act 1988*.

**Question 18: Are there any issues with government agencies using web data tools, such as internet scraping to monitor black economy behaviours?**

It is unclear which web data tools will be utilised, by which specific government agencies, what type of data is likely to be the subject of the monitoring exercises, how that data will be treated and what legal implications will flow. Further details on how the proposed amendments would be implemented and regulated, including information on the scope, operation, regulation of the monitoring activities of government and authorised personnel are required to respond to this question.

Our initial concerns include whether there is a risk that the utilisation of web data tools may increase the possibility of unauthorised access to information about individuals by third parties; whether there are risks of identity fraud or identity theft and how these risks might be alleviated.

The Law Society considers that there is also a need to address and consult further with stakeholders regarding how the proposed strategies will be executed and whether the services provided will be external to government agencies and even located outside Australia. We recommend that Government undertakes a considered review of the technical details of the proposal to ensure that the proposed amendments do not have serious unintended consequences for the privacy and cybersecurity of individuals.

**Question 19: Should the period of freezing orders under PoCa be extended from three days to 14 days? Are there any impediments to granting this extension?**

No. The existing period of three days provides a balance between the Commissioner's need for time to apply for a restraining order and the interference with the individual's account.

The Law Society also notes that if further consideration is given to extending the period of freezing orders, there would also need to be consideration given to how to preserve the status quo for the affected individual. The account may be the only source of funds for a taxpayer and significant loss and damages may flow from the freezing order if the taxpayer is unable to access any funds during this period.

**Question 20: Should the period of freezing order under PoCa allow for further extension beyond 14 days until the relevant financial institution has provided data sought by enforcement authorities? Are there any impediments to granting this extension?**

Please refer to our answer to Question 19.

**Question 21: Are there any impediments in giving discretion to courts to freeze only specific transactions or funds in relation to a bank account or person?**

No, provided the courts would otherwise have made the freezing order over all the person's assets or the entire bank account.

**Question 22: Should the ATO be able to access historical telecommunications data? If so, what type of telecommunications data should be able to be accessed?**

Any such access would need to be authorised by a court, and only in exceptional circumstances.

**Question 23: How should access to telecommunications data be obtained by the ATO and what safeguards should apply?**

Please refer to our answer to Question 22.

**Question 24: Would there need to be any specific limitations to address particular circumstances or specific concerns?**

Yes. The Commissioner should comply with the *Privacy Act 1988*.

**Question 25: What are the benefits of, or any impediments to conferring a tax jurisdiction on the Federal Circuit Court of Australia to hear and determine taxation matters?**

The Federal Circuit Court of Australia is not currently resourced appropriately to hear and determine taxation matters. Please refer to our answer to question 26.

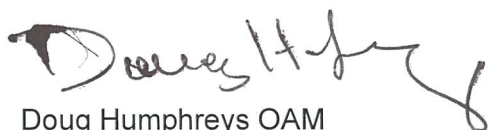
**Question 26: What are the benefits of, or any impediments to conferring a jurisdiction on the Federal Circuit Court of Australia to hear criminal matters relating to the black economy activities?**

In order for the Federal Circuit Court of Australia to adequately and appropriately hear criminal matters relating to the black economy, a new criminal jurisdiction would need to be created in the Federal Circuit Court. This would require incorporating appropriate processes and recruiting magistrates who have relevant experience.

This is not an insignificant undertaking. For example, the Federal Court of Australia is about to conduct its first cartel jury trial. The Court has arranged a criminal judge to hear the case and the preparations for the trial commenced five years ago.

Please contact Liza Booth, Principal Policy Lawyer, at [liza.booth@lawsociety.com.au](mailto:liza.booth@lawsociety.com.au) or on (02) 9926 0202 if you would like to discuss this submission.

Yours faithfully,



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President