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Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Online: economics.sen@aph.gov.au

Dear Sir/ Madam

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

CPA Australia represents the diverse interests of more than 164,000 members working in 150 countries and regions around the world. We make this submission on behalf of our members and in the broader public interest.

We support the Government's efforts to address the black economy and recognise the diminishing need to undertake large cash transactions in the modern digitised economy. While we are aware that cash is an enabler of illegal activity, criminalising certain cash transactions in the manner proposed is an unnecessarily harsh response to the problem of avoiding scrutiny by the Commissioner of Taxation and other government agencies. There are already a number of existing checks and balances in the system to address illegal activities where cash is involved.

We are concerned about the the lack of a strong evidence-based case to justify the contravention of existing criminal law principles and the proposed criminal penalties. There has also been insufficient reasoning as to why criminal offences are seen as being the most appropriate solution or why the power to set exceptions should be delegated to the Minister. This has been noted by the Senate Standing Committee for the Scrutiny of Bills.

Further, the Bill undermines the fundamental notion that the burden of proof rests with the prosecution. It reverses the onus of proof in some cases, undermines the right to silence, unacceptably introduces vicarious criminal liability into Australian law and provides the Minister with extraordinary powers.

On behalf of our members and in the public interest, we reiterate our position as submitted to Treasury on the exposure draft of this Bill and recommend that the Bill be withdrawn.

We remain of the view the policy intent behind this Bill would best be achieved by a mix of administrative penalties for breaches, but also incentives for business to move to electronic payment options.

Further, and as part of our support to address the black economy, we suggest that there should be incentives for business to reduce their reliance on cash transactions, such as reducing or eliminating fees imposed on electronic banking transactions. Our Asia-Pacific Small Business Survey demonstrates that such incentives may also have a positive impact on the broader economy, as it shows a solid link between business growth and the adoption of technology by small business.

We recommend that:

- administrative penalties replace criminal prosecution with reference to laws implemented in other jurisdictions such as India and Spain
- the Australian Taxation Office (ATO), the Commonwealth Director of Public Prosecutions (CDPP) and other relevant agencies are better resourced to address criminality using existing powers and offences

- electronic transaction fees and charges imposed by financial institutions are reduced and barriers for business to transact electronically are removed, and
- small businesses in Australia are incentivised to improve their digital capability to support a voluntary shift away from cash.

Notwithstanding our position as outlined above, if the Government proceeds with the proposed measures, we recommend that:

- the legislation is further improved to clearly define the criminal act and intent
- the qualifications in the Act's Objects are included in the offences
- the onus of proof be placed on the prosecution, rather than the defendant
- *sub-section 10(2) Periodic supplies* is clarified
- *section 16 Vicarious criminal liability* is removed
- defences available to defendants are further enhanced
- the excepted entities and transactions be incorporated into the Bill rather than be detailed in the Rules.

Detailed comments are included in the attachment.

If you have any queries do not hesitate to contact Elinor Kasapidis, Tax Policy Adviser at CPA Australia on elinor.kasapidis@cpaaustralia.com.au or 03 9606 9666.

Yours sincerely

Dr Gary Pflugrath CPA

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Attachment

CPA Australia submission: Currency (Restrictions on the Use of Cash) Bill 2019 [Provisions]

The use of cash or digital currency as a medium of exchange is well-established and is, in and of itself, not harmful. Large numbers of Australian consumers and businesses have voluntarily shifted to electronic payment platforms, but cash and digital currencies are still accepted as tender. This legislation is attempting to deal with a symptom, not the cause, of the black economy. While the use of cash in a large transaction may be an indicator of risk, it does not prove by itself that the behaviour is criminal. However, the proposed legislation treats the users of cash and digital currencies, above a relatively low threshold, as criminals.

Some businesses have high cash takings such as laundromats, market stalls or personal services providers and may, either in single or multiple transactions, pay for their expenses in cash for convenience or to avoid bank transaction costs. The cash is deposited at some point in the supply chain and transactions can be traced through invoices and accounts. The digital currency industry is also an alternative to fiat currencies and is able to be scrutinised by virtue of the use of blockchain technology and immutable ledgers. There is no intent to avoid detection, nor is the cash or digital currency necessarily used to facilitate criminal activity.

This Bill enables the scenario that an individual can be audited and even if their tax liability is reported correctly, detection of a cash transaction of $10,000 or more means they can be prosecuted, receive a criminal conviction and fines of up to $12,600 for strict liability offences or $25,200 and a two year jail sentence for indictable offences. The longer-term ramifications can include negative effects on employment, travel and other civil liberties.

1. Criminalisation of financial transactions and improper construction of offences

The presumption that only tax evaders, money launderers and criminals use cash, and the mindset that these new offences are required to address criminality in order to protect the integrity of the tax system (as well as other laws), has resulted in a proposed Bill and Rules that run counter to well-established criminal law principles.

The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers[1] describes criminal offences as *"conduct that results in physical or psychological harm to other people or conduct involving dishonest or fraudulent conduct"* (e.g. loss to government revenue, money-laundering activity or that the cash was from the proceeds of crime). We argue that neither condition is satisfied, in and of itself, merely by making large transactions in cash or digital currency.

The choice to use criminal offences and penalties (including incarceration) for the use of cash is also significantly more punitive than other jurisdictions[2]. In no jurisdiction identified by CPA Australia are jail sentences a potential penalty, while criminal convictions are rare. Most recently, Malaysia – a country with a black economy estimated at over 20 per cent of gross domestic product[3] – has proposed only financial penalties for the use of cash and a much higher threshold based on purchasing power parity.

The Bill significantly increases the ability to prosecute people for an action without needing to demonstrate the commission of what would normally be considered criminal behaviour. The Bill contains no qualifications or safeguards to preserve the presumption of innocence and the offences are constructed so that the prosecution no

[1] Attorney General's Department, 2011. See also Principled Regulation: Federal Civil and Administrative Penalties in Australia (Australian Law Reform Commission, 2002) for tests of criminality including whether serious harm is caused to people, whether it is a contravention of fundamental values that is harmful to society and the significance of the contribution the criminal law can make to dealing with issue.

[2] Examples include:

- India: penalty of an amount equivalent to the amount of transaction (effectively a 100 per cent tax) administered by the tax agency
- Belgium: fines up to €225,000
- Spain: administrative penalty of 25 per cent of the transaction amount administered by the tax agency.

[3] Din, Badariah Haji, Estimating the determinants of shadow economy in Malaysia, Malaysian Journal of Society and Space, Volume 12, Issue 5, 2016

longer needs to demonstrate intent (*mens rea*). There are no administrative or civil penalty provisions against which the criminal offending can be distinguished[4].

The Objects have been modified from the Exposure Draft and its wording has been refined to principally focus on tax system integrity with a secondary generic object referencing 'other laws'. The expansive nature of the term 'other laws' raises concerns as to the potential unrestricted application of these laws by any regulatory body that wishes to criminalise those it regulates.

Further, because the wording of the offences is not qualified by the Act's Objects, the prosecution is required to prove nothing apart from the fact that cash changed hands and the amount of the transaction or series of transactions was $10,000 or more. This is confirmed by paragraph 1.42 of the Explanatory Memorandum which states *"to commit these two offences [intention and strict liability] the entity must have intended to make or accept a payment".* The lack of requirement for the prosecution to demonstrate that the use of cash was intended to avoid scrutiny by the Commissioner of Taxation or the relevant authority in charge of 'other laws' goes against the Objects of the Act.

The offences should clearly reflect the qualifications of the Act and the prosecution should be required to show that the entity made or received a payment that resulted in the avoidance of scrutiny (strict liability) or was made with the intention to avoid scrutiny. This will ensure that payers and recipients of cash transactions who properly record and declare the funds will not be prosecuted.

In the absence of any qualification to the offences, there is also little distinction between the strict liability offence (section 12) and the indictable offence (section 13). The offences are expressed in the same terms and there is no guidance on what the content of *mens rea*, or what recklessness, might involve beyond the undertaking of the transaction itself which is insufficient for a criminal offence.

For the strict liability offence, the defence of 'honest and reasonable mistake of fact' is challenging to argue given that cash or digital currency cannot be mistaken for anything else. Similarly, for the indictable offence, it is virtually impossible for the prosecutor not to demonstrate the *mens rea* given that the person will know that they were exchanging cash.

The only defence available would be to show that the subsections did not apply because the payment was of a kind specified in the proposed Rules. This delegation of power provides the Minister with extraordinary discretionary power to determine the exceptions and potential defences.

Given the severity of the punishment, qualifications should be included in the offences to ensure that the prosecution is required to demonstrate the intention to avoid scrutiny in order to appropriately constrain the application of the offences.

2. The parliamentary process is critical to ensure oversight of exceptions and modifications

The Bill also provides the Minister with the ability to determine who may be subject to criminal prosecution, and for which transactions. The legislation and its accompanying Rules enable the Minister to determine exceptions to the regime as he or she sees fit. As stated in the Explanatory Memorandum (paragraph 1.59):

> *Allowing kinds of transactions to be made exempt from the cash payment limit by legislative instrument ensures that there is flexibility in the regulatory regime to accommodate new kinds of transactions. Given the serious nature of the proposed offences and the breadth of the activities to which they can apply, it is important to ensure that swift changes can be made to accommodate new kinds of transactions in which the use of cash is necessary or appropriate.*

[4] We note that the approach taken for this Bill contrasts with the deliberations reflected in the *Minister Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018*. That Bill reflected the Taskforce's intent to design a comprehensive suite of civil and criminal penalties, with the level of penalty commensurate with that of the harm caused by particular behaviours. The associated Explanatory Memorandum also contemplated determining the intent to which criminal law sanctions should apply in the context of defining dishonesty. The offences address specific negative behaviours such as falsifying books, obstructing or hindering the regulator and providing misleading information. Further, the indictable offences place a clear burden of proof on the prosecution to prove intent.

For the very reason that the proposed offences are serious in nature and broad in application, we believe that it is insufficient for the only scrutiny to be that of the Senate Regulations and Ordinances Committee. The parliamentary enactment process is critical to ensuring oversight, debate and transparency over the exception process.

At a minimum, the currently identified exceptions should be written into the legislation – a view echoed by the Scrutiny of Bills Committee (subject to the provision of sound justification to the contrary by the Minister). This would include the exception for digital currency which would alleviate the regulatory risk for developers and support, in particular, the viability of Australian start-ups[5].

Permitting the Minister to add further exceptions by legislative instrument should also be reconsidered. Caution is required with respect to the use of the legislative instruments to ensure there are no unintended consequences for consumers, businesses, the financial system or civil liberties.

3. Inappropriate introduction of vicarious criminal liability

The introduction of 'vicarious criminal liability' into Australian law is highly concerning and should be reconsidered.

Criminal law has always required the commission of some act (*actus reus*) and often, but not always, requires the existence of some mental element accompanying the act (*mens rea*). Strict liability offences only require an *actus reus* (whilst occasionally allowing the honest and reasonable mistake defence). The proposed offences, however, go further.

The deeming provisions explained in the Explanatory Memorandum, for example, attribute liability to one member of a partnership, because of the acts of the other partner, meaning that the 'innocent' partner will be guilty of a criminal act despite having done nothing and having no mental element. It potentially criminalises nothing other than association. Whilst the attribution of liability through agency and joint and several liability is acceptable in civil law, in criminal law it may well be without precedent.

The Bill purports to create an offence which can be committed by doing nothing and which effectively criminalises legal forms of association (e.g. partnerships). The reverse onus of proof is incredibly difficult to argue as it requires proving that you did not do something and runs counter to the fundamentals of criminal law such as the presumption of innocence and the standard of proof. The prosecution should be required to prove beyond a reasonable doubt that the defendant committed the act, and, for indictable offences, intended to do so.

Criminal offences fall into two categories:

1. those that are committed by doing an act which is accompanied by a mental state (traditional mens rea offences)[6], and
2. those that are committed only by the doing of an act, with no requirement that a mental state to exist (strict and absolute liability offences).

The offence created by section 16, so far as it concerns the 'vicariously liable' person, does not fall into either of the above two categories. The only thing the prosecution would need to prove is that the defendant is, for example, a partner in a partnership, or a trustee of a trust.

While there are good reasons for vicarious or joint liability in a civil or commercial context[7], by contrast, criminal law is not concerned simply with liability for loss or damage, the proper allocation of risk, or the vindication of private rights generally. Criminal law is concerned with identifying and 'punishing' behaviour that is societally detrimental.

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[5] We note that the digital currency providers and exchanges are becoming increasingly incorporated into regulatory frameworks and with that, the risks associated with digital currencies are diminishing. Further, the ATO's work with digital exchanges and the nature of the blockchain means that transactions are recorded and verified.

[6] Incidentally, the first category includes form of inchoate liability (attempt, conspiracy, and incitement) and forms of joint criminal liability (e.g. joint criminal enterprise), since those forms of liability still require a person to have both done something and had a particular state of mind.

[7] For example, it is appropriate that a member of a partnership be joint and severally liable for the debts of his or her partners. Likewise, there are good public policy reasons why an employer should be tortiously vicariously liable for the acts of their employees (indeed even criminal acts).

Criminal offences create stigma in a way that civil wrongs do not and findings of guilt and convictions can seriously impact a person's future opportunities, including employment opportunities, credit, ability to travel, etc.

It is entirely inappropriate for someone to be marked as a criminal for nothing other than having lawfully joined a partnership, or assumed the responsibilities of being a trustee.

Section 16(2) of the Bill creates a defence for individuals who did not aid, abet, counsel or procure the relevant act or omission, and who were not in any way knowingly concerned in, or party to the relevant act or omission.

The Explanatory Memorandum explains at paragraph 1.78 "*A defence is available for a person that is taken to commit an offence because of this provision. The offence does not apply to a person if the person can demonstrate that they were not in any way involved in the commission of the offence*" and goes on to say at paragraph 1.80 structuring it as a defence is appropriate "*as it is based on the knowledge and state of mind of the defendant…[and it] would be difficult or impossible for the prosecution to ascertain*". This statement belies the fact that prosecutors are frequently required to prove, and do prove, a defendant's state of mind inferentially without recourse to admissions made by the accused.

Further, in criminal proceedings, the burden of proof lies upon the prosecutor. A criminal defendant may remain entirely silent in the face of a prosecution and their silence cannot be treated as an admission of guilt. Only in the narrowest of circumstances can an adverse inference be drawn from it. The right to silence (and the privilege against self-incrimination) is an important protection which preserves some measure of fairness in the criminal process.

The Bill undermines the right to silence by effectively requiring a defendant to either give evidence or call evidence to satisfy an evidential burden (which is a precondition to raising the defence in s 16(2)). Presumably, it would often be the case that the defendant himself or herself is the only witness to their non-participation, and would therefore be required to give (rather than call) evidence in order to satisfy the evidentiary burden. This in turn would expose them to cross-examination on a range of issues, and not just the issue of their defence.

The 'vicarious accused's' participation (whether by aiding, abetting, counselling etc) should therefore be a positive element of the offence, and not a defence.

In terms of the construction of section 16(1), Column 2 purports to identify every 'vicariously liable' person while Column 1 contains the entity who has committed the act. Given that none of the entities in Column 1 are in fact entities (e.g. a trust is a relationship), there will no doubt be uncertainty about how those 'entities' are to be regarded as committing acts and it is difficult to forsee how these provisions will operate in some circumstances; such as:

- Trusts with a single trustee. How does that 'trust' commit an act? Presumably by the act of its trustee. If that is so, why is there any need for sub-paragraph (a) in the second column?
- What if the trustee is a company with several directors? It appears that if the company committed an offence under the bill, the co-directors are not vicariously liable. Why then should a co-trustee of an ordinary non-corporate trust be vicariously liable when a co-director of a trustee company would not?

The importation of civil and commercial concepts of assumptions of liability into a criminal context raises practical difficulties which support our principled objection to the introduction of vicarious criminal liability into Australian law.

4. Treating multiple payments as a single payment

One of the obvious difficulties is the issue of multiple payments being treated as a single payment, particularly as it applies to gifts. At para 1.34 the Explanatory Memorandum says "*you instead look to assess a series of payments that relate to a single supply or are a single gift and determine if, as a result of the payment, the amount of cash provided in the series of payments equals or exceeds the cash payment limit*."

While 'supply' is given the same meaning as in the GST Act, it is unclear how the same structure can be applied to gifts. A gift by definition involves no consideration and so various payments can't be attributed to that single supply. If someone is given $6000 as a gift in the morning and another $6000 in the evening, that should not be treated as a series of payments for a single gift. The examples provided in the Explanatory Memorandum are simplistic and

there may be situations where determining the issue of supplies for consideration is difficult. While the Bill now attempts to define periodic supplies in section 10, the definition is confused by section 10(2) as there is difficulty in determining what is a 'periodic basis' or a 'periodic component', which may give rise to difficulties in administering the provisions.

For criminal law purposes, it may be more appropriate to consider the expression of the offence at section 143 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (*AML/CTF*) which deals with conducting transfers so as to avoid reporting requirements. This is based on the manner and form of the movements, and also provides a clear defence in relation to sole or dominant purpose.

5. Existing powers and offences sufficient to address the black economy

The intended outcome of the legislation is to eliminate the ability for transactions to remain unrecorded based on the argument that criminals and tax evaders use cash as a means of avoiding detection. This Bill creates a predicate offence that is, however, so general and unconstrained that even legitimate transactions and innocent people can be prosecuted.

The Act's Objects no longer refer to cash being used to facilitate a range of criminal activities but rather the more general statement of "*protecting the integrity of the Commonwealth taxation system*". The note in section 3 provides examples of activities facilitated by cash including tax evasion, money laundering, fraud, bribery and obtaining financial advantage by deception. We note that offences for such activities are already available in the *Criminal Code Act 1995* (Criminal Code), *AML/CTF* and the *Crimes (Taxation Offences) Act 1980*. In addition, false and misleading statement offences (e.g. for under-declaring income) are contained both within the *Criminal Code* as well as the *Taxation Administration Act 1953* (TAA).

Neither the Black Economy Taskforce Report, the consultation paper nor the Explanatory Memorandum satisfactorily addresses the question of why the significant range of existing powers and information[8] available to government is insufficient to address the black economy, and why the criminalisation of cash transactions is the appropriate solution.

We suggest that better enforcement using existing powers and ongoing government support of the digital economy will, in the longer term, better resolve these issues without encroaching on legitimate business operations or the use of legal tender. The reporting of suspicious matters under the AML/CTF and the ATO's newly established Tax Integrity Centre could also be improved and be more effectively actioned by government agencies.

The proposed offences will most likely be investigated by the ATO or AFP and prosecuted by the CDPP. We question the use of scarce resources to investigate and prosecute cash transaction offences when significant tax frauds and money laundering operations continue to occur.

We recommend that greater investment is made in the capability and capacity of the ATO, AFP and CDPP to deal with serious criminal offending, rather than investigating and prosecuting cash payments made in the course of legitimate business dealings.

6. Behavioural change through administrative penalties, digital literacy and addressing electronic transaction costs

A number of policy levers are available to government to reduce the instances of large cash transactions. The current proposal only deals with penalising that behaviour. Such an approach by itself is unlikely to achieve the Bill's objectives. We therefore recommend that the government also explore alternative penalties and incentives that accelerate the shift away from cash transactions.

[8] AUSTRAC receives regular financial transaction reports, including suspicious matters, while government agencies already have access to significant volumes of information about taxpayers including bank data and asset holdings. The ATO can issue information gathering notices using formal powers, while the Australian Federal Police can execute warrants for criminal matters.

Evidence suggests that encouraging the internalisation of social norms is more effective than the use of instrumental incentives such as criminal offences[9] and that the use of criminal law for symbolic purposes and ease of regulatory functions has a weak normative effect[10,11].

Administrative penalties or fines – as introduced in overseas jurisdictions – are a more efficient[12] and potentially more effective means of changing behaviour due to their financial impact, without the disproportionate consequences of a criminal conviction[13]. Consideration should also be given to a reporting framework for businesses to disclose, and for both parties in the transaction to be subject to the penalty in order to encourage compliance. If, like other jurisdictions, this is administered by the Commissioner of Taxation, public reporting can be used for intelligence and case selection, and the ATO can apply administrative penalties as a consequence of an audit.

Our member engagements indicate that electronic transaction costs are a major reason why there isn't a higher uptake of electronic payments by small businesses in Australia. Electronic transaction fees and other banking-related charges are either absorbed by the business or passed on to customers. The government must therefore ensure that electronic transaction costs for small businesses are as close to nil or parity with cash handling fees as commercially feasible. This may help meet the policy objectives of this Bill in a better way than criminalising certain cash transactions.

Our Asia-Pacific Small Business Survey also indicates that improving the digital capability and literacy of Australian small businesses may lead to a higher uptake of electronic payment methods, especially new digital/mobile payment technologies such as ApplePay, PayPay and WeChatPay. A stronger investment in digital training and information for small business by government would also likely help facilitate a further shift away from cash transactions.

Acknowledgements

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