

Introducing an Economy-Wide Cash Payment Limit

Government response to the Black Economy Taskforce Final Report

29 June 2018

Black Economy Division
The Treasury
Langton Crescent
PARKES ACT 2600
Email: blackeconomy@treasury.gov.au

Contact: David Turner
President, NSW Young Lawyers
Leah Serafim
Chair, NSW Young Lawyers Business Law Committee

Contributors: Leah Serafim and Ravi Nayyar

Coordinators: Priti Joshi and Bronte Sellers

The NSW Young Lawyers Business Law Committee makes the following submission in response to the 2018-19 Budget announcement regarding the introduction of 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.

The New South Wales Young Lawyers Business Law Committee (**Committee**) is a forum of like-minded individuals 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 paper is intended to provide broad comments on the Committee's views of the economy-wide cash payment limit policy and is not intended to address with specificity the Consultation Paper released by Treasury on 23 May 2018 titled 'Introducing an Economy-Wide Cash Payment Limit - Government response to the Black Economy Taskforce's Final Report (**the Final Report**).¹

In summary, the Committee submits that:

1. The policy intent to combat the black economy, money laundering and terrorism financing is of paramount importance to the community in light of the significant economic and social costs of these phenomena.
2. 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. The Committee does not support the measure.
3. The Committee considers the measure is unlikely to be properly enforced and increases the regulatory compliance costs for legitimate businesses, particularly smaller businesses. 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.
4. 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. This will strengthen the capacity and efficacy of the taxation and anti-money laundering and counter-terrorism financing (**AMLCTF**) regimes, and will deliver greater value to the community than the implementation of the recommended cash-payment limit.
5. In the event the measure is adopted the Committee:
 - a. recommends that the Government should delay its introduction until after the conclusion of the research covered by recommendation 3.6 of the Black Economy Taskforce's Final Report.
 - b. recommends that the Government should extend its exception of financial institutions from the cash-payment limit to include all entities that are reporting entities under section 5 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AMLCTF Act**).

¹ Black Economy Taskforce, 'Black Economy Taskforce: Final Report' (Report, Treasury, Commonwealth of Australia, October 2017) 53.

- c. does not support introducing different monetary threshold limits applicable to residents and foreign residents (or ‘foreign tourists’).

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. Transactions in excess of this amount would need to be made using the electronic payment system or by cheque.

The proposed measure follows Recommendation 3.1 of the Final Report² that significant risks (such as financial crime risks) to legitimate commercial behaviour can result from large, undocumented cash payments being made for cars, yachts and other luxury goods, agricultural crops, houses, building renovations and commodities. The measure seeks to target high value cash payments, particularly to target persons who breach their taxation obligations or engage in criminal activity such as money laundering³ and terrorism financing.⁴

As the Final Report outlined, the recommended cash payment limit is designed to complement Australia’s AMLCTF regime.⁵ This is because, for instance, the *AMLCTF Act* requires reporting entities – entities that provide ‘designated services’ specified by section 6 of the *AMLCTF Act* (such as financial and gambling services)⁶ – to report all cash transactions worth at least \$10,000 to the Australian AMLCTF regulator and Financial Intelligence Unit, the Australian Transaction Reports and Analysis Centre (**AUSTRAC**).⁷

² Black Economy Taskforce, ‘Black Economy Taskforce: Final Report’ (Report, Treasury, Commonwealth of Australia, October 2017) 53.

³ Schedule to the *Criminal Code Act 1995* (Cth), division 400.

⁴ Schedule to the *Criminal Code Act 1995* (Cth), division 400.

⁵ This comprises Division 400 of the Schedule to the *Criminal Code Act 1995* (Cth); *AMLCTF Act*; *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007* (No. 1) (Cth); *Financial Transaction Reports Act 1988* (Cth); and *Financial Transaction Reports Regulations 1990* (Cth).

⁶ *AMLCTF Act* s 5 (definition of ‘reporting entity’).

⁷ *AMLCTF Act* ss 5 (definition of ‘threshold transaction’) 43.

It is proposed that the system of penalties for the breach of the measure will apply to both parties to the contravening transaction in order to broaden the reach of the regime and help its efficacy.⁸

Other jurisdictions, particularly in the European Union, such as France, Spain, Italy, Portugal and Israel,⁹ have adopted various cash payment limits to combat the black economy and associated activities like money laundering and terrorism financing.

Unless otherwise indicated, all references to '\$' are to Australian Dollars.

Policy behind the measure

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. As a consequence, black economy operators enjoy an unfair competitive advantage over legitimate operators; because they do not bear the cost of complying with tax obligations, black economy operators can undercut their compliant competitors.¹⁰ If black economy operators are not adequately penalised by regulators or targeted by law enforcement, this can engender a sense of unfairness among compliant operators. In turn, these perceptions of unfairness may mix with the perception that there is little regulatory risk to noncompliance, contributing to the normalisation of black economy activity.¹¹

Care must also be taken to ensure that enforcement activity is not pursued counterproductively. For example, excessively aggressive enforcement and/or overly complex AMLCTF regulations can be counterproductive in attempting to regulate underground remittance networks, driving legitimate remittance

⁸ The Treasury, Australian Government, 'Introducing an Economy-Wide Cash Payment Limit Government response to the Black Economy: Taskforce Final Report' (Consultation Paper, The Treasury, Australian Government, 23 May 2018) 8.

⁹ Peter Sands et al, 'Limiting the Use of Cash for Big Purchases: Assessing the Case for Uniform Cash Thresholds' (Occasional Paper, Royal United Services Institute, September 2017) 139.

¹⁰ The Treasury, Australian Government, 'Introducing an Economy-Wide Cash Payment Limit Government response to the Black Economy: Taskforce Final Report' (Consultation Paper, The Treasury, Australian Government, 23 May 2018) 53.

¹¹ The Treasury, Australian Government, 'Introducing an Economy-Wide Cash Payment Limit Government response to the Black Economy: Taskforce Final Report' (Consultation Paper, The Treasury, Australian Government, 23 May 2018) 17-18.

agents ‘underground’ and costing regulators the existing visibility of these actors’ activities.¹² One reason these operators are driven underground is the excessive compliance costs plaguing them as a result of such regulatory styles, making their participation in the *regulated* remittance ecosystem unviable.

Participants in the black economy perpetuate a cycle of disregard for tax compliance and for the important role tax collection plays in funding vital social services.

Furthermore, the cash payment limit has been recommended in a context where the global amount of illicit funds available to be laundered was estimated to be 2.7% of global GDP in 2009. The need for the international community itself to improve its efforts in fighting the black economy is laid bare in the fact that, as estimated in 2011, less than 1% of this money is seized and frozen.¹³

¹² International Monetary Fund, *Regulation Frameworks for Hawala and Other Remittance Systems* (International Monetary Fund, 2005) 3; Rob McCusker, ‘Underground Banking: Legitimate Remittance Network or Money Laundering System?’ (Trends & issues in crime and criminal justice paper No 300, Australian Institute of Criminology, Australian Government, July 2005) 2; Supriya Singh, ‘Bankers are about to Ensure Money Transfers Go Underground’, *The Conversation* (online) 21 November 2014 <<http://theconversation.com/bankers-are-about-to-ensure-money-transfers-go-underground-34487>>.

¹³ United Nations Office on Drugs and Crime, United Nations, ‘Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes’ (Research Report, United Nations Office on Drugs and Crime, United Nations, October 2011) 5.

Concerns about the proposed measure

The Committee, however, has two significant concerns about the efficacy of the proposed measure:

1. whether it can be properly enforced; and
2. whether the existing capabilities of regulators and law enforcement agencies deployed in addressing the black economy are adequately resourced.

Practical implementation issues

The Committee submits that an economy-wide cash payment limit of \$10,000 imposed on all payments made to businesses (bar the designated services institutions exemption outlined in the introduction to this submission) will not be effective in preventing or deterring individuals and businesses from participating in the black economy. From a practical perspective, regulatory bodies are not best placed to monitor the acceptance by businesses of cash for high-value transactions and whether transactions and incomes are appropriately disclosed in accordance with AMLCTF and taxation obligations. This practicality stems from, as EUROPOL highlights, the inherent nature of cash as 'so widely accepted, anonymous and virtually impossible to track'.¹⁴ This is linked with how cash transfers are, essentially, peer-to-peer and untraceable in light of the inherent nature of cash as a bearer instrument, freely exchanged between parties to a transaction without centralised oversight, bar traditional law enforcement approaches that are arguably imperfect, as per the comments of EUROPOL. Furthermore, peer-to-peer cash transfers lack an audit trail for investigators to use as leads to track suspect transactions in question. The global AMLCTF standard-setter,¹⁵ the Financial Action Task Force also highlighted criminal economies to thus be fuelled in large part by significant amounts of cash.¹⁶ The views of these prominent international organisations highlight the fact that the intention of the measure to counter the use of cash for activities like tax evasion, money laundering and terrorism financing is unlikely to be realised. This renders the measure largely futile and unnecessary.

¹⁴ EUROPOL, 'Why is Cash Still King? A Strategic Report on the Use of Cash by Criminal Groups as a Facilitator for Money Laundering' (Report, EUROPOL, 2015).

¹⁵ Peter Sands et al, above n 9 'Limiting the Use of Cash for Big Purchases: Assessing the Case for Uniform Cash Thresholds' (Occasional Paper, Royal United Services Institute, September 2017), 5.

¹⁶ Financial Action Task Force, 'Money Laundering through the Physical Transportation of Cash' (Report, Financial Action Task Force, October 2015) 27.

The proposed measure is introduced in the context of the inherent difficulty of measuring black economy activity,¹⁷ especially money laundering since it represents underground economic activity.¹⁸ This can complicate the efficacy of the Government's enforcement activity in seeking to disrupt black economy activity. There is also a risk that enforcement will be ineffectively targeted due to incomplete evidence and data about criminal typologies involving high-value transactions¹⁹ and may reinforce negative perceptions of regulatory risk and fairness among compliant businesses, driving them into the black economy. Even with the availability of deduction incentives, such as the \$20,000 instant asset write-off, non-compliant entities are likely to continue to operate with impunity in not disclosing high-value cash transactions and be financially better off overall.

Further, the resultant lower efficacy of enforcement as a means of changing behaviour is arguably enhanced by the fact that, as the Final Report identified, 'enforcement has become invisible',²⁰ particularly since many regulators prefer to settle criminal cases.²¹ The Committee submits that if the measure is to be introduced, its introduction should occur after the conclusion of the research which is the subject of recommendation 3.6, given that the measure targets transactions that likely involve high-denomination banknotes. Having an evidence base which includes this research would inform the design of the measure, so that regulators and law enforcement agencies can properly set their enforcement priorities, assess the quality of their enforcement activity, and be better placed to implement more strategic enforcement strategies to have the largest impact in terms of changing operator behaviour.²²

The Committee's concerns are echoed by a paper published by the Royal United Services Institute in 2017, which noted a lack of evidence for cash payment limits being an effective deterrent of financial crime (such

¹⁷ Black Economy Taskforce, 'Black Economy Taskforce: Final Report' (Report, Treasury, Commonwealth of Australia, October 2017), 23.

¹⁸ Nicholas Alan McTaggart, 'Follow the Money to Achieve Success: Achievable or Aspirational' (2017) 24(3) *Journal of Financial Crime* 425, 427; Friedrich Schneider and Dominik H. Enste, 'Shadow Economies: Size, Causes, and Consequences' (2000) 38(1) *Journal of Economic Literature* 77, 77.

¹⁹ See eg Australian Transaction Reports and Analysis Centre, 'AUSTRAC Typologies and Case Studies Report 2014' (Report, Australian Transaction Reports and Analysis Centre, 2014) 4-7 for the importance of money laundering and terrorism financing typology and case studies reports for helping direct enforcement activity.

²⁰ Black Economy Taskforce, 'Black Economy Taskforce: Final Report' (Report, Treasury, Commonwealth of Australia, October 2017) 178.

²¹ Ibid 178.

²² Ibid 23-4.

as money laundering and terrorism financing).²³ The same paper argued that cash payment limits would have little effect on petty crime or low-level tax evasion,²⁴ and for similar reasons would have a limited impact on terrorism financing, given terrorism financiers' reliance on low-value transactions to maintain terrorist networks and cells.²⁵

The Committee submits that more efficient allocation of government resources would be a better solution creating new legal rules, explained further below.

Existing capabilities

The Committee submits that the funding for the proposed measure should be invested in AUSTRAC's surveillance and compliance functions, the ATO's audit functions, and the other members of the law enforcement and intelligence communities. This is because these agencies can arguably use existing powers and existing laws to detect and disrupt breaches of the taxation and AMLCTF regime. The Committee submits, for instance, that the ATO's audit capabilities can be effectively used to counter black economy activity by a business to gauge the relevant tax shortfall. It can do so, for instance, by detecting discrepancies between inventory and income, with deterrence being provided through the system of often substantial penalties and interest applied to the amount of tax owed by the business.

The need for more funding for new black economy laws is demonstrated by the arguable difficulty for agencies to build cases for money laundering prosecutions, for instance, under Division 400 of the Schedule to the *Criminal Code Act 1995* (Cth). This is especially so because it is dry difficult for the Crown to discharge its onus of successfully conducting money laundering prosecutions, namely proving the relevant fault elements, particularly the defendant's belief that the relevant money has illicit origins.²⁶ This is especially a function of regulators' and law enforcement agencies' ability to conduct adequate investigations and surveillance of the relevant actors. This was especially evident in *Ansari v The Queen*,²⁷ where it was

²³ Peter Sands et al, above n 9, 'Limiting the Use of Cash for Big Purchases: Assessing the Case for Uniform Cash Thresholds' (Occasional Paper, Royal United Services Institute, September 2017), viii.

²⁴ Ibid 11.

²⁵ Ibid vii-viii, 9.

²⁶ Peter Sands et al, above n 9, 'Limiting the Use of Cash for Big Purchases: Assessing the Case for Uniform Cash Thresholds' (Occasional Paper, Royal United Services Institute, September 2017), vii-viii, 9; See for example the Schedule to the *Criminal Code Act 1995* (Cth) s 400.3(1).

²⁷ (2010) 241 CLR 299 ('Ansari').

difficult to prove the defendants' knowledge²⁸ and thus their requisite belief.²⁹ However, the defendants' recklessness as to whether the money in question was the proceeds of crime, carrying a lesser penalty than intent to participate,³⁰ was proven.³¹ While this case was unique in that the efforts of investigating agencies were hampered by a lack of transaction records,³² some of the difficulties regulators encountered in that case are encountered by regulators more generally in money laundering investigations (especially with the use by criminals of technology to better cover their tracks and disguise the relevant audit trail).³³

Regarding AUSTRAC, the additional funding would be better allocated for continued outreach to the population of reporting entities and the agency's development of further educational resources for smaller and newer reporting entities. This is to ensure that the entities that may not have sufficient compliance resources can learn about their compliance obligations and what exactly is required of them).

Furthermore, the Committee submits that, if the cash payment limit were implemented, the exception from the cash payment limit for financial institutions should be extended to include all entities that are reporting entities under section 5 of the *AMLCTF Act*. This would remove the need to amend the relevant legislation, since threshold transactions under that section would not be made illegal by the cash payment limit.

No ‘foreign tourist’ exemption

In the event the measure is adopted, the Committee does not support introducing different monetary threshold limits applicable to residents and foreign residents (or ‘foreign tourists’).

Certain cultures in foreign jurisdictions take the view that ‘cash is king’ and will generally transact with large cash payments rather than use electronic payment systems. However, the mere fact of the foreign tourist being a tourist does not negate from an Australian perspective the responsibility of businesses to report

²⁸ *Ansari* (2010) 241 CLR 299, 307 (French CJ) citing *Ansari v The Queen* (2007) 70 NSWLR 89, 111 (Howie J).

²⁹ Rosanne Celona and Sandra Browne, ‘Analysing a Real Life Money Laundering Case’ (Paper presented at the Second Anti-Money Laundering Forum, Melbourne, Presentation 7 March 2008).

³⁰ See for example the Schedule to the *Criminal Code Act 1995* (Cth) s 440.3(2).

³¹ Ibid; Rosanne Celona and Sandra Browne, above n 28 ‘Analysing a Real Life Money Laundering Case’ (Paper presented at the Second Anti-Money Laundering Forum, Melbourne, Presentation 7 March 2008); *Ansari* (2010) 241 CLR 299.

³² Celona and Browne, above n 28.

³³ Australian Criminal Intelligence Commission, ‘Serious Financial Crime in Australia 2017’ (Report, Australian Criminal Intelligence Commission, 2017) 6-7.

income received from every transaction. There is also an inherent difficulty in that the business would be required to confirm the person making the payment is indeed a 'tourist'.

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.

Contact:



David Turner
President
NSW Young Lawyers
Email: david.turner@younglawyers.org.au

Alternate Contact:



Leah Serafim
Chair
NSW Young Lawyers Business Law Committee
Email: leah.serafim@younglawyers.org.au