

21 November 2019



The Secretary
Senate Standing Committees on Economics
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: economics.sen@aph.gov.au

Dear Sir/Madam,

Currency (Restrictions on the Use of Cash) Bill 2019 [Provisions]

We refer to the reference of the Currency (Restrictions on the Use of Cash) Bill 2019 [Provisions] (the **Bill**) to the Senate Standing Committees on Economics (the **Senate Committee**) on 19 September 2019, for inquiry and report.

The Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) is pleased to make this submission in relation to the Bill and grateful for the indulgence of the Senate Committee to allow extra time.

We note that the Bill actions a recommendation of the Black Economy Taskforce to introduce a cash payment limit of \$10,000 (the **cash payment limit**) for transactions between businesses and individuals.

We further note, in particular, that:

- the Bill establishes strict liability offences which will apply to individuals, bodies corporate and other entities such as partnerships trusts and superannuation funds which either make or accept a payment in excess of the cash payment limit;
- these offences include circumstances in which the relevant payment is part of a series of payments that are made for a supply or as a gift and the total amount of cash included in the series of payments exceeds the cash payment limit;
- the extended geographical jurisdiction asserted by the Bill is such that in addition to applying to payments (or the result of payments) occurring in Australia an offence is committed if a payment, wherever it is made in the world, is:
 - made by an Australian citizen or resident;
 - also contrary to local law; and
 - wholly or partly for a supply in Australia;
- the applicable criminal penalties for the offences of strict liability established in the Bill include imprisonment for up to two years as well as fines, which would apply to all those involved in a transaction including the provider of the relevant goods or services and the individuals that are their employees; and
- the Bill is effectively criminal rather than regulatory in nature. No statutory authority is charged with responsibility for its implementation or administration. It is stated in the Explanatory Memorandum to the Bill that:

primary responsibility for decisions to charge and prosecute offenders rests with the Australian Federal Police and the Commonwealth Department of Public Prosecutions.

Strict liability for making or accepting a cash payment in excess of the limit

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**) establishes a risk-based regime in accordance with international principles for the prevention of money laundering and counter-terrorism financing. As a risk-based regime, the providers of designated services adapt the amount of scrutiny of any particular transaction or customer according to the degree of money laundering/terrorism financing (**ML/TF**) risk presented by that customer. Cash transactions above a threshold of \$10,000 are subject to a reporting requirement.

The Bill takes a different approach and imposes substantial criminal fines and terms of imprisonment on entities making or accepting a payment in excess of the cash payment limit. This ban exposes front line staff of retail and wholesale business operations, potentially including large numbers of low paid and unskilled employees, to criminal consequences for conduct within the scope of their employment and which they may have no control over, without regard to the ML/TF risk and other circumstances of the transaction underlying the offence, or the individual's role in it.

The power to exempt certain circumstances or payments is proposed to be delegated to the Treasurer (ss 12(5) and 13(3)). The Explanatory Memorandum to the Bill (at para 1.60) indicates that this is due to 'the importance of speed', among other reasons. This is apparently a reference to the need to respond quickly to address unintended consequences of the Bill. The Committee considers that rather than grant an unfettered executive power to the Minister to exempt from the legislation, it would be preferable for the policy making process to identify appropriate limits and exemptions on the offences the Bill establishes and incorporate them into the Bill so that Parliament has the opportunity to debate the proposal in its entirety (i.e. both the offence and the limits on it). Limits on the very broad offences established by the Bill should be subject to the checks and balances of the regulation making process, at a minimum.

As the Explanatory Memorandum makes clear (para 1.63) the defendant bears the evidential burden of establishing that their payment was within the parameters of an exemption established by the Treasurer. Given the broad nature of the offences, the Committee considers that the assertions in para 2.10 ff of the Explanatory Memorandum in relation to the presumption of innocence require closer examination.

Compliance burden on the retail sector

While the basic proposition of the Bill is very simple, the compliance requirements to implement it are far reaching, complex, and will require fundamental reconfiguration of the accounting systems of all businesses that accept cash or digital currency, to recognise and track cash payments including instalment payments. There is very little time allowed to accomplish this, even if the commencement of the legislation is delayed to July 2020. Further, much of the retail sector is casual, with little bargaining power and not highly engaged with their workplace or employer (for example in relation to training requirements) and is exposed to potential criminal liability under this Bill for ordinary activity in the course of their employment unless their employer takes strong compliance action to protect them.

The compliance record of the retail sector has, however, recently received significant media attention following the demonstrated persistent inability of some of Australia's largest retail

businesses to comply with fundamental aspects of employment law. The result has been that large numbers of retail staff have not received their full entitlements in many cases for periods of years. The Bill is of concern because it will lead retail business to lose sales, with an immediate economic impact on the employer, but the primary risk of prosecution for the proposed offences is borne by employees. The employer is not subject to meaningful incentives to mitigate that risk to their staff by training them promptly and effectively. These risks are increased when the degree of turnover and casual nature of retail sector employees is considered. That is, that even a retailer which trains its staff diligently is likely to have new hires dealing with customers before they have been adequately trained.

The Bill would benefit from the addition of specific obligations on businesses to take reasonable steps to ensure other entities under their direction or control comply, and legislated defences for staff that are acting within the scope of their employment and in accordance with their training and direction.

Customer awareness

The Committee further understands that there are no plans for a public awareness campaign in relation to the new laws, and that it is intended to rely on industry associations to build awareness. It is noted that it is an offence both to make as well as to accept a cash payment over the limit. While industry-based campaigns may have some impact on the staff of affected businesses (should their employers choose to train their staff to comply), it is not apparent how the customers of these businesses can reasonably be expected to become aware of the new offences that apply to them.

Steps should be taken to make the public aware of the new obligations and business be provided with communication tools for their customers. No statutory body is tasked with responsibility for public education, the development of regulatory guidance or enforcement strategy, or review of the effectiveness or impact of the changes to be enacted in the Bill.

The Committee has concerns should this proposed legislation be enacted, there will be widespread non-compliance by both suppliers and customers. The nature of the offences renders detection of offences problematic and if non-compliance is widespread there is a real risk that the law will be, or will be perceived to be, the subject of arbitrary or capricious enforcement, contrary to fundamental principles of the rule of law. This risk is increased by the lack of any provision for oversight of the administration of the Bill. The importance of visible and consistent, efficient and equitable enforcement is discussed in Chapter 8 of the Black Economy Taskforce report.

Geographic application

The extended geographical jurisdiction asserted by the Bill is drawn from tax legislation and is intended to address one quite specific scenario whereby payment takes place outside Australia. It appears to the Committee that the nature of the tax offences this regime was developed to address is fundamentally different to the application of these principles in the Bill.

In a taxation context, the relevant conduct is likely to be premeditated and undertaken with the benefit of advice by a relatively small number of taxpayers. In the context of a payment over the cash payment limit, the relevant circumstances are routine and frequently undertaken without the benefit of advice or with any degree of premeditation. The Bill imposes a substantial burden of awareness on all Australian citizens and residents shopping online using digital currency, or using cash while overseas, to make themselves aware of a relatively obscure aspect of local law.

Further, the requirement that jurisdiction is only asserted when the payment is contrary to local law introduces an arbitrary element to the application of the extended jurisdiction.

It is foreseeable that travelers may need to make large cash payments in emergency situations when, for example, their electronic payment methods break down. The Bill in its current form would, for example, potentially leave travelers with the choice of either committing an offence punishable by years in prison, or defaulting on payment of their accommodation.

It does not appear to the Committee that the regulatory problem addressed by this aspect of the Bill, as it is noted in the scenario mentioned in the Explanatory Memorandum is justified by the substantial risk of unintended consequences for all Australians travelling or transacting overseas.

Interaction with the AML/CTF Act

The Explanatory Memorandum notes the expectation that exceptions will be created for 'certain payments that are subject to reporting obligations under the AML/CTF Act'. Without this exception, the Bill will radically alter the operation and effectiveness of the AML/CTF Threshold Transaction reporting regime. If this exception is implemented, it appears the impact on the operation of the Bill still needs to be examined more closely. For example, Australian Prudential Regulation Authority regulated superannuation funds, which are reporting entities under the AML/CTF regime are also dealt with in detail in the Explanatory Memorandum (para 2.11) in the context of the liability of superannuation fund controllers under the Bill. The policy behind these overlapping approaches is not apparent on the information available to the Committee for the purposes of this submission.

Should you require further information in the first instance please contact Henrietta Thomas, Chair of the Financial Services Committee on [REDACTED] or [REDACTED].

Yours sincerely,

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Rebecca Maslen-Stannage
Chair, Business Law Section