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13 August 2019

Manager
Black Economy Division
Treasury
Langton Cres
Parkes ACT 2600

Online: blackeconomy@treasury.gov.au

Dear Sir/Madam,

Currency (Restrictions on the Use of Cash) Bill 2019

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.

CPA Australia supports the Government's efforts to address the black economy and recognises 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, we have concerns about the Government's intention to impose only criminal penalties on the use of legal tender above the $10,000 cap and the introduction of vicarious criminal liability.

There are a number of existing checks and balances in the system to address criminal enterprises already, and to link all large cash transactions to criminality is a step too far. The proposed offences can lead to an individual being convicted, fined and/or jailed for up to two years for merely using cash, regardless of the purpose or nature of the transaction. CPA Australia notes that the Treasury 2018 consultation paper did not present a strong evidence-based case to justify the proposed extraordinary penalty for the use of legal tender, nor did it make mention of why criminal offences are seen as being the most appropriate solution.

The presumption that only tax evaders, money launderers and criminals use cash, and the mindset that these new offences are required to address criminality, has resulted in a proposed Bill and Instrument that run counter to well-established criminal law principles and have the potential to affect many Australians. It extends criminal liability to innocent parties associated with a potential offender, such as partners in a partnership, and has application to Australian citizens and residents outside Australia.

It significantly increases the power of government agencies to investigate and prosecute people for an action, without needing to demonstrate the commission of what would normally be considered a criminal act, nor the intent to commit such an act. The Bill contains no qualifications or safeguards that reflect a presumption of innocence or ensure that the prosecution bears the burden of proof.

In summary, on behalf of our members and in the public interest, CPA Australia argues that both the proposed Bill and Instrument:

- contain unnecessarily and unreasonably broad offences
- contain no qualifications that reflect the Act's objects
- introduces vicarious liability into criminal law
- effectively reverse the onus of proof
- place an unreasonable burden on the defendant
- do not provide sufficient defences, and
- provide the Parliament, rather than the Treasurer, with the power to determine who is excepted.

We believe the policy intent behind this Bill would best be achieved by a mix of administrative penalties for breaches and incentives for business to move to electronic payment options. The focus on criminalising certain cash transactions is an extreme response to the problem of avoiding scrutiny.

In addition to penalising those that are parties to large cash transactions, 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, showing a solid link between business growth and the adoption of technology by small business.

CPA Australia recommends that the proposed Bill and Instrument be withdrawn. Further consultation should be undertaken to consider:

- administrative penalties to replace criminal prosecution with reference to laws implemented in other jurisdictions such as India and Spain
- more adequately resourcing AUSTRAC, the Australian Federal Police (AFP), the Australian Taxation Office (ATO), Commonwealth Director of Public Prosecutions (CDPP) and other relevant agencies to address criminality using existing powers
- reviewing the electronic transaction fees and charges imposed by financial institutions to reduce or remove the barriers for business to transact electronically
- encouraging small business in Australia to improve digital capability and literacy to support a voluntary shift away from cash.

In the event that the Government proceeds with the proposed measures, CPA Australia recommends that:

- the legislation is improved to clearly define the criminal act and intent
- the qualifications in the Act's Object are included in the offences
- the onus of proof be placed on the prosecution, rather than the defendant
- vicarious criminal liability is removed
- defences available to defendants are enhanced
- the excepted entities and transactions be incorporated into the Bill and the Instrument be withdrawn, and
- the law be accompanied by a long-term information and education campaign for consumers, business and not-for-profits.

Detailed comments are included in the attachment.

If you have any queries do not hesitate to contact Gavan Ord, Manager Business and Investment Policy at CPA Australia on gavan.ord@cpaaustralia.com.au or 03 9606 9695.

Yours sincerely

Dr Gary Pflugrath CPA

Head of Policy and Advocacy
CPA Australia

Attachment

1. Criminalisation of legitimate transactions with disproportionate penalties

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. In effect, it provides the Treasurer with the ability to determine who is subject to criminal prosecution, and for which transactions. Government agencies can prosecute and, if successful, obtain a criminal conviction along with financial penalties and/or jail of individuals (and their entities), without the need to demonstrate a loss to government revenue, money-laundering activity or that the cash was from the proceeds of crime. There are no administrative or civil penalty provisions against which the criminal offending can be distinguished.

The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (Attorney General's Department, 2011) describes criminal offences as *"conduct that results in physical or psychological harm to other people or conduct involving dishonest or fraudulent conduct"*, neither of which are satisfied by making large transactions in cash or digital currency. Principled Regulation: Federal Civil and Administrative Penalties in Australia (Australian Law Reform Commission, 2002) suggests assessing the behaviour against 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.

The use of cash or digital currency to make large transactions is, in and of itself, not harmful and its use as a medium of exchange is well-established. Large numbers of Australian consumers and businesses have voluntarily shifted to electronic payment platforms, but cash is still accepted as legal tender. 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. There is no intent to avoid detection, nor is the cash used to facilitate criminal activity.

The approach taken for this Bill contrasts with the deliberations reflected in the *Treasury 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 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.

CPA Australia is supportive of efforts to combat criminal activity, however notes that alternatives to cash or digital currency are already available to those who wish to transact "outside the system", such as the use of bullion or adaptations of nostro-vostro accounts and ledgers.

2. The Object of the Act is qualified but the offences are not

The Object states that the Act is to prevent the use of cash to avoid the scrutiny of regulatory authorities using the examples of illicit activities that can be facilitated by large cash payments. However, this is not reflected in the wording of the offences. This significantly reduces the burden of proof on the prosecution as they do not need to demonstrate that the act was committed in order to avoid scrutiny, and therefore enables the application of the laws to a far broader group of individuals and bodies corporate than the Object suggests. In essence, because the offence is not qualified in line with the Object, there is very little for the prosecution to prove apart from the fact that cash changed hands and the amount of the transaction or series of transactions was over $10,000.

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.

3. There are limited defences and those that are available place the burden of proof on the defendant

In the absence of any qualification to the offences, there is little distinction between the strict liability offence (Clause 10) and the indictable offence (Clause 11). 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.

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 specificied in the Instrument.

Given the severity of the punishment, qualifications should be included in the offences to ensure there is no reverse onus of proof and to appropriately constrain the application of the offences. Better still, those directly undertaking the action should be subject to administrative penalties, not criminal prosecution.

4. Inappropriate extension of criminal liability to other entities

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*). For strict liability offences they only require an *actus reus* (whilst occasionally allowing the honest and reasonable mistake defence). The proposed offences, however, go further.

The deeming provisions explained at paragraph 1.57 of 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 proposes that the actions of a single partner in a partnership of, say, 10 individuals will lead to the prosecution of all 10 partners with the burden of proof resting on each of them to show that they did not have knowledge of, nor did they have anything to do with the transaction. It is particularly unfair when years may have passed since the transaction and the other partner has no recollection of the transaction. This 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. Instead, these offences lead to guilt by association.

The Explanatory Memorandum explains at paragraph 1.60 "*It is a defence for a person that is taken to commit an offence because of this provision to demonstrate that the person was not in any way involved in the commission of the offence*" and goes on to say at paragraph 1.63 structuring it as a defence is appropriate "*as it is based on the knowledge and state of mind of the defendant*".

This is inappropriate as not only do they have to show that they did not aid, abet etc., but they also have to show they were not in any way knowingly concerned. The standard of proof the vicariously liable defendant has to meet is incredibly high. Prosecutors are frequently required to prove, and do prove, a defendant's state of mind inferentially without recourse to admissions made by the accused.

This introduction of vicarious criminal liability into Australian law is highly concerning and must be reconsidered.

5. 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 1.26 the Explanatory Memorandum says "*you instead look to assess a series of payments that relate to a supply or are a 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 $6,000 as a gift in the morning and another $6,000 in the evening, that should not be treated as a series of payments for a single gift.

Even the issue of supply for consideration is difficult. For example, the Explanatory Memorandum says "*An example of payments that do not constitute a series are monthly payments of rent – each payment is for the use of the property for a different period*." However, this may not be correct. A person entering a lease agreement might be permitted under the lease agreement to pay monthly but the all the payments are contributing toward the purchase of a single leasehold estate that covers the entire period.

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.

6. The offences apply to transactions outside of Australia

Extended jurisdiction – Category B means that Australians can be prosecuted under Australian law for transacting in large amounts of cash outside Australia. In some jurisdictions, it remains normal practice for business to business transactions, including large transactions to be done in cash. this could result in an Australian running a business overseas facing criminal prosecution in Australia where they have used cash to purchase goods or services for more than $10,000, even where it is only means of making that transaction. While the Treasurer's exception is available , it again places the evidential burden on the defendant to prove that the transaction satisfies the circumstances specified in the Instrument.

While CPA Australia supports efforts to hold Australians committing criminal acts offshore to account, the absence of qualifications in the offences makes the extra-territorial application of these laws concerning. Many Australians operate legitimate businesses or travel extensively overseas and should not be subject to the threat of prosecution for their use of cash, especially where its use is unconstrained in that jurisdiction.

We are unaware of any other jurisdiction that has legislated the extra-territorial application of its similar currency restriction laws.

7. Australia's legislation is far more punitive than other jurisdictions

The choice of criminal offences and penalties (including incarceration) is also significantly different to other jurisdictions. Below are examples of how other jurisdictions regulate large cash transactions:

- 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, or
- Spain: administrative penalty of 25 per cent of the transaction amount administered by the tax agency.

In no jurisdiction identified by CPA Australia are jail sentences a potential penalty, while criminal convictions are rare.

The severity of the penalties contained in the proposed offences is disproportionate to the behaviour and highly concerning. In effect, an individual can be audited and even if their tax liability is reported correctly, detection of a business-to-business cash transaction above $10,000 (including outside Australia where it may be the only way to make that transaction) 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.

Further, the deterrence effect of cash limits is not yet proven, despite a number of jurisdictions implementing similar laws albeit in the civil, rather than criminal, sphere.

8. 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 Object refers to cash being used to facilitate a range of criminal activities – all of which have existing criminal offences available to prosecutors. Offences dealing with money laundering, fraud, bribery, obtaining financial advantage by deception and tax evasion are available in the *Criminal Code Act 1995* (Criminal Code), *AML/CTF* and the *Crimes (Taxation Offences) Act 1980*. 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).

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.

Neither the consultation paper nor the Explanatory Memorandum satisfactorily addresses the question of why the wide range of existing powers and information available to government is insufficient to address the black economy, and why the criminalisation of cash transactions is the appropriate solution.

CPA Australia suggests 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 could also be improved and be more effectively actioned by government agencies.

9. Investigation and prosecution of the offences is inefficient and administrative penalties should be considered

The proposed offences will most likely be investigated by the ATO or AFP and prosecuted by the Commonwealth Director of Public Prosecutions (CDPP). CPA Australia questions the use of scarce resources to investigate and prosecute cash transaction offences when significant tax frauds and money laundering operations continue to occur. The standard of proof required for criminal prosecutions is higher than administrative penalties, and the extent to which agencies can effectively enforce the legislation may be limited.

CPA Australia suggests 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.

Evidence also suggests that encouraging the internalisation of social norms is more effective than the use of instrumental incentives such as criminal offences[1] and that the use of criminal law for symbolic purposes and ease of regulatory functions has a weak normative effect[2,3]. Administrative penalties or fines – as introduced in overseas jurisdictions – are a more efficient[4] and potentially more effective means of changing behaviour due to their financial impact, without the disproportionate consequences of a criminal conviction[5]. Consideration should also be

[1] Kroneberg, C., Heintze, I. and Mehlkop, G, The interplay of moral norms and instrumental incentives in crime causation, Volume 48, Issue 1, Criminology, 2010
[2] Aliverti, A., Making people criminal: The role of criminal law in immigration enforcement, Volyme 16, Issue 4, Theoretical Criminology, 2012
[3] Crawford, A., Governing through anti-social behaviour: regulatory challenges to criminal justice, Volume 49, Issue 6, 2009
[4] Brown, RM., Administrative and criminal penalties in the enforcement of occupational health and safety legislation, Osgoode Hall L. J., Volume 30, 1992
[5] Blondiau, T., Billiet, C.M., Rousseau, S, Comparison of criminal and administrative penalties for environmental offenses, European Journal of Law and Economics, Volume 39, Issue 1, 2015

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.

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

The legislation and its accompanying instrument enable the Treasurer to determine exceptions to the regime as he or she sees fit. As stated in the Explanatory Memorandum:

> *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, 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.*

For the very reason that the proposed offences are serious in nature, CPA Australia believes 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 and transparency over the exception process.

At a minimum, the currently identified exceptions should be written into the legislation. Permitting the Treasurer to add further exceptions by legislative instrument also should be reconsidered. Caution is required with resepct to the use of the legislative instruments to ensure there are no unintended consequences for consumers, businesses, the financial system or civil liberties.

11. The Bill increases uncertainty for the fintech industry

Financial technology (fintech) and alternative payment systems are a growth area globally. Governments and regulators seek to strike a balance between regulatory oversight, financial system stability and consumer protection as the volume and value of alternative means of exchange increases. The inclusion of 'digital currency' within the Bill, and its exclusion from the legislative instrument, creates uncertainty for the developers of fintech products. The ability of the Treasurer to remove the exception for digital currencies, or even certain digital currencies, is a regulatory risk for developers and may affect the viability of Australian start-ups in particular. It may therefore encourage Australian start-ups to develop their fintech applications in other markets with a more certain regulatory framework.

The fintech industry is 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. Given the acknowledgment in the Explanatory Memorandum that the *"ways in which digital currency is presently used in Australia, it is expected that the Treasurer will exempt most transactions involving digital currency"*, the exception should therefore be included in the Bill to give the industry greater certainty.

12. Costs to business may increase

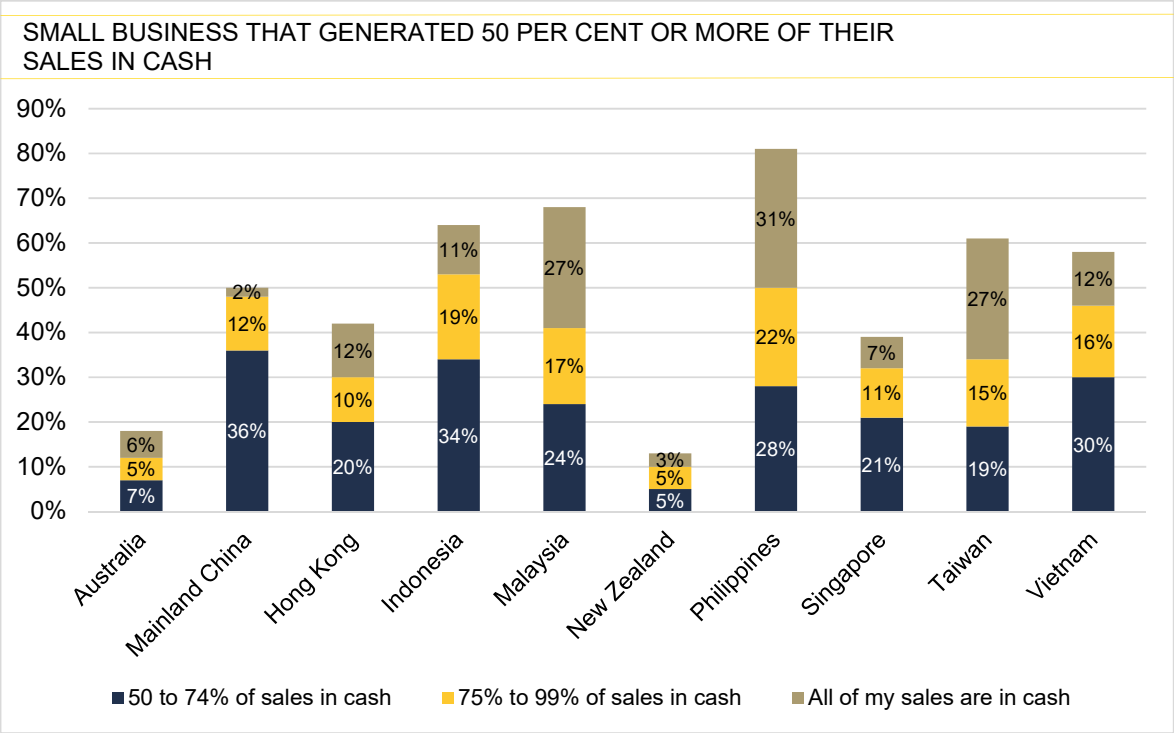
While many businesses have already shifted to electronic payments, the costs incurred by businesses in doing so are not insignificant. Electronic transaction fees and other banking-related charges are either absorbed by the business or passed on to customers. Government should be mindful of unintended effects or potential shifts in pricing for business banking services. The government should ensure that electronic transaction costs for small businesses are as close to nil or parity with cash handling fees as commercially feasible.

13. Encouraging changes in behaviour through incentives

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 objective. We therefore recommend that the government also explore incentives and support for business that accelerate the shift away from cash transactions. This includes considering how to reduce or remove the costs associatied with electronic transactions.

In stating this, our Asia-Pacific Small Business Survey 2018 found that Australian small businesses were the second least likely in the region to have cash as their major source of their revenue. However, it suggests that Australian enterprises doing business in Asia are likely to legitimately receive and trade in cash.

Figure 1: Percentage of sales that are received in cash – small business by country



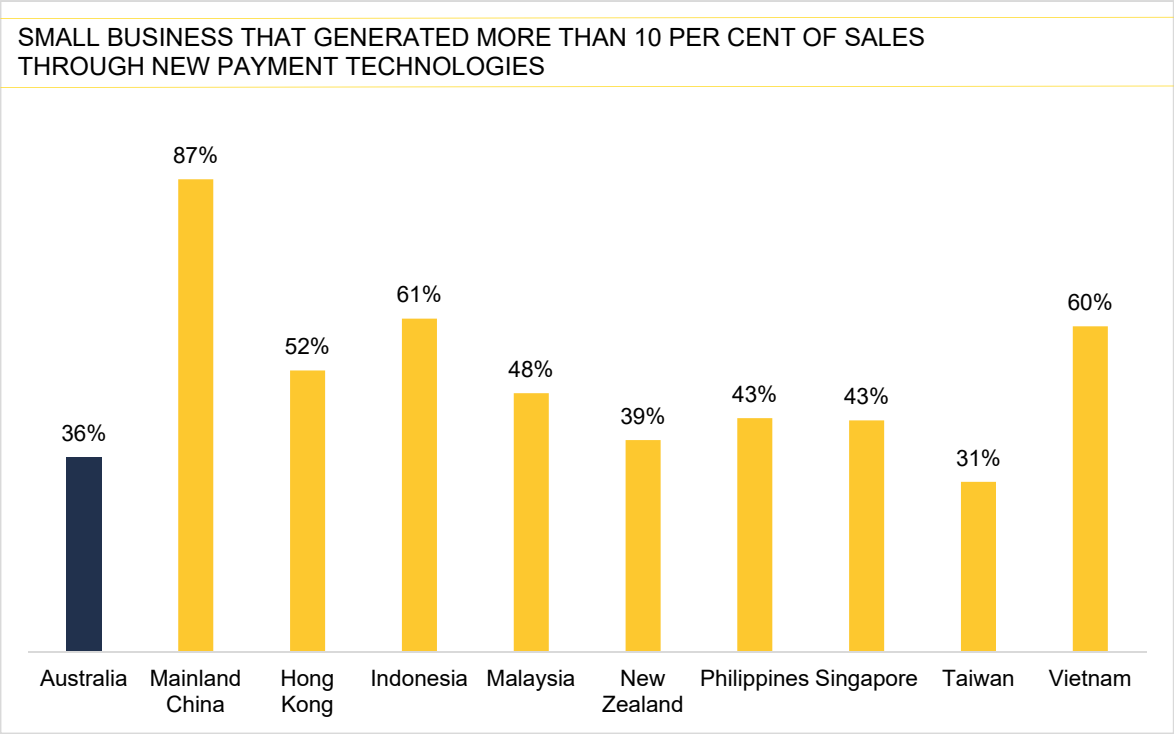
Source: Asia-Pacific Small Business Survey 2018, CPA Australia

While Australian small businesses perform well in this regional comparison, there is still room for improvement. Our engagement with members that advise Australian small businesses indicates that the cost of electronic transactions is a major reasons why there isn't a higher uptake of electronic payments. Reducing or removing those costs for small businesses and therefore consumers may help meet the policy objectives of this Bill in a way better than criminalising certain cash transactions.

Our survey also indicates that improving the digital capability and literacy of Australian small businesses may also 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.

The below chart from our survey shows that Australian small businesses lag behind competitors from most markets in terms of adoption of new digital and mobile payment technologies.

Figure 2: Percentage of sales received through digital/online/mobile payment technologies such as PayPal, AliPay, TenPay, WeChatPay, ApplePay etc – small business by country



Source: Asia-Pacific Small Business Survey 2018, CPA Australia

14. Informing and educating consumers, business and not-for-profits of the change

With the Bill proposing to criminalise certain ways in which consumers, business and not-for-profits transact, it is essential that its introduction be accompanied by an infromation and education campaign. We therefore recommend that the Government articulate how it will support consumers, business and not-for profits comply with this change.

We see such an information and education campaign extending beyond the short term in order to support businesses who may transact with individuals and other businesses unfamilar with the law in the coming years. Making it a longer term campaign would also assist Australian businesses who begin operating outside of Australia in the future from inadvertently breaching the law.