

Dear Chair and Members of Senate Economics References Committee,

The Terms of Reference for your inquiry into Australia's Taxation System are broad enough to address the problem of the cash economy. Accordingly, I enclose both my original submission to the Black Economy Taskforce in 2017 and an updated submission for your consideration.

The cash economy is still a significant part of the Australian economy and in my view the reforms which have been implemented in response to the Black Economy Taskforce Final Report, have been ineffective in addressing the cash economy.

The cash economy still warrants the attention of the Senate Economics References Committee. Over \$100 Billion per annum is still withdrawn from ATM's. As at June 2023, the Reserve Bank reported that \$101.3 Billion in cash is in circulation. It also reported an increased demand for \$100 banknotes.

The current reforms of the *Payment Systems Regulation Act 1998* (PSRA) provide an opportunity to look at the regulation of interchange fees and surcharges on debit and credit cards. Australian consumers are spending approximately \$1 Trillion per annum on debit and credit cards. The fast pace of tap and go payments makes it unrealistic for consumers to assess how much they are being charged in surcharges. There is a need to regulate and to protect consumers in relation to these largely hidden fees.

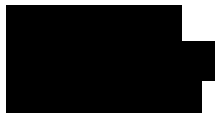
Payment Systems reforms also provide an opportunity to address the cash economy. It is time to ban cash only GST registered businesses and to put a price on cash either in the form of a GST or a surcharge. This is intended to be a revenue neutral reform for consumers. Consumers who continue to use cash should be required to pay the GST or surcharge. Consumers who only make card payments can avoid the new tax. By putting a price on cash and by banning cash only GST registered businesses, consumers will only need to withdraw cash for minor discretionary spending e.g. democracy or charity sausage sizzles.

The loss to the revenue from the cash economy still runs into the Billions annually. It also erodes confidence in the Australian Tax System when millions of wage and salary earners rightly believe that participants in the cash economy are not paying their fair share of tax.

I thank the Senate Economics References Committee for considering this submission.

Kind Regards

Dr Cosmas Moisisdis



**Submission to Senate Economics References Committee  
Reforming the Cash Economy  
Dr Cosmas Moisisdis**

I thank the Senate Economics References Committee for conducting an inquiry into Australia's Taxation System and for allowing submissions on this important issue. In this submission I wish to focus on the cash economy.

I am a published author in the field of criminal law and I have had extensive experience in tax crime. I make this submission with a focus on tax compliance. Instead of looking to new taxes, there is a real need to improve compliance in relation to existing taxes.

**Introduction**

Traditional methods of dealing with the cash economy such as ATO audits and prosecutions have not been effective in dealing with widespread low visibility cash transactions which often result in no tax being paid. It is time to put a price on cash.

In reforming the cash economy, it is time to ban 'cash only' businesses and to impose a price on cash either in the form of a GST or a surcharge. This is intended to be a revenue neutral reform for consumers. Consumers who choose to continue using cash, should be required to pay a GST or surcharge. Consumers who only make card payments, can avoid the new tax.

**2017 Submission to the Black Economy Taskforce**

In 2017 I made a submission to the Black Economy Taskforce. That submission is attached and in my view, it is still relevant today. In that submission, I emphasised that the size of the cash economy and the loss to the Revenue was greater than was previously forecast. Monitoring the cash economy was very difficult on account of the low visibility of cash transactions and the lack of audit evidence. Existing offence provisions in the *Taxation Administration Act 1953* (Cth) and even the general offence provisions in the *Criminal Code* (Cth) had proven ineffective as acting as a deterrent to cash economy offending on account of the problem of proving the offences in the first place. General and specific deterrence in the criminal law require offences to be both detectable and prosecuted.

The Black Economy Taskforce sought to achieve greater compliance in the cash economy. The Taskforce's terms of reference made it clear that banning cash was not an option. My proposed solution was a revenue neutral model to deal with the cash economy. In short, I proposed legislative amendments to ban the running of 'cash only' businesses and I also proposed that a price be put on cash by way of a 10 percent GST on all ATM and EFTPOS cash withdrawals. If traders were compelled to accept card payments, and if consumers were deterred from going to the ATM to extract cash to pay a service provider who was offering a discount for cash, then there would be far greater compliance in the cash economy. The legislative reforms I proposed were as follows:

- 'Merchants' under the *Payment Systems (Regulation) Act 1998* (Cth) should be required to accept electronic card payments for the provision of goods and services anywhere in Australia. This requirement should apply irrespective of whether a business is conducted at fixed premises or is mobile. There should be no minimum transaction amounts for electronic payments. This requirement should be subject to a 12 month implementation period to allow all merchants adequate time to migrate to an electronic payments platform.

- Compulsory registration for GST on account of having a turnover of over \$75,000 under the *A New Tax System (Australian Business Number) Act 1999* (Cth), could be the trigger for 'merchants' being required to also provide electronic payment facilities.
- It should be an offence under the *Payment Systems (Regulation) Act 1998* (Cth) for any Merchant not to acquire and make available to customers electronic payment facilities at every place where the enterprise is conducted.
- It should also be an offence on the part of any Merchant to refuse to accept card payments and to insist on cash payments.
- The *A New Tax System (Australian Business Number) Act 1999* should be amended in a number of respects. Section 8 should draw a distinction between 'conducting an enterprise' and 'conducting a cash enterprise'. Section 15 should be amended to permit information gathering to determine whether or not a cash enterprise is being conducted. There should be a mandatory requirement to declare if a business is a 'cash enterprise'.
- The ABN Registrar could be authorised to maintain a Roll of Cash Enterprises. It should be an offence under s23 of the *A New Tax System (Australian Business Number) Act 1999* to conduct a cash enterprise which is not registered on the Roll of Cash Enterprises.
- Compliance officers of the ATO should be authorised to conduct inspections of business premises to ensure compliance with the legislation. ATO Investigators should be authorised to issue infringement notices in the first instance for low value transactions. A regime of escalated prosecution based penalties should be available for higher value transactions and for repeat offences, including a maximum of 12 months imprisonment for offences of failing to acquire electronic payment facilities or refusing to accept card payments.
- In more complex investigations, search warrants can be sought by the AFP under s3E Crimes Act 1914 (Cth).
- After a 12 month implementation period, a further law reform measure can be considered. One option would be to amend the *A New Tax System (Goods and Services) Act 1999* (Cth) to impose a 10 percent non-refundable GST on all ATM, EFTPOS terminals or financial institution based withdrawals of cash. If all consumers gravitate to electronic based payments then such a measure would be revenue neutral. Section 9-70 *A New Tax System (Goods and Services) Act 1999* prescribes that the amount of GST on a taxable supply is 10% of the value of the taxable supply. A separate rate of GST can be prescribed in relation to cash withdrawals.
- Law reform under the *A New Tax System (Australian Business Number) Act 1999* and the *Payment Systems (Regulation) Act 1998* (Cth) would lead to a reduction in the use of cash and increased deposits in the banking system. Such a transition may be reflected in a review of any interchange fees. It would also provide an opportunity to consider whether credit card surcharges by merchants should be allowed to continue, or if allowed, whether the rates ought to be fixed. Consideration can also be given as to whether merchants should be required to provide notice to

consumers of any permitted surcharges. As far as possible, the gradual transition to a cashless economy should be achieved without consumers being worse off.

## **2024 Recommendations to Economics Legislation Committee**

The 2017 recommendations I made to the Black Economy Taskforce are still relevant today. The Treasury Report *A Strategic Plan for Australia's Payments System June 2023 (pages 22-24)* noted that the Reserve Bank's Consumer Payments Survey in 2022 found that 13 percent of payments were made in cash, whereas in 2019, the figure was 27 percent. Other problems identified included bank branches and ATM's closing down and consumers having difficulty accessing cash. The Report stated that 'Treasury will in 2023 commence engagement with relevant Commonwealth government agencies and industry on options for maintaining adequate access to cash for as long as Australians want to use cash.' (p.24)

The Treasury Report *A Strategic Plan for Australia's Payments System June 2023* concludes with a Roadmap of proposed consultations, an update to the *Payment Systems Regulation Act 1998 (PSRA)*, a new payment licensing framework and new technology. The *Treasury Payments System Modernisation: Regulation of payment service providers Consultation Paper December 2023* goes into further detail about the proposed regulatory oversight framework. These developments are commendable. As part of this process, both interchange fees and surcharges need to be better regulated. In order to allow for competition, maximum fees ought to be set. Consumers do not have the time in making card payments to evaluate the electronic transaction fees they are charged.

The Reserve Bank of Australia in its report, *Review of Retail Payments Regulation—Conclusions Paper October 2021* stated the following on the subject of surcharges:

### **6. Surcharging**

#### **6.1 Issues for the Review**

The Consultation Paper noted that the Bank and most stakeholders were of the view that the revised surcharging framework put in place following the 2015–16 Review was functioning well. This framework gives merchants the right to levy a surcharge to recover the cost of accepting payments in designated card schemes, with the ACCC having enforcement powers to prevent merchants from surcharging excessively...

#### **6.4 The Board's assessment**

##### **The merchant's right to surcharge promotes a more efficient and competitive payments system**

The Board's long-standing view – which has been supported by developments in merchant service fees over the past two decades (see Graph 1 above) – is that the right of merchants to apply a payment surcharge plays an important role in promoting competition in the payments system and keeps downward pressure on payment costs for businesses. If a business chooses to apply a surcharge to recover the cost of accepting more expensive payment methods, it results in more transparent price signals and may encourage customers to use a cheaper payment option. In addition, the possibility that a customer may choose to use a lower-cost payment method when faced with a surcharge puts competitive pressure on payment providers to lower their merchant costs, and may help merchants in negotiating lower prices directly with their payment providers. By helping keep merchants' costs down, the right to apply a surcharge means businesses can offer a lower price for goods and services to all of their customers and thereby reduce the extent to which users of lower-cost payment methods are cross-subsidising users of more expensive payment methods.

The position of the Reserve Bank on surcharges being left to market forces is totally unsatisfactory. With modern 'tap and go' electronic payments, consumers usually have no idea what surcharges and interchange fees are applied at the time of purchase. To suggest that the ACCC can intervene as a result of complaints or subsequent reviews, is unfair to consumers. An update to the *Payment Systems Regulation Act 1998 (PSRA)* and associated licensing framework and new technologies,

provides an opportunity to regulate both interchange fees and surcharges for debit and credit cards. At the same time there is an opportunity to put a price on cash as a means of addressing the cash economy.

It is also appropriate for Government to have a mature conversation with the Australian public about the cash economy. Cash is not free. There is a cost in printing, storing and transporting currency. There is also a security risk to businesses that deal in cash. Government should also admit what we all know. It is very difficult to achieve oversight of the cash economy. The consumer and the service provider are usually the only persons present when a discount is offered and accepted for paying in cash. The cash economy is a drain on the revenue. It disadvantages honest businesses, especially the increasing number of businesses that are required to operate on a cashless basis. It is also a burden on the wage and salary earners who have to make up the shortfall from those who participate in the cash economy and don't declare or under declare their earnings. It is time to put a price on cash.

In 2017 I recommended a 10 percent GST on cash withdrawals from ATMs or EFTPOS withdrawals. In the context of the current PSRA reforms, this new tax could be called a surcharge on cash withdrawals rather than a GST. Whether it is called a surcharge or a GST, it does not have to be set at 10 percent. After an appropriate phase in period (to allow any GST registered merchants who still running 'cash only' businesses to set up for card payments) a specific GST or surcharge on cash could be imposed at 2-3 percent and be ramped up over time. The Australian public needs to be told by Government that by going to the ATM to withdraw cash to pay for goods and services in cash, often results in the person receiving that cash payment not declaring it and not paying their fair share of tax. The obvious also needs to be said. The bulk of these transactions will never be detected. If Governments are to provide the benefits and services the community expects, then we need to deal with compliance in the cash economy. A GST or surcharge on cash withdrawals is appropriate if no tax is going to be paid by the person ultimately receiving the money. If all merchants are required to accept card payments, then the proposal is revenue neutral. If consumers only withdraw cash for minor discretionary spending e.g. charity sausage sizzles, then a GST or surcharge on cash withdrawals will become acceptable in the community.

### **Is the Cash Economy Still a Problem in 2024?**

According to the Reserve Bank of Australia Retail Payments data, between January 2024 and July 2024, ATM monthly withdrawals in Australia ranged from a high of \$9.5 Billion in February 2024 to a low of \$8.8 Billion in July 2024. Total card purchases on Australian issued cards ranged from \$84.3 Billion in February 2024 to \$85.8 Billion in July 2024. This means that on an annualised basis, over \$100 Billion per annum is withdrawn from ATMs.

The fact that on an annualised basis, approximately \$1 Trillion is spent by Australian consumers via debit cards and credit cards, suggests that cards are widely accepted and that there must be a reason for the ATM cash withdrawals. Elderly consumers who have been unwilling or unable to migrate to card payments would be one cohort of ATM customers. Another cohort of ATM customers would be those who want to have some cash on hand for cash only situations such as charity sausage sizzles. In all likelihood, the majority of ATM customers are withdrawing cash to spend at cash only or discount for cash businesses. This means that the bulk of ATM withdrawals result in downstream untaxed transactions.

The Reserve Bank Retail Payments data suggests that the majority of traders have already migrated to offering fixed and mobile electronic payment options. This means that legislating to make it illegal for GST registered traders to run a 'cash only' business, is not going to be a huge imposition in 2024.

According to the *Reserve Bank of Australia 2023 Annual Report* (p101-104), the value of banknotes in circulation was \$101.3 Billion as at the end of June 2023, which was equivalent to 4 percent of GDP. It was also noted that there were 2 billion banknotes in circulation. It is also interesting that the Reserve Bank reported that 'The number of notes in circulation declined across all denominations except the \$100 note, which grew more slowly than its historical average.' (p103). The Reserve Bank reported that in the 10 years to 2022/23, the growth in demand for the \$100 note was 7.3 percent. (p104) It is a concern that there has been an increasing demand for \$100 notes. These notes are unlikely to be spent at charity sausage sizzles.

The \$101.3 Billion in cash in circulation in June 2023 was of course in addition to the sums that were withdrawn at ATMs for the same month.

### **How Successful Were the Black Economy Taskforce Reforms?**

In response to the *Black Economy Taskforce Final Report*, the *Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Act 2018* (Cth) was passed. The legislation focused on prohibiting sales suppression tools. In my original submission (paras 59-81) I explained in detail why the existing criminal law was sufficient to cover such conduct and why this approach was not the answer to the cash economy. It is appropriate for the Economic Legislation Committee to require Treasury and ATO to report on any investigations and prosecutions under these new provisions.

In response to the *Black Economy Taskforce Final Report*, the *Treasury Laws Amendment (Black Economy Taskforce Measures No. 2) Act 2018* (Cth) was also passed. This Act created an amendment to Division 26 Part 2-5 *Income Tax Assessment Act 1997* (Cth) by providing that tax deductions cannot be made in respect of payments to persons such as employees if there is non-compliance with provisions requiring withholdings or particular declarations. Treasury and ATO should be asked to report to the Economics Legislation Committee on the results of implementing this legislation. It is fair to ask what is the incidence of businesses which pay employees cash in hand (and which are also non-compliant in relation to TFN declarations, superannuation entitlements and worker's compensation cover) but which also seek tax deductions for such payments?

The bulk of cash economy transactions involve consumers paying for goods and services in cash, usually in low visibility environments and in circumstances where a discount is given for cash. If there is a price on cash and consumers increase their usage of card payments, then the businesses which pay their employees 'cash in hand' will have access to far less cash to fund such employment arrangements.

### **Conclusion**

The reform of the *Payment Systems Regulation Act 1998* (PSRA) provides an opportunity to address issues such as the regulation of interchange fees and surcharges on debit and credit cards, being issues of concern to consumers. In resolving these issues, it is also appropriate to address the cash economy by putting a price on cash. Whether it is called a GST or a surcharge on cash, there is a need to address the significant loss to the Revenue from the cash economy. Audit compliance activity and prosecutions have been ineffective in addressing the cash economy. The time has come to put a price on cash in the form of a GST or surcharge.

Dr Cosmas Moisidis  
3 October 2024

## **A Response to the Black Economy Taskforce Interim Report March 2017 Dr Cosmas Moisisdis<sup>1</sup>**

### **Executive Summary**

The purpose of this submission is to respond to the Black Economy Taskforce Interim Report March 2017 and in doing so to express views on the regulatory reforms which are needed in order to respond to the challenges of the cash economy.

The challenge posed by the black economy is to restore the confidence of the Australian community in the taxation system. There is a need to restore a level playing field in which all taxpayers pay their fair share of tax. Whatever views are expressed on the issue of the size of the black economy, it is clear that there is a widespread perception that the black economy is prevalent, and that many, if not most of the participants in the black economy, are beyond the reach of the law. Cash transactions which take place behind closed doors or on private property, take place away from the watchful eye of any revenue agency. Even in the case of retail transactions which take place in a more public environment, practices suggestive of tax evasion such as ringing up 'no sale' on a cash register, or not even using a cash register are prevalent. In these circumstances, many consumers are also tempted to take advantage of the situation and seek discounts for cash wherever possible.

If the mischief caused by the black economy is to be addressed, then a regulatory environment is required in which compliant behaviour on the part of traders and consumers is encouraged. Regulations also need to be supported with offence provisions which encourage compliance. If regulations can be ignored and if offences are not fit for purpose, then public confidence in the administration of the taxation system will be undermined. In this submission it is argued that there is currently inadequate regulation of the cash economy and that the available offences and penalties under the *Taxation Administration Act 1953* (TAA) and the *Criminal Code* (Cth) are ill suited to the prosecution of deliberate non compliance in the cash economy. The methodology of the TAA focuses on false statements associated with the aggregated reporting of transactions in tax returns. If compliance in the cash economy is going to be effective, then there is a need for regulations and offence provisions which will encourage compliant tax behaviour. Otherwise, we will not restore the confidence of the Australian community in the ability of Government to tackle the black economy.

What this submission also reveals is that the size of the black economy cannot be accurately estimated and that its true size is likely to be somewhere between 1.5 and 14 percent of GDP. Given the potential enormous magnitude of this risk which has features of anonymity, low visibility, and significant problems of proof, the time has come to consider more effective solutions.

This submission discusses advances in electronic payments technology, in particular the Reserve Bank's New Payments Platform and asks the question, why shouldn't the provision of electronic payment facilities by providers of goods and services be made compulsory? Is there any justification for continuing to run a 'cash only' business? Such a compliance model lends itself to straightforward offence provisions

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<sup>1</sup> Dr Cosmas Moisisdis BA LLB PhD (Monash). The views expressed in this submission are entirely the views of the author and are not put forward on behalf of any other organisation.

such as failing to acquire electronic funds payment facilities or refusing to accept card payments.

In this submission it also argued that it is unreasonable to expect any revenue agency to effectively tax the final transactions in a payments system in which wage and salary earners, pensioners and others, have income first deposited into bank accounts, then withdraw it via ATM cash withdrawals, and then spend it on transactions which have taxation implications. If the Australian cash economy now contains 1.6 million participants, a solution is needed which is effective across this entire taxpayer population.

The suggested additional solution here is to limit access to cash by progressively reducing ATM withdrawal limits. In 2009 ATM withdrawal limits were set at \$800 per day. By 2015 the daily ATM withdrawal limit has been increased to \$2,000. As electronic transactions become more widespread, the issue of ATM withdrawal limits needs to be revisited.

The Black Economy Interim Report presents us with enormous challenges. It also presents us with an opportunity to fully address a major unresolved issue in Australia's taxation system.



## Introduction

1. This response to the Black Economy Taskforce Interim Report (the Interim Report) takes account of the fact that there is currently under way a transition to a cashless society. It is argued that that transition needs to be actively managed rather than being passively observed. The Interim Report states that 'the Government has asked the Taskforce to develop a forward-looking, innovative and whole of Government black economy strategy.'<sup>2</sup> If we are going to actively manage the transition to a cashless society then we need to consider what regulations will be necessary to achieve that outcome. In considering any law reform in relation to the cash economy, this submission addresses the following issues:
  - The size of the cash economy. This issue reflects the size of the mischief that needs to be addressed and it also sheds light on the effectiveness of existing compliance strategies.
  - The effectiveness of existing offence provisions in dealing with cash economy non compliance.
  - Whether regulatory amendments need to be made to the *Payment Systems (Regulation) Act 1998* to support the expansion of electronic payments.
  - A commentary on other recommendations in the Black Economy Interim Report.

## Size of the Cash Economy

2. The issue of the size of the cash economy is critical to the law reform debate. If the mischief to be addressed is minor, then the need for law reform is not compelling. However, if the mischief to be addressed is significant and is affecting the ability of Government to effectively function by adequately funding services, balancing budgets and addressing accumulating government debt, then a case for major law reform is warranted. In short, this is a critical issue in the debate and it is not one to be skimmed over because it is a difficult question.
3. The Interim Report concedes the difficulties in determining the size of the cash economy. The Report correctly states that 'estimating the size of the black economy is notoriously difficult given its clandestine nature', and 'measuring the black economy is fundamentally difficult given the hidden nature of the problem, the large number of participants and limitations of audits and other estimation methods.'<sup>3</sup> The Interim Report expresses a tentative conclusion in favour of the lowest estimate of the size of cash economy at 1.5 percent of GDP as stated by the Australian Bureau of Statistics (ABS):

In 2012, the ABS estimated that the black economy was around 1.5 per cent of GDP in Australia (approximately \$25 billion per annum today), up from 1.3 per cent in 2001. The ABS estimate applies a direct method and is based on methodology recommended by the OECD. It primarily uses results from ATO

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<sup>2</sup> Michael Andrew Black Economy Taskforce Interim Report March 2017 at [https://consult.treasury.gov.au/tax...division/black-economy-taskforce/.../BE\\_IR.docx](https://consult.treasury.gov.au/tax...division/black-economy-taskforce/.../BE_IR.docx) p.2.

<sup>3</sup> IBID 11, 13.

audits to adjust income and expenditure measures from the National Accounts.<sup>4</sup>

Based on our early consultations, we assess this estimate to have been a broadly accurate one for the recent past.

However, a range of trends, vulnerabilities and other considerations suggest the black economy could be larger today. These include tax and regulatory burdens (which become more costly after a period of low wages and profits growth), expansion of sharing economy activity (and other sectors beyond the regulatory perimeter), money laundering and even changing social norms. The declining use of cash as a means of payment and the use of new payment technologies may be working in the other direction. These are explored further in Chapter 2.

A number of studies suggest that the black economy could be larger in Australia (and other OECD countries). These have been subject to considerable academic controversy. Based on our preliminary examination, we are not convinced by these studies.

We are aware of the ATO work to estimate the size of 'tax gaps' across major tax bases. The Taskforce will consider the results of this project, if completed, in our Final Report.<sup>5</sup>

4. The Interim Report concludes that the problem of estimating the size of the black economy will be addressed in more detail in the final report.<sup>6</sup> It is important then, to either attempt to answer the question of the size of the black economy or alternatively, to put forward matters that should be taken into account in the Final Report.
5. Australian Bureau of Statistics (ABS) *Information Paper: The Non-Observed Economy and Australia's GDP, 2012* estimated that the cash economy was no more than 5 percent of GDP and it identified 5 components to the Non Observed Economy (NOE):
  - Underground production including deliberate concealment of legal activities to avoid tax
  - Illegal production
  - Informal production of goods and services by self-employed
  - Household production including crops, livestock and owner built houses, and
  - Underground production missed due to deficiencies in data collection.
6. The ABS *2012 Report* described the underground economy as follows:

*3.3 Underground production tends to occur in areas where there is a low level of regulation and a high proportion of cash transactions, and is often undertaken by small businesses. It is concentrated in industries such as construction, accommodation, cafes and restaurants, personal and other services, and retail trade. Typically, owners of these businesses deal directly with their customers and can avoid taxes by under-reporting their income through understating cash receipts and/or overstating their business expenses. Conversely, it is less significant in highly regulated industries due to stronger incentives for management to report strong sales and profit performances, as well as more stringent independent auditing processes.*

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<sup>4</sup> Australian Bureau of Statistics (2012), *Information Paper: The Non-Observed Economy and Australia's GDP 2012*.

<sup>5</sup> Note 1, 13-14.

<sup>6</sup> Note 1, 15.

7. ABS acknowledged in its report that a 2010 Work Bank model estimates the Australian Cash economy at 14 percent of GDP. The ABS acknowledged in its Report that it could not accurately assess underground production as a percentage of GDP:

**ADJUSTMENTS TO GDP (E)**

3.12 Business intelligence suggests that it is likely that there is underreporting of consumer expenditure similar to the underreporting of income to the Australian Taxation Office (ATO). To partially offset the income adjustment for income underreporting, the ABS makes a small adjustment to the HFCE estimate to allow for the underreporting of sales in business surveys (mainly the monthly retail turnover survey). Some small adjustments are also made to **private gross fixed capital formation** in respect of own account home construction and alterations, being part of household production for own use (note: this is not household production for own final use as this is investment in capital). Goods or services used for own gross fixed capital formation can be produced by any kind of unit, whether incorporated or unincorporated. ...

3.14 Based on aggregate tax audit information, around 70% of the income adjustment factor is added to output and 30% is deducted from intermediate consumption (with some variation between industries) to account for understatement of sales and overstatement of expenses by businesses. These adjustments are the best estimates given the information available. Getting a more accurate assessment of the total degree of under and over reporting would require the ATO to begin a program of taxation audits on a randomised sample of businesses every five years or so.<sup>7</sup>

8. An Australian Institute 2012 study found that 574,900 persons were involved in cash in hand work. Cash in hand work was estimated to cost the Commonwealth and States at least \$5 Billion per year.<sup>8</sup>
9. An Australian National University Regulatory Institutions Network study (2004) stated that the size of cash economy 1989/90 was 10.1 % of GDP increasing to 14.1% of GDP 2001/2.<sup>9</sup> Reinhart, Job and Braithwaite in their

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<sup>7</sup> The Australian Bureau of Statistics has estimated the nation's underground production' or cash economy as worth 1.5 percent of Gross Domestic Product or about \$24 billion a year. The annual trade in illegal drugs is worth another 0.4 percent of GDP or about \$6.5 billion a year: Matt Wade The Canberra Times Sep 13 2013 p3.

<sup>8</sup> David Richardson and Richard Denniss, *Cash in hand mean less cash for states—the impact of tax evasion on public finances* The Australian Institute (Technical Brief No. 17 October 2012). Australian Institute researcher and co-author of the Australian Institute Report has said that some of the methods of calculating the black economy put the amount of tax revenue foregone at as much as \$14 billion. 'We believe our estimate [\$5 billion in missing revenue] is very conservative.' [Sun Herald](#) [Sydney, N.S.W] 21 Oct 2012: 5.

<sup>9</sup> Monika Reinhart, Jenny Job & Valerie Braithwaite, *Untaxed Cash Work: Feeding Mouths, Lining Wallets* Report for the Department of Family and Community Services, Regulatory Institutions Network Australian National University (March 2004).

In another commentary on the size of the cash economy, Judith Tydd and Dan Hall in *Inside the Black Economy* BRW 2 September 2010 stated:

'The black economy is booming...unofficial estimates suggest it may be worth as much as \$110 billion each year...

It is surprisingly easy to operate out of the view of the taxman. Businesses encourage customers to pay cash and discourage payments by credit cards, EFTPOS or any transaction involving a receipt or any other record taking...

If the customer is not paying attention or doesn't seem interested in getting a receipt, it makes sense for anyone seeking to pay less tax to record a transaction at \$2 rather than say \$52. In that way

Regulatory Institutions Network Study expressed the following conclusion about the size of Australia's cash economy:

*Conclusion*

*It is clear that an estimate of the size of a cash economy will vary depending on the method used to calculate it and the assumptions made. If we put faith in the currency demand method used by both Schneider (2000; 2002) and Bajada (2002), it seems that the current size of Australia's cash economy sits between 14% to 15% of GDP. The use of a different method by the ABS puts the size of the cash economy as low as 2%. On the issue of change, Schneider claims an increase of an order that corresponds to the OECD average over 11 years. Bajada, over the period from the mid 1960s to 2000, maintains that there has been little change. The ABS (2003:6) is currently considering "how to develop estimates for historical periods".*

*What is also clear is that a cash economy of around 15% would have some significant negative effects on the National Accounts, the policy government sets, and on the quality and quantity of benefits and services the Australian community receives from government. If the cash economy is around the 14-15% mark, we might assume that certain individuals pay less tax than they should by declaring less income than they earn. We might also assume that there are people claiming government payments and benefits to which they are not entitled, or making lower payments to government than they should. And we can assume that the community in general is aware of this (see Braithwaite, Reinhart, Mearns & Graham, 2001), and their perceptions of non-compliance on the part of others in the community does nothing to build or maintain their trust in others, in government and in government departments and agencies. Alternatively, it may be seen another way: In an era where government is encouraging self-sufficiency, some of those who are claiming government payments and benefits may be finding life so difficult that they are compelled to engage in cash economy practices to supplement their income to provide for themselves and/or their dependents.*

*Whether the true size of the cash economy is at the lower limit or the upper limit, Bajada's point that there is considerable stability in cash economy activity is well taken. Australians may be enmeshed in, or at least faced with, a web of cash economy practice, whether they like it or not. One wonders if carpe diem (seize the day) is a strong philosophy in Australia – are people just not thinking about the impact of their actions and preferring to live for the moment rather than think of the future? While many of those engaged in government regulation might think cash economy practices are those of the self-interested rational actor, there may also be more to it than that. The following chapters provide behavioural data on Australians who work in the cash economy. Such data may help illuminate some of the drivers of cash economy participation and point to directions for future research.<sup>10</sup>*

10. In their comprehensive review of the tax gap, Norman Gemmell and John Hasseldene argue that the tax gap as conventionally defined, is conceptually flawed because it fails to capture behavioural responses by taxpayers adequately. They argue that 'further work is required , on both conceptual and

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there's no correct receipt of takings kept by the cash register. Another way of avoiding the hated government charges [GST] is to pay staff straight from the cash register.'

<sup>10</sup> Schneider and Bajada have been described as using the 'currency demand' model to determine if the amounts of cash in the hands of the public and outside the banking system, is a reflection of unreported income. The Bajada model has been criticised by Breusch on the basis that a simple change in the units of measurement will produce a completely different estimate: see Trevor Breusch *Australia's Cash Economy: Are the Estimates Credible?* The Economic Record Vol. 81 No.255 (Dec 2005) 394 at 402.

empirical aspects before, researchers are likely to deliver tax gap estimates suitable for policy analysis (e.g. implications for enforcement policy).’  
Gemmell and Hasseldene conclude:

In an earlier section we argued that conventional definitions of the tax gap are misleading because they omit behavioural responses. The conventional tax gap will therefore be an inaccurate estimate of the ‘true’ tax gap to the extent of these responses. Even ignoring this, assessing the reliability of conventional tax gap estimates (or the hidden economy estimates that underlie them), is difficult, not least because the various reporting measures capture quite different things yet definitions of the variable of interest are often vague. In addition, measurement errors are generally of unknown magnitude, but are likely to be large in most cases; and may vary considerably within the same study.

As a result, a shift in the tax gap index of, say 10% from one year to another (e.g. from 1.0 to 1.1) might be dominated by margins of error of, say, 30% around each estimate. Authors of hidden economy or tax gap estimates almost never provide this kind of information, which would allow judgments to be made about the reliability of the estimates produced.

Nevertheless, from what we know about the sources of data used to produce tax gap estimates, the quality of the methods adopted, the potential for error within methods and noncomparability across them, we posit that in many cases the margins of error associated with individual estimates are just too big for these methods to form a reliable guide to year to year changes in tax compliance or ‘tax gaps’.

In support of our contentions, the absolute size of the hidden economy or tax gap estimates in any one year also appears to be subject to large margins of error. This is perhaps most evident in the case of Australian evidence where the Australian Bureau of Statistics (ABS) estimates the hidden economy around 2% with a maximum of 4.8%, whereas Bajada (1999, 2003) claims it is around 15%. The ABS used national accounting data methods while Bajada used MIMIC modelling.

Because most tax gap estimates are based on macro variables, which typically involve estimates of the hidden economy, they are conducted at a high level of aggregation. Thus, even if they could be measured with much smaller errors, they are unlikely ever to provide accurate indices of income tax gaps. Further, the criticisms of MIMIC methods by Breusch serve to highlight the non-robustness of this increasingly popular but misguided method of estimating the size of the hidden economy or tax gaps...

It would seem that it is difficult if not impossible, both to measure the absolute size of unpaid tax in any one year, and how this changes from year to year. Margins of error around most estimates are not generally reported but are probably sufficiently large to render annual changes in these estimates to be well within likely error bands. Tax gap estimates using taxpayer compliance data, such as those produced by the IRS, though hopefully more accurate, probably represent a lower bound on missing tax revenue.<sup>11</sup>

11. The comments of Gammell and Hasseldene invite a closer examination of the methodology and limitations of the study contained in the Australian Bureau of Statistics (ABS) *Information Paper: The Non-Observed Economy and Australia's GDP, 2012* which put Australia's cash economy at 1.5 percent of

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<sup>11</sup> Norman Gammell and John Hasseldene, *The Tax Gap a Methodological Review* in Toby Stock (ed) *Advances in Taxation* Vol.20 Emerald Group Publishing Limited 203-221.

GDP. The ABS 2012 Report made the following concessions about its limitations:

#### **SCOPE AND LIMITATIONS OF THE CURRENT STUDY**

1.10 This paper aims to improve national accounts estimates. As such, the paper does not generate estimates of such concepts as "the cash economy", "tax evasion" or "illegal activity". However, the research does provide insight into these concepts, as they are closely related to the components of the NOE [Non Observed Economy].

1.11 By its very nature, the NOE cannot be directly measured. Therefore, estimates of NOE activity must rely on limited indicative information and a variety of indirect methods – all of which can be regarded as contentious. It is likely that an unknown proportion of underground production is already captured in the observable data, owing to the data sources used and the estimation methods employed in collecting the observable data. For example, expenditure data captures the use of income that was generated from unobserved underground transactions.

1.12 In conducting the review, the ABS has sought to use the best research methods suitable for improving the quality of the Australian National Accounts. Other studies have used alternative methods based on the information available to those studies. For example, the estimates from a recent World Bank study [Shadow Economies all over the World: New Estimates for 162 Countries from 1999 to 2007](#) are different to ABS estimates, and reflect not only a difference in methods, but a difference in study objectives.

1.13 The ABS invites comment on the methods, assumptions and results of the study from users of the national accounts and other organisations and researchers who are interested in the topic. The paper is experimental in nature and is intended as a means of fostering discussion.

12. The ABS 2012 Report makes the following comments about its methodology and the data upon which it relied:

a. **ADJUSTMENTS TO GDP (P)**

3.13 The adjustments applied to GDP(I) are also applied directly to the production-based estimate of GDP(P) as they are directly related supply-side measures using more or less the same annual data sources. The adjustments are made to gross output and total intermediate use for incorporation into the supply use framework.

3.14 Based on aggregate tax audit information, around 70% of the income adjustment factor is added to output and 30% is deducted from intermediate consumption (with some variation between industries) to account for understatement of sales and overstatement of expenses by businesses. These adjustments are the best estimates given the information available. Getting a more accurate assessment of the total degree of under and over reporting would require the ATO to begin a program of taxation audits on a randomised sample of businesses every five years or so.

#### **DATA SOURCES**

3.17 The adjustments rely on indicative information from aggregated income tax audit data, qualitative comment, and checks and balances inherent in the national accounting methodology.

3.18 The ABS has consulted with the ATO for intelligence on methodological issues and tax compliance trends by industry. To calculate the underground

production adjustments, the ABS used the ATO's project based audits, business income tax data and aggregated goods and services tax (GST) audit data to calculate estimates for underground production.

13. The ABS 2012 Report makes very frank disclosures that the non observed economy (NOE) cannot be directly measured, that 'estimates of NOE activity must rely on limited indicative information and a variety of indirect methods – all of which can be regarded as contentious' and that its 'paper is experimental in nature and is intended as a means of fostering discussion'. This means that the Black Economy Interim Report cannot safely assert that the black economy amounts to 1.5 percent of GDP or \$25 billion per year.
14. The issue of the size of the black economy needs to be further considered in the Black Economy Taskforce Final Report. If a definitive figure cannot be asserted for the size of the cash economy, then it should be conceded that the range of figures contained in other studies such as those by the OECD and other comparable jurisdictions may well be correct. Gammell and Hasseldene refer to comparative studies of other jurisdictions which put the cash economy at between 8 and 15 percent of GDP. If the concession is made that the non observed economy by reason of its anonymity and clandestine nature cannot be accurately measured, then law reform needs to proceed on the basis that there is a very substantial mischief that needs to be addressed. The greater the tax gap caused by the cash economy, the greater is the need to deter, detect and be able to deal with such tax evasion.

#### **Existing Offences are Inadequate to Address the Cash Economy**

15. In the case of intentional and dishonest non compliance with tax laws, there are general offence provisions under the *Criminal Code* (Cth) and taxation specific offences under the *Taxation Administration Act 1953* (Cth) (TAA) which can be utilised. The *Criminal Code* (Cth) makes provision for more serious offences which are triable on indictment before judge and juries and which carry penalties of up to 10 years imprisonment in the case of fraud based offences. The *Taxation Administration Act 1953* (TAA) contains summary offences which are punishable by fines or by imprisonment for periods of up to 12 months. Summary offences are triable before Magistrates' Courts.
16. In the case of tax fraud prosecutions which rely on the *Criminal Code*, offence provisions such as s134.1 (Obtain property by deception) and s134.2 (Obtain financial advantage by deception) are available. The general dishonesty offences under s135.1 *Criminal Code* are also available. The salient feature of all of these offence provisions is that they are based on conduct by taxpayers such as the making of false returns or statements. This means the making of false income tax or GST returns or providing false substantiation documents in response to an audit.
17. The *Criminal Code* offence provisions are not ideally suited to prosecuting offences in relation to the cash economy. These offence provisions involve a number of hurdles. Firstly, the indictable nature of the offences requires the prosecution to establish a significant quantum of the alleged fraud in order to justify the use of these charges rather than proceeding with lesser charges under the TAA. Secondly, the *Criminal Code* charges tend to be provable on the basis of alleging that various returns have been filed which are false in a material way. For example, it might be alleged that income tax returns have been filed which understate income or which overstate expenses. GST

returns might be filed with false input tax credits claimed and without all GST collected on sales being declared and remitted. In the case of the taxpayers who are participating in the cash economy, these returns require the reporting of aggregated transactions over monthly or quarterly periods in the case of the GST, and over yearly periods in the case of income tax returns. These returns do not require the reporting of individual cash transactions. If it is accepted that individual cash transactions in the black economy involve anonymity and have a clandestine nature, then it also has to be accepted that the non reporting of these transactions in an aggregated manner (as required by tax returns) presents enormous problems of proof for auditors, criminal investigators and prosecutors.

18. The *Taxation Administration Act 1953* (TAA), ought to be the vehicle for early intervention and engagement in cash economy non-compliance. The legislation prescribes summary offences which should lend themselves to summary modes of proof. Ideally, there should be provision for offences which can target the cash economy at the micro level—that is at the level of individual transactions. Instead, the offence provisions to some extent mirror the methodology of the *Criminal Code* (minus the mental elements of dishonesty) and are geared to the macro level—the making of false statements and returns. This means that individual potentially non reported transactions are not targeted. Instead, the offence provisions lend themselves to addressing the non reporting of aggregated transactions in the form of returns or statements to the ATO.
19. The example of a tradesperson performing a service for cash and not providing a receipt, does not give rise to an offence on the part of the consumer or on the part of the tradesperson. There is no duty by the consumer to demand a receipt and the tradesperson is only required to report the transaction in an aggregated fashion with all other transactions when lodging annual income tax returns or monthly or quarter GST returns. It is unrealistic to expect these otherwise anonymous cash transactions to be traced all the way to the taxpayer's returns in order to determine whether they were reported or not reported.
20. The TAA offences of making a false or misleading statement to a taxation officer (s8K) or recklessly making a false or misleading statement to a taxation officer (s8N) are clearly return based rather than transaction based offences. These offence provisions do not support compliance in the cash economy at its source—being the time at which individual transactions took place. Instead, the focus is on reporting of aggregated transactions by the taxpayer, in a self-assessment fashion at the end of tax reporting periods.
21. The TAA did attempt to address the cash economy through the introduction of the following record keeping offences:
  - section 8L Incorrectly Keeping Records, and
  - section 8T Recklessly Incorrectly Keeping Records
22. Australia's taxation laws do not prescribe requirements to adhere to any accounting standards. Unlike many overseas jurisdictions, we do not have certified cash registers which are connected to a central revenue agency. The accounting records required of a tradesperson cannot be expected to be the same as those of a public company. Provisions such as s262A *Income Tax*



*Assessment Act 1936* provide that 'a person carrying on a business must keep records that record and explain all transactions and other acts engaged in by the person that are relevant for any purpose of this Act.' In the context of a criminal prosecution where all offence provisions are required to be construed strictly, a provision such as s262A is open to argument as what are the minimum record keeping requirements for a particular business.

23. The cumulative effect of imprecise statutory record keeping provisions and the introduction of record keeping offences in the TAA, is that instead of the prosecution being required to prove non compliance with an *accounting standard* as the gravamen of the offence, the prosecution is required to effectively prove that the records kept by the business were incorrect by reason of failing to record (and declare) all of the income of the business. A summary taxation offence should not involve such complexity.

### **The Transition to a Cashless Society**

24. A number of commentators have noted that there is an accelerating expansion of cashless transactions and that this is being driven both by consumer demand and by the provision of advances in technology and infrastructure such as EFTPOS facilities and the Reserve Bank's New Payments Platform (NPP). The question for policy makers is whether the transition to a cashless society will be allowed to evolve based on market forces or whether there is an imperative for this transition to be guided and facilitated by Government policies and legislation?
25. On 16 February 2016 the then Assistant Treasurer Alex Hawke writing an opinion piece in *The Age* *No small change: moving to a cashless society is the next step for the Australian dollar*, discussed the history of currency in Australia, the 50<sup>th</sup> anniversary of the change to decimal currency and the prospects of a cashless future for Australia. Alex Hawke noted the rise of EFTPOS, credit and debit cards, electronic transfers and contactless technology. Mr Hawke made the following comments:

Cheques are almost obsolete and even cash is declining in popularity. According to the RBA, in 2013 cash represented only 47 per cent of transactions, down from nearly 70 per cent in 2007. In fact, Australia is well on the way to becoming a cashless society. Like the change to decimal currency 50 years ago, the move to a cashless society will be a fundamental shift in the way Australia's payment system operates. The change will lead to countless benefits for all Australians in convenience and security, and will save billions in transaction costs every year. However, unlike the government-led change in 1966, the move to a cashless society will be driven by consumers and businesses choosing the payment methods that are best for them. In the face of this change, the government will need to be nimble, removing obsolete regulations and ensuring that innovation isn't stifled by ill-considered interventions.

26. The *The Sydney Morning Herald* on 17 February 2016 followed with an article by Fergus Hunter *Cashless future will save billions and requires red tape abolition* Alex Hawke, in which it was stated:

Some countries are leading the charge towards cashless systems. The Danish government has proposed removing the obligation for businesses

to accept cash payments and in Sweden hard cash represents just two per of the economy as card and mobile payments take over.

27. The 2013 Reserve Bank *Third Survey of Consumer Use of Payment Methods* found that between 2007 and 2013 there was an increase in the use of card payments by consumers and cash payments had fallen from 69% in 2007 to 47% in 2013. The survey also noted an average surcharge on card payments of 4 percent.
28. According to the Australian Payments Clearing Association in December 2015 there were 956,167 EFTPOS terminals in Australia and 31,661 ATMs.

### **The Swedish Tax Agency—Lessons for the Australian Cash Economy**

29. In considering any transition to electronic payment platforms, the 2012 Swedish Tax Agency study of its rollout of Certified Cash Registers is instructive for our purposes.
30. As of 1 January 2010 it became law that firms selling goods or services in return for cash were required to have a certified cash register and report the cash register to the Swedish Tax Agency. The provisions also involved an obligation to produce and offer the customer a receipt. In addition to regular audits, the Swedish Tax Agency was given the right to control cash trading through supervision and inspection visits.
31. The purpose of the legislation was to protect complying businesses from unfair competition and to make it more difficult to evade payment of tax.
32. By October 2012 there were 74,000 companies with certified cash registers and 5000 companies were granted exemptions from being required to have cash registers. Exemptions were also granted to businesses of insignificant scope and to town square and market traders.
33. In the first 3 years of the new scheme, 80,000 supervisory visits, 22,000 inspections and 900 audits were conducted of cash trading businesses. Compliance activities performed included controlled purchases, receipt inspections, customer counting and cash inventory. Inspections were made based on reports from supervisory visits, public tip offs, reports from other areas of the Tax Agency's operations and from collaboration with partner Government agencies.
34. The compliance and investigation activity revealed that approximately 12 percent of all companies with certified cash registers did not register all purchases when visited. Some industries featured a higher level of non-reporting. Restaurants did not report 18.9% of purchases and hairdressers did not report 13.9 percent of purchases. The conclusion reached was that for all industries, 9 percent of observed purchases were not registered.
35. The immediate effect of the legislation is that there was an increase in reported revenue of 5 percent. The reforms resulted in increased tax revenues of at least SEK 3 billion per annum as a result of reduced tax evasion and increased VAT and income tax from business activity.

36. The report noted that a better methodology for inspection visits in industries other than restaurants and hairdressers needed to be developed.<sup>12</sup> The study did not contain any figures for home-based or mobile workers such as tradespeople. Given that the cash register rollout was based on fixed terminals for retail premises rather than mobile EFTPOS type machines, it would be fair to conclude that the overall non compliance rate was in fact much higher than 12 percent.
37. The province of Quebec in Canada and the Belgium tax administration have both developed solutions to authenticate and preserve transactional data generated by electronic cash registers and Point of Sale systems, to combat cash and credit card skimming frauds in retail sales. Both the Quebec and Belgium solutions involve encryption of transaction data and digitally signing sales receipts. The encryption modules secure the data on the business premises. In the case of the Quebec model, the hardware and software is under strict Government control. Under the Belgium system, the hardware can be manufactured by various third parties to Government specifications with the software and system activation mechanism being controlled through a Government issued smartcard.<sup>13</sup>

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<sup>12</sup>Requirement of cash registers Impact Evaluation English Summary of the Swedish Tax Agency Report 2013: [https://www.skatteverket.se/.../Summary+of+Report+2013\\_2+The+Requirement+of+Cash+Registers.+An+impact+evaluation.pdf](https://www.skatteverket.se/.../Summary+of+Report+2013_2+The+Requirement+of+Cash+Registers.+An+impact+evaluation.pdf)

The following is a press release from Retail Innovation, the company associated with the rollout of certified cash registers in Sweden:

**One € billion of the Shadow Economy in Sweden has turned into tax revenues: Retail Innovation a part of the success!**

posted Jul 5, 2013, 5:32 AM by Martin Ekenberg [ updated Jul 5, 2013, 5:33 AM ] at <https://sites.google.com/a/retailinnovation.se/www/nyheter/procav>

Three years after its implementation, the Swedish legislation requiring certified cash registers with a fiscal control unit, has proved to be a success for the Government Treasury. The Swedish Tax Agency estimates that at least €355 million of VAT per year previously withheld in cash-based trade, now has been reported as a result of the new law. The results were presented on June 26th in the impact evaluation report.

In 2010 a legislative reform with specific requirements of cash registers was adopted. The purpose of the new law was to fight the shadow economy, tax evasion and tax fraud in primarily the retail sector, promoting a fair business competition.

The Swedish high-tech company Retail Innovation AB provided input during the whole development process leading to the implementation of the law, and made it possible to introduce fiscal control units in Sweden. Retail Innovation's product CleanCash® was the first one to be certified and the company have 90 000 units installed out of the approximately 140 000 on the Swedish market.

<sup>13</sup> See Richard T. Ainsworth *Real Time Solution to Refund Fraud: VAT Lessons from Belgium, Brazil and Quebec* Tax Analysts May 7 2012 533, 537-538. A data encryption program was rolled out for all Quebec provincial restaurants by November 2011 on account of an estimates \$425 million being lost to fraud. For a discussion on how electronic certified cash registers can combat fraudulent zapper technology see Richard T. Ainsworth and Urs Hengartner *Quebec's Sales Recording Module (SRM)*:

### Denmark's Danske Mobile Pay

38. Like Sweden, Denmark has also experimented with certified cash registers. As the media reports below indicate, Denmark has effectively abandoned the use of certified cash registers and now over 90 percent of smartphone users make payments over the Danske Bank's Mobile Pay App.
39. Denmark has now set a deadline of 2030 to do away with paper currency. Furthermore, banks and businesses are seeking legislative authority to refuse to accept cash and to only deal in electronic transactions. This is accelerating the move to a cashless society.<sup>14</sup>

### Reserve Bank Model for a Transition to a Cashless Society

40. The Payments System Board of the Reserve Bank oversees the payment systems in Australia. It is responsible for promoting the safety and efficiency of the payments system through the *Payment Systems (Regulation) Act 1998* (under which it can designate new payment systems (e.g. EFTPOS, PayWave, PayPass, Visa and Mastercard) and impose an access regime or establish standards to be complied with by participants in the system) and the *Payment Systems and Netting Act 1998* (under which it can protect transactions and make payments final and irrevocable).
41. What is significant about the *Payment Systems (Regulation) Act 1998* and the *Payment Systems and Netting Act 1998*, is that the legislation focuses on a voluntary opt in regime for banks and merchants to provide electronic payment facilities to consumers. The legislation and regulations make no provisions for compulsory electronic payment facilities to be available to all consumers who wish to make payment by card.
42. Considering that EFTPOS, PayWave, or PayPass is available to merchants in the form of mobile hand held devices, there is no reason why mobile and home based providers of goods and services should not be required by law to provide such services. It should be illegal to run a 'cash only' business and to refuse card payments. Such a change in legislation would also permit the issue of merchant surcharges for card transactions to be addressed. These charges do vary and are not always visible at the point of sale.
43. By Legislative Instruments, *Access Regimes* are created for the Master Card System, the Visa Card System and the ATM System. The *Access Regime for the Master Card Payment System* in virtually identical wording to the *Access Regime for the Visa Card System* or the *Access Regime for the ATM System* provides:

1. This Access Regime is imposed under section 12 of the Payment Systems (Regulation) Act 1998.

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Fighting the Zapper, Phantomware, and Tax Fraud and Technology 57 Can. Tax J 719 (2009), Richard T. Ainsworth, Zappers: Retail VAT Fraud Int'l VAT Monitor (May/June 2010) 175

<sup>14</sup> See <https://cointelegraph.com/news/cash-electronic-money-scandinavia>  
<http://www.centrodeinnovacionbbva.com/en/news/denmark-heads-toward-cashless-society>  
<http://www.pymnts.com/cash/2016/denmark-shutting-down-last-mint-cash/>

2. This Access Regime applies to the credit card system operated within Australia known as the MasterCard system or the MasterCard network card system designated on 12 April 2001 by the Reserve Bank of Australia under section 11 of the Payment Systems (Regulation) Act 1998, which is referred to in this Access Regime as “the Scheme”.

3. In this Access Regime:

an “acquirer” is a participant in the Scheme in Australia that provides services to a merchant to allow the merchant to accept a credit card;

an acquirer is a “self acquirer” if it acquires transactions for which it or a related body corporate (as that term is defined in the Corporations Act 2001) is the merchant;

“authorised deposit-taking institution” has the same meaning given to that term in section 5(1) of the Banking Act 1959;

“credit card” means a card issued under the rules of the Scheme that can be used for purchasing goods or services on credit, or any other article issued under the rules of the Scheme and commonly known as a credit card;

an “issuer” is a participant in the Scheme in Australia that issues credit cards to the issuer’s customers;

“merchant” means a merchant in Australia that accepts a credit card for payment for goods or services;

44. What is readily apparent from the Access Regimes under s12 *Payment Systems (Regulation) Act 1998* (Cth) is that the legislation facilitates rather than compels participation in these electronic payment schemes. There is no requirement which compels ‘Merchants’ to accept credit cards or debit cards as payments for goods and services. In the case of the *Payment Systems (Regulation) Act 1998 Standard No.1 of 2016 The Setting of Interchange Fees in the Designated Credit Card Schemes and Net Payment to Issuers*, ‘Merchant’ is defined as follows:

**Merchant** means, in relation to a Scheme, a merchant in Australia that accepts a Credit Card of that Scheme for payment for goods or services;

#### **New Compliance Measures and Offences— First Phase of Law Reform**

45. Whilst the reporting of certain cash transactions is regulated under the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) and the *Financial Transactions Reports Act 1988* (Cth), there is no equivalent requirement to report cash transactions on the part of suppliers of goods and services under any other legislation. Suppliers of goods and services who deal in cash do not fall within the definition of ‘cash dealer’ under the *Financial Transactions Reports Act 1988* (Cth). Nor are suppliers of goods and services for cash, ‘reporting entities supplying designated services’ under s6 of the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth). The focus of other legislation such as the *Taxing Acts* is on the reporting of aggregated annual income, rather than individual cash transactions. As a result, individual instances of non compliant black economy activity, are difficult to detect and difficult to prosecute.
46. The *A New Tax System (Australian Business Number) Act 1999* (Cth) does not distinguish between a business that receives payments in cash and a business that does not engage in such commerce. It is desirable to first identify and register businesses that receive payment in cash, and secondly to ascribe to such businesses, ‘Merchant’ status under the *Payment Systems*

*(Regulation) Act 1998 (Cth)* and to require them to acquire and provide electronic payment facilities to their customers.

47. Such a regime will not apply to all ABN holders. Businesses which are internet based should not be required to provide EFTPOS type facilities because their means of commerce is likely to be internet banking. The same is likely to be the case in relation to ABN entities such as trusts. Even when an ABN holder does deal in cash, they should be exempt from the regime if they are also exempt from registration for GST. GST registration is compulsory in cases of turnover of \$75,000 or more. In the case of non profit bodies, there is no requirement to register unless turnover is \$150,000 or more. This should mean that very small businesses or non profit associations conducting fund raising activities such as sausage sizzles, will be exempt.
48. The *A New Tax System (Australian Business Number) Act 1999* ought to be amended to allow the Registrar to have a 'Roll of Cash Enterprises' being enterprises that deal in cash and secondly for the Registrar to have information gathering powers to be able to establish which entities should be declared as 'Cash Enterprises'. 'Cash Enterprises' should be defined as individuals or entities which receive payment in cash and which are also required to register under the GST Act. These enterprises should be designated as 'Merchants' under the *Payment Systems (Regulation) Act 1998*. This should then give rise to obligations to provide electronic banking facilities to customers.
49. In addition to the suggested amendments to the *A New Tax System (Australian Business Number) Act 1999 (Cth)* the following specific legislative provisions should be considered:
  - All 'Merchants' under the *Payment Systems (Regulation) Act 1998 (Cth)* should be required to accept electronic card payments for the provision of goods and services anywhere in Australia. This requirement should apply irrespective of whether a business is conducted at fixed premises or is mobile. There should be no minimum transaction amounts for electronic payments. This requirement should be subject to a 12 month implementation period to allow all merchants adequate time to migrate to an electronic payments platform.
  - It should be an offence under the *Payment Systems (Regulation) Act 1998 (Cth)* for any Merchant not to acquire and make available to customers electronic payment facilities at every place where the enterprise is conducted.
  - It should also be an offence on the part of any Merchant to refuse to accept card payments and to insist on cash payments.
  - The *A New Tax System (Australian Business Number) Act 1999* should be amended in a number of respects. Section 8 should draw a distinction between 'conducting an enterprise' and 'conducting a cash enterprise'. Section 15 should be amended to permit information gathering to determine whether or not a cash enterprise is being conducted. There should be a mandatory requirement to declare if a business is a 'cash enterprise'. If there is a failure to declare that a business is a cash enterprise or if a false statement is made in respect of whether or not a business is a cash enterprise, then that should be an offence under s23 of the Act. There should also be a provision which can be modelled on *Part 3A* of the *Anti-Money Laundering and Counter-Terrorism Financing Act*

2006, for the ABN Registrar to maintain a Roll of Cash Enterprises. It should be an offence under s23 of the *A New Tax System (Australian Business Number) Act 1999* to conduct a cash enterprise which is not registered on the Roll of Cash Enterprises.

- Compliance officers of the ATO should be authorised to conduct inspections of business premises to ensure compliance with the legislation. ATO Investigators should be authorised to issue infringement notices in the first instance for low value transactions. A regime of escalated prosecution based penalties should be available for higher value transactions and for repeat offences, including a maximum of 12 months imprisonment for offences of failing to acquire electronic payment facilities or refusing to accept card payments.
- In more complex investigations, search warrants can be sought by the AFP under s3E *Crimes Act 1914* (Cth).

### **Gradual Transition to a Cashless Society—Second Phase of Law Reform**

50. Law reform under the *A New Tax System (Australian Business Number) Act 1999* and the *Payment Systems (Regulation) Act 1998* (Cth) would lead to a reduction in the use of cash and increased deposits in the banking system. Such a transition may be reflected in a review of any interchange fees. It would also provide an opportunity to consider whether credit card surcharges by merchants should be allowed to continue, or if allowed, whether the rates ought to be fixed. Consideration can also be given as to whether merchants should be required to provide notice to consumers of any permitted surcharges. As far as possible, the gradual transition to a cashless economy should be achieved without consumers being worse off. Even without the law reform proposed, the gravitation to electronic payments is gathering momentum and issues of fairness to consumers need to be addressed now.
51. If the Reserve Bank's *Payment Systems (Regulation) Act 1998* (Cth) legislative regime is amended as suggested, then after a 12 month implementation period, a further law reform measure can be considered. One option would be to amend the *A New Tax System (Goods and Services) Act 1999* (Cth) to impose a 10 percent non-refundable GST on all ATM, EFTPOS terminals or financial institution based withdrawals of cash. If all consumers gravitate to electronic based payments then such a measure would be revenue neutral. Section 9-70 *A New Tax System (Goods and Services) Act 1999* prescribes that the amount of GST on a \*taxable supply is 10% of the value of the taxable supply. A separate rate of GST can be prescribed in relation to cash withdrawals. Just as the excise on tobacco has been progressively increased to deter consumers from smoking, a similar approach can be taken to cash withdrawals. If a 10 percent GST does not deter consumers, then the rate can be increased to 15 or 20 percent. A separate rate of GST on cash withdrawals does not need to be tied to the general rate of GST.
52. A second and less controversial option which would have a similar effect is by regulation to limit the amount of ATM withdrawals. In 2009, ATM withdrawals were limited to \$800 per day. By 2015 the ATM withdrawal limit was increased to \$2000 per day. If electronic transactions continue to increase in number, then consumer and trader behaviour can be influenced by restricting access to cash. As electronic transactions increase, consideration can be given to first, reducing the ATM withdrawal limit to \$500 per day and gradually further reducing it to \$500 per week.

53. Cash is not free. There is a cost to Government to produce notes and coins and a cost to business to physically handle currency. A price on cash would reflect the fact that cash transactions often have a low visibility and present major compliance issues. Apart from the cost to Government and the taxpayer in producing physical currency, there is growing evidence that electronic transactions, especially contactless or tap and go transactions are in fact faster and cheaper for the consumer than cash. As Nigel Phair has stated:

**Contactless Versus Cash**

In today's economy cash often attracts a discount for the purchase of a good or service. On a per transaction basis, cash appears relatively inexpensive compared to other payment methods and this may explain why some merchants promote the use of cash. However, the cost of cash is not trivial; measured as a proportion of the sales value at the average transaction size, the cost of a cash transaction is around 2.5%...

Combining the total time consumers use to make payments with estimates of the value of this time suggest that the opportunity cost for consumers in making payments is about \$2.6 billion per annum. Of this amount, per transaction, BPAY and cheque payments are estimated to be the most expensive payment instruments, at \$0.60 per transaction. At the other end of the spectrum, the relative speed of contactless debit transactions impose a cost of \$0.13 per transaction on consumers. Cash and credit card transactions are estimated to cost \$0.18 and \$0.19 per transaction.<sup>15</sup>

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<sup>15</sup> Nigel Phair *The Truth About Contactless Payments* Centre for Internet Safety University of Canberra 15 April 2016 at <https://www.canberra.edu.au/about-uc/media/monitor/2016/april/the-truth-about-contactless-payments-uc-report>



## **Response to Specific Black Economy Interim Report Recommendations**

### **Access to Australian Government Procurement Opportunities Should Be Limited to Firms Which Have a Good Tax Record**

54. The aspirational objective of this recommendation is commendable. However, as is noted, it is difficult to define what a good tax record is and it is difficult to apply the policy in a non-arbitrary way. Whilst procurement providers may seek to engage sub-contracting firms which appear to abide by the same standards, they will not be privy to all the records of the subcontracting firms and will not know if a cash in hand workforce is being engaged.

### **Tax Incentives for Small Business Who Adopt and Invest In Non Cash Business Models**

55. If the recommendations put forward in this submission are adopted, then a recommendation might be made that tax rebates or other concessions are provided to small businesses for the cost of acquiring fixed and/or mobile EFTPOS/Paywave/Paypass type machines and for acquiring any other payment technologies.

### **Expansion of the Taxable Payment Reporting System**

56. The Taxable Payments Reporting System (TPRS) is described as a transparency measure requiring businesses to report all payments to contractors in the building and construction industry. It is suggested that it is extended to other high risk areas such as cleaning, couriers, owner builders, the home improvement sector and IT contractors. This suggested expanded list demonstrates the reach of the cash economy beyond the retail sector.
57. In theory, this proposal is unobjectionable. In practice, it is fair to ask how will compliance be enforced? What is there to stop homeowners paying cleaners cash in hand? How will abuses of the system be detected? In the case of building contracts, how will this regime stop the practice of a building contract being partly in writing and partly oral, with only the written agreement being documented for tax purposes? Even in cases which require building permits, the value of the works may be underquoted and any written building contract may not reflect the true agreement between the parties. Apart from situations where building permits are required, how will a revenue agency even know of the existence of the agreement in question? For example, a painter can be engaged to paint a home for \$10,000 to \$20,000. Such a maintenance contract does not require a permit and it might also be agreed that the painter will be paid partly or fully in cash. In reaching agreement, a cash and a non cash price are likely to be quoted.

### **Deductibility of Cash Wages and Contractor Payments**

58. This recommendation is not objectionable, however the incidence of it arising in practice needs to be considered. The claiming of deductions for payments to a cash in hand workforce are likely to be discovered in any taxation audit. The more likely practice of such a small business is to pay cash in hand workers straight from the till out of untaxed and undeclared cash receipts. In order to avoid detection, the business would forego the claiming of a tax deduction for the wages and contract payments expenses. This tax deduction loss, would be more than offset by the fact that the related income would not be declared and also, on account of the fact that such arrangements provide an opportunity to pay below award wages and avoid payment of

superannuation, sick leave, long service leave and the full amount of workers' compensation premiums. Consideration needs to be given to how this type of conduct can be prevented in the first place.

### **An Immediate Ban on Sales Suppression Technology**

59. The Interim Report calls for an immediate ban on sales suppression technology which is said to allow businesses to understate their takings for tax purposes. The Interim Report states:

The widespread availability and use of sales suppression software has been confirmed by a number of international tax jurisdictions and the OECD has noted that legal and technological means to control the proliferation of this software are being used or considered by several countries.

The ATO has identified this as a threat to the integrity of the tax system. We are proposing an immediate ban on the manufacture, distribution, possession, use or sale of such technology.

60. The issue raised in the Interim Report is whether law reform is necessary to create offences in relation to the modification of Point of Sale (POS) Software (described as phantomware) or the creation of external software (usually taking the form of USB sticks described as 'zappers') for the purpose of altering or deleting sales records and thereby facilitating the defrauding of the revenue.
61. In this submission it is argued that the existing criminal law offences are sufficient to address such conduct and that further empirical research is needed in relation to countries which have passed specific legislation which targets phantomware and zappers. There is a likelihood that such legislation has not effectively added to the available offence provisions in those jurisdictions.
62. In short, it is the falsification of accounting records and the submission of false returns which is the gravamen of such offending. The focus on the *tools* by which such conduct is perpetrated does not aid an investigation or prosecution. In the case of 'phantomware', the tools employed may be no more than modifying or reprogramming existing POS software. Software which permits the editing or deletion of accounting entries is not criminal in itself without an accompanying intention to delete or falsify accounting records with a view to submitting false returns.
63. Sales Suppression software is claimed to be prevalent in the case of cash transactions. Instead of focusing on additional offences based on use of software, an alternative course is consider how electronic transactions can be encouraged and thereby remove the incentive for sales suppression practices. Instead of sales suppression offences, there is a need to legislate for the greater availability of electronic payment facilities and thereby limit the incentives for sales suppression practices. If all transactions are banked, then the motivation for sales suppression offences will be significantly reduced.
64. It is difficult to proscribe Sales Suppression Software without being able to define the activity to be prohibited. Sales suppression or skimming for the purpose of evading taxes can take place through the following methods:
- Failing to ring cash sales into the cash register by either using a cash box or ringing up 'no sale'.

- Diverting sales to a second register which can be kept off the books.
- 'Phantomware' is software which is installed in the Point of Sale system (POS) or the existing software may be modified.
- 'Zappers' which contain external programs usually on a USB key, allow a POS system to be accessed and altered.
- A modern POS without Phantomware or external zappers can do the following:
  - stop certain items, such as refunds, voids and other negative transactions, from appearing on the report or journal;
  - stop certain items, such as refunds, voids and other negative transactions, from being added to the grand totals;
  - use the training mode, for either the entire till, or an individual clerk, meaning that the items are not recorded in the normal reports;
  - reset grand totals and other counters to zero, or in some cases any specified number; and
  - specify that certain line items are programmed so that they do not appear in the report or journal.<sup>16</sup>

65. The OECD Report *Electronic Sales Suppression A Threat to Tax Revenues*, suggests that if the volume of EFTPOS transactions increases, the incentive for sales suppression practices will diminish:

'In the past, a critical feature for any type of "skimming" was the existence of a substantial amount of cash sales. Credit and debit sales were rarely the target of "skimming" because of the audit trail left by these types of transactions. However, recently evidence of the suppression of credit and debit sales has also been found. This is currently being investigated by a number of countries to see whether it may indicate a new trend and how it can be countered. This work is not yet advanced enough to be reported here.'<sup>17</sup>

66. There is a need to gather empirical evidence on the ratio of cash versus electronic funds transfer transactions which are the subject of sales suppression. If the sales suppression activity predominantly involves cash transactions (because suppressed electronic transactions are visible in bank statements) then serious consideration may need to be given to increasing the number of electronic consumer transactions.
67. The purpose of sales suppression software in the form of phantomware or zapper technology is to use the software for the purpose of randomly deleting sales entries in an electronic cash register so that any tally of sales extracted from the cash register will not reflect the true sales position. Achieving an understated sales outcome, is prima facie intended to facilitate an understatement of income to revenue authorities. Are existing offence provisions inadequate to address this behaviour?
68. Section 8T *Taxation Administration Act 1953* (Cth) squarely covers the consequences of using of zapper technology or phantomware for dishonest purposes. The s8T offence prohibits any conduct in which accounting records

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<sup>16</sup> OECD Report *Electronic Sales Suppression A Threat to Tax Revenues* p.14

<sup>17</sup> IBID p.13.

are kept in such a way that they do not correctly record the transactions of the business, with the intention of deceiving or misleading the Commissioner or with the intention of defeating the purposes of a taxation law. Section 8T provides:

**8T Incorrectly keeping records with intention of deceiving or misleading etc.**

A person who:

- (a) keeps any accounts, accounting records or other records in such a way that they:
    - (i) do not correctly record and explain the matters, transactions, acts or operations to which they relate; or
    - (ii) are (whether in whole or in part) illegible, indecipherable, incapable of identification or, if they are kept in the form of a data processing device, incapable of being used to reproduce information;
  - (b) makes a record of any matter, transaction, act or operation in such a way that it does not correctly record the matter, transaction, act or operation;
  - (c) engages in conduct that results in the alteration, defacing, mutilation, falsification, damage, removal, concealing or destruction of any accounts, accounting records or other records (whether in whole or in part); or
  - (d) does or omits to do any other act or thing to any accounts, accounting records or other records;  
with any of the following intentions, namely:
    - (e) deceiving or misleading the Commissioner or a particular taxation officer;
    - (f) hindering or obstructing the Commissioner or a particular taxation officer (otherwise than in the investigation of a taxation offence);
    - (g) hindering or obstructing the investigation of a taxation offence;
    - (h) hindering, obstructing or defeating the administration, execution or enforcement of a taxation law; or
    - (j) defeating the purposes of a taxation law;
- (whether or not the person had any other intention) commits an offence.

69. In the case of s8T(c) *Taxation Administration Act 1953* it can surely be argued that the use of zipper technology or phantomware to randomly delete sales entries amounts to the following conduct:

(c) engages in conduct that results in the alteration, defacing, mutilation, falsification, damage, removal, concealing or destruction of any accounts, accounting records or other records (whether in whole or in part); (my emphasis)

with any of the following intentions, namely:

- (h) hindering, obstructing or defeating the administration, execution or enforcement of a taxation law; or
- (j) defeating the purposes of a taxation law;

70. Section 8T *Taxation Administration Act* offences are subject to the following limited penalties:

**8V Penalties for offences against sections 8T and 8U**

(1) Subject to subsection (2), an offence against section 8T or 8U is punishable on conviction by a fine not exceeding 50 penalty units or imprisonment for a period not exceeding 12 months, or both.

(2) Where:

- (a) a person is convicted of an offence against section 8T or 8U; and
- (b) the court before which the person is convicted is satisfied that the person has previously been convicted of a relevant offence;

the penalty that the court may impose in respect of the first-mentioned offence is a fine not exceeding 100 penalty units or imprisonment for a period not exceeding 2 years, or both.

71. If the above penalties are not considered adequate to reflect the criminality involved on account of the duration of the offending or on account of other factors such as the quantum of the fraud, then *Criminal Code* (Cth) offences can be considered. Depending on the charge, *Criminal Code* offences can carry maximum penalties of up to 5 years or 10 years imprisonment. The following *Criminal Code* general dishonesty offences are relevant and applicable to cases involving sales suppression where sales records have been deliberately falsified for the purpose of facilitating the lodgement of understated income tax returns:

### **135.1 General dishonesty**

#### *Obtaining a gain*

(1) A person commits an offence if:

(a) the person does anything with the intention of dishonestly obtaining a gain from another person; and

(b) the other person is a Commonwealth entity.

Penalty: Imprisonment for 5 years.

(2) In a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew that the other person was a Commonwealth entity.

#### *Causing a loss*

(3) A person commits an offence if:

(a) the person does anything with the intention of dishonestly causing a loss to another person; and

(b) the other person is a Commonwealth entity.

Penalty: Imprisonment for 5 years.

(4) In a prosecution for an offence against subsection (3), it is not necessary to prove that the defendant knew that the other person was a Commonwealth entity.

(5) A person commits an offence if:

(a) the person dishonestly causes a loss, or dishonestly causes a risk of loss, to another person; and

(b) the first-mentioned person knows or believes that the loss will occur or that there is a substantial risk of the loss occurring; and

(c) the other person is a Commonwealth entity.

Penalty: Imprisonment for 5 years.

72. Other charges such as conspiracy to defraud under the *Criminal Code* Cth can also be considered. According to Matthew D. Lee, tax fraud cases in the United States involving zapper technology, have been prosecuted by the use of general criminal law offences such as conspiracy to defraud.<sup>18</sup> There was no need to develop a specific zapper technology offence.
73. In cases involving sales suppression technology, the problem of lack of prosecutions for such conduct is not due to a lack of available offences. The problem is due to the difficulties involved in detecting, investigating and proving such offences in court. The difficulties in proving such cases is demonstrated by the following passage from the OECD Report *Electronic Sales Suppression A Threat to Tax Revenues*:

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<sup>18</sup> Matthew D. Lee, *A Federal Crackdown On Tax Zapper Software* (January 21, 2017) at <https://taxcontroversy.foxrothschild.com/2017/01/federal-crackdown-tax-zapper-software/>

### Investigating traces

In cases where electronic sales suppression software is used, it can be assumed that the measures that reduce the cash flow will also make it difficult or impossible to uncover the real revenue through a standard audit of books and records. This is clear from recent investigations of Phantomware and the conclusion is that investigators are largely dependent on digital forensics to uncover what has happened. However, even though digital forensic tools will often not be available to auditors, their e-audit skills may still allow the auditor to locate and copy valuable back-up and other files.

Cases, reported from Sweden and Norway, illustrate how changes have been made to the way the electronic sales suppression software works in order to make detection more difficult. In early versions of a Phantomware program in a back office system, a large number of traces were left, related to the changes that were made, and files remained in the system that contained the original sales data. The tax administrations uncovered the use of the electronic sales suppression software and the manufacturer obtained information about their findings. Upon a subsequent investigation it was found that the program had been modified to not leave such traces. Newer versions of the program remove most traces of the original sale and have functionality that appears intended to prevent discovery by digital investigation of the system, such as changing the time stamps for the data files, etc.

The legal powers and technical ability to secure the contents of electronic cash registers and computers are critically important in the detection of Phantomware and the use of electronic sales suppression software. Although the sales suppression software may be able to create credible evidence for a reduced turnover and remove all traces of the actual turnover, one must work on the assumption that electronic evidence will remain in the underlying layers, such as in the operating systems and file systems. These are areas that in many cases can only be investigated through digital forensics. The use of Zappers can also leave traces in data in operating systems and file systems. Unlike Phantomware, a Zapper is removed from the system after its use and cannot be analyzed on the basis of the material that is normally accessed in digital forensics. If a Zapper is found, it would be analysed; in most cases, this would require the use of legal powers to seize personal belongings.<sup>19</sup>

74. The exercise of audit powers including inspections under s353-15 *Taxation Administration Act 1953* and audit interviews or production notices under s353-10 *Taxation Administration Act 1953* may be insufficient to discover the presence and use of phantomware or zapper technology. Such audits would need to give rise to a reasonable suspicion of criminal offences in order to justify the execution of search warrants under s3E *Crimes Act 1914* (Cth) so that premises and persons can be searched for zapper USB devices. A Digital Forensic search for phantomware needs to be supported by a search warrant.
75. Without extensive audits including the use of computer forensic auditors, the detection of cash economy participants who have accessed zapper or phantomware technology is quite difficult. Even such intensive investigations are contingent on reliable intelligence to identify taxpayers who have purchased such technology.

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<sup>19</sup> Note 16 above P.19-20

76. The OECD Report *Electronic Sales Suppression A Threat to Tax Revenues* makes it clear that tax administrators may look to legislation to specifically target sales suppression or they may look at this area as part of a wider strategy to close the tax gap:

Some tax administrations have seen their work in this area as part of a wider strategy on whether to tackle the “tax gap” or to address the grey economy.

To develop a strategic response to electronic sales suppression a tax administration can identify the nature of risks to which it might be exposed; that could draw on some of the information in this report and valuable information can also be obtained from experienced contacts in other tax administrations that are further along the path in dealing with sales suppression.

A number of tax administrations have made clear through legislation their strategic intent to combat electronic sales suppression. Legislation criminalising the supply, possession or use of electronic sales suppression software should be available for prosecutors as this may speed up the often lengthy process of tackling the rogue suppliers as well as provide a powerful signal to manufacturers and suppliers. Ireland has recently introduced such legislation and it is being introduced at state level in the United States (including Florida, Maine and New York).<sup>20</sup>

77. Empirical evidence is needed from Ireland and the US states of Florida, Maine and New York in relation to the specific sales suppression offence provisions introduced in those jurisdictions, the number of investigations conducted and the number of successful prosecutions. The US sales suppression fraud cases discussed by Richard Ainsworth were prosecuted by means of general criminal offences instead of any specific sales suppression offences.<sup>21</sup>

78. In the case of Ireland, s1078 of the *Finance Act 2011* provides for the following offences:

“(ba) knowingly or wilfully possesses or uses, for the purpose of evading tax, a computer programme or electronic component which modifies, corrects, deletes, cancels, conceals or otherwise alters any record stored or preserved by means of any electronic device without preserving the original data and its subsequent modification, correction, cancellation, concealment or alteration,

(bb) provides or makes available, for the purpose of evading tax, a computer programme or electronic component which modifies, corrects, deletes, cancels, conceals or otherwise alters any record stored or preserved by means of any electronic device without preserving the original data and its subsequent modification, correction, cancellation, concealment or alteration.”.

79. If the Irish offence provisions are contrasted with s8T *Taxation Administration Act 1953*, all that has been achieved is to change the emphasis of the offence from a focus on the records which have been altered or deleted for the purpose of defeating a taxation law to a focus on the *tools* which are used to achieve the purpose of altering or deleting the records for the purpose of defeating a taxation law.

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<sup>20</sup> Note 16 above p.23-24.

<sup>21</sup> Richard Ainsworth, *Sales Suppression: The International Dimension* (2016) AM.U.L Rev 1241

80. The gravamen of the offence is the alteration or deletion of records for the purpose of defeating a taxation law by ultimately lodging a false return. Whether the tools employed are an omission to make an entry in a record, a manual alteration of that record or an internal or external computer generated large scale alteration or deletion of records, the problems of proof remain. Those problems can be summarised as follows:
- Sales suppression involves a multitude of record keeping activities which can be achieved with or without the aid of additional software which may be used to facilitate the fraudulent alteration of records.
  - Sales suppression software is difficult to define and difficult to detect. Even when it is detected there is a need to demonstrate a dishonest intention associated with its acquisition and its deployment. The British Columbia case of *R v InfoSpec Systems Inc* [2013] BCCA 333 demonstrates that even the sale of a zapper which permits transactions to be deleted, does not constitute an offence unless there is also an intention to dishonestly conceal income. [22] [23]. In other words, any accounting software with an edit or delete function is not an illegal 'zapper' unless there is also an intention in acquiring it or in deploying it, to use it to fraudulently alter sales records.
  - A legislative change in focus from the fraudulent alteration of records to a focus on the tools which may have been deployed to alter those records does not overcome the other evidentiary problems such as ascertaining the underlying cash transactions which actually occurred and thereby establishing the quantum of any fraud. Furthermore, an audit or a Digital Forensics investigation may not actually discover the existence or deployment of any phantomware or zappers.
  - Sales suppression offences should not be viewed in isolation. Unlike other jurisdictions, Australia has general record keeping requirements and it has no requirements which make the use of cash registers or even tamper proof cash registers compulsory. Accordingly the use of cash boxes or the misuse of cash registers (e.g. by ringing up no sale or by not retaining original cash register records), may be a far greater mischief.
81. It needs to be emphasised that sales suppression is difficult to detect, investigate and prosecute. This is illustrated by a simple example of a husband and wife running a café with 3 support staff. Not only would there be need to prove that sales suppression software was downloaded and deployed, there would also be a need to resurrect the deleted cash transactions in some way (e.g. retrieval by digital forensic experts or evidenced from a second set of books). If investigators have reached that stage, then there is a need to ascertain which of the proprietors or staff who all had access to the cash register are culpable? Sales suppression can be committed for the purpose of defrauding the revenue, defrauding the proprietor or in the case of franchises, defrauding a master franchisor who is entitled to a percentage of the takings. These difficulties in investigations are acknowledged by Richard Ainsworth who has stated:

### III. LESSONS LEARNED

Technology-assisted sales suppression fraud differs fundamentally from traditional tax fraud. The technology at the heart of this fraud needs to be dealt with directly, and most likely with counter technology. With regards to the zapper provided by Mr. Au, it was on a CD, and the zapper provided by Mr. Yin was on a thumb drive.<sup>194</sup> The current version of the Profitek Zapper is available online and does not require local installation. Additionally, Profitek offers an Online Ordering Module (OLO), which Profitek suggests can be used to enhance sales via the internet. In this type of situation, both sales



records and the zapper would be located in the cloud, making it considerably more difficult for an auditor to find. As technology advances, technology-assisted sales suppression will also inevitably increase.<sup>22</sup>

### **Business Registration Integrity and Modernisation**

82. The recommendations put forward in this submission seek to make more effective use of the Australian Business Register so that 'cash enterprises' are identified and regulated. Whilst there is regulation of 'cash dealers' under the *Financial Transactions Reports Act 1988* (Cth) and 'reporting entities supplying designated services' under s6 of the *Anti-Money Laundering and Counter Terrorism Financing Act 2006*, suppliers of goods and services who deal in cash are not effectively regulated under either the Australian Business Register or under the Access Regimes as contained in the *Payment Systems (Regulation) Act 1998*. There will be no transparency of cash businesses unless they are regulated as suggested in this submission.

### **Tax Literacy Training for Trades and Small Business People**

83. Any transition to cashless payments should involve such training. In the case of any prosecutions following an implementation period, the prosecution should be able to assert that there has not only been a change in the law, but that the ATO through training and media campaigns has brought these changes in the law to the attention of small business.

### **Funding for ATO Activities**

84. Compliance in the cash economy will involve extensive field visits including education campaigns at first and ongoing compliance and investigation activities. For a change in the law to be effective, there needs to nationwide coverage. Implementation of any law changes requires the ATO to be adequately funded.

### **Regulatory Burdens Affecting Small Business**

85. The transition to cashless payments should provide an opportunity for compliance costs to be reduced rather than increased. Electronic payment of wages should integrate with the ATO's Single Touch Payroll System. Consideration should be given to how the electronic payment of expenses can automatically be recorded as deductions to be claimed by a business. The same should apply with the income receipts of a business. Cash income and cash expenditure not only needs to be counted and banked, it also needs to be substantiated by the keeping of physical documents such as receipts.

### **Possible Cash Payment Limit Across the Economy**

86. Limiting cash payments across the economy is desirable given the noted anonymity of cash. New technology platforms such as the New Payments Platform (NPP) facilitate the transition to a cashless society. The suggestion of a cash limit per transaction of \$10,000 requires careful consideration. It could be made law that no financial institution is permitted to allow a withdrawal of more than \$1000 cash per account holder per day (with a \$500 limit at ATM's). If funds can easily be transferred from one account to another or made portable via debit or credit cards, then the question needs to be

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<sup>22</sup> IBID p. 1265. See also OECD Report *Technology Tools to Tackle Tax Evasion and Tax Fraud* (31 March 2017) at <http://www.oecd.org/tax/crime/technology-tools-to-tackle-tax-evasion-and-tax-fraud.htm>. In this latest OECD Report the view is taken that sales suppression offending should be fought with counter technology tools e.g. certified tamper proof cash registers. It is not suggested that the approach to take is to legislate for new offence provisions.

asked why is there a need for a cash withdrawal in an amount greater than \$1000 per day?

87. Unlike the reportable cash transactions offences in s142 *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) (AMLCTF Act), cash payments may be made or structured without any banking evidence to prove what was done.<sup>23</sup> In the case of the AMLCTF reportable cash transactions offences, investigators are aided by bank statements showing multiple deposits of less than \$10,000 which were made over a very short time period. In the case of the suggested offences, if cash payments are not intended to be declared for tax purposes, then they are unlikely to be banked. In such a case, there will be difficulty in gathering evidence of prohibited cash transactions above a suggested level such as \$10,000. It will also be difficult to detect structured payments to avoid this limit such as agreements for part payment by electronic funds transfer and part payment by cash.
88. An alternative to consider in order to encourage electronic payments, is to withdraw the larger denomination currency notes from circulation. Consideration can be given to phasing out the \$100 note and the \$50 note. If both the \$100 note and \$50 note are withdrawn from circulation based on the rationale that the remaining notes and coins are sufficient for low value transactions, then that will be a deterrent to the making of large purchases for cash. A \$10,000 cash purchase requires 100, \$100 notes. A \$10,000 payment requires 200 \$50 notes, and if only \$20 notes are available, then 500 notes will be required to complete the transaction. The withdrawal of currency from circulation does not require the introduction of offence penalties and the associated problems of detection and investigation.
89. According to the Reserve Bank of Australia Annual Report 2016 at the end of June 2016 there were 1.4 billion banknotes worth \$70.2 billion in circulation. According to the Reserve Bank 2016 Annual Report:

Demand for banknotes continued to increase across all denominations, and was strongest for high denomination banknotes, with the value of \$100 banknotes increasing by 9 percent and the value of \$50 banknotes increasing by 6 percent in 2015/16. This growth in high denomination banknotes is well above recent growth in nominal income for the economy and reflects a range of factors, such as overseas demand, which is heavily influenced by

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<sup>23</sup> Section 142 *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) provides:

**142 Conducting transactions so as to avoid reporting requirements relating to threshold transactions**

(1) A person (the *first person*) commits an offence if:

(a) the first person is, or causes another person to become, a party to 2 or more non-reportable transactions; and

(b) having regard to:

(i) the manner and form in which the transactions were conducted, including the matters to which subsection (3) applies; and

(ii) any explanation made by the first person as to the manner or form in which the transactions were conducted;

it would be reasonable to conclude that the first person conducted, or caused the transactions to be conducted, in that manner or form for the sole or dominant purpose of ensuring, or attempting to ensure, that the money or property involved in the transactions was transferred in a manner and form that would not give rise to a threshold transaction that would have been required to have been reported under section 43.

Penalty: Imprisonment for 5 years or 300 penalty units, or both.

movements in the exchange rate, and the fact that high denomination banknotes are also used as store of wealth, especially in times of financial uncertainty and low interest rates.

90. What is not discussed in the Reserve Bank 2016 Annual Report is whether or not the demand for high denomination value banknotes was fuelled by the cash economy. Furthermore, although reference was made to 70.2 Billion dollars worth of banknotes being in circulation as at June 2016, we do not know how many times these banknotes changed hands in the preceding financial year. Nor do we know how many taxing points these transactions gave rise to or the resulting loss to the revenue.

#### **A Sharing Economy Reporting Regime**

91. The Sharing Economy raises questions as to whether or not a business is being conducted with corresponding income that needs to be declared. Any further legislation to define and tax such businesses needs to take account of issues such as incomes generated, tax thresholds and whether or not there is a duty to declare income and lodge returns. Over and above these requirements is the problem of proof. For example, whilst a house may be advertised for holiday rental on Airbnb, the actual rental agreement entered into might be verbal and the payments made might be made in cash. Whilst electronic payments do not guarantee that the income will be declared, they take away anonymity and increase the risk of detection in an audit. If the informal nature of the Shared Economy involves tax evasion risks, then these risks are multiplied if cash is a significant mode of payment.

#### **A Possible Bright Line Test for the Hobby Business Income Distinction**

92. This proposal is attractive as it would make it clear to those operating in the Shared Economy or running hobby farms, that at a certain point they are in fact conducting a taxable business with a duty to keep records and return income. However, it should not be entirely a matter of self-assessment for such individuals to declare that they are now above a given tax threshold and will start reporting income. The cash economy facilitates non compliance in such cases.
93. It is suggested in this submission that the provision of electronic payments should be made compulsory on the part of 'Merchants' under the Reserve Bank's *Payment Systems (Regulation) Act 1998* Access Regimes. It is submitted that the definition of 'Merchants' should include ABN registered 'cash enterprises'. Considering that the GST Act has a \$75,000 threshold for registration, it is likely that many of those operating in the Shared Economy on a part time or hobby basis, will take the view that they do not need to register for GST nor do they need to register for an ABN. This means that there will no requirement for them to maintain EFTPOS facilities for the few customers that they in fact attract. In such cases, the suggested brake on ATM withdrawals (by reducing daily withdrawal limits) would result in their customers asking for bank account details so that they can make an electronic payment. Alternatively, there will be a reliance on new NPP based technologies such as phone to phone payments.
94. Unless measures are taken to discourage the use of cash, then cash will flourish in the Shared Economy and in case of hobby businesses. In both situations, the ability of revenue authorities to monitor non-compliance in the case of usage of cash will be very limited.

### **Lowering the GST Threshold**

95. According to this submission any lowering the GST threshold will qualify new GST registrants as 'Merchants' under suggested amendments to the Reserve Bank's Access Regimes. This will result in the burden of acquiring EFTPOS payment facilities for these new GST entities. However, if new limits are imposed on any cash withdrawals from ATM's, then the customers of these low turnover businesses will be demanded non cash payment options. Consumers are already well accustomed to making low value electronic consumer to consumer payments through platforms such as Ebay. Considering that the New Payments Platform will make these payments easier (e.g. phone to phone payments) there is no need to lower the GST threshold of \$75,000 on account of the problem of cash transactions.

### **Limited Use of Amnesties**

96. The suggestion of an amnesty for vulnerable employees in the cash economy is one worth exploring. These individuals are often paid below award wages and are denied superannuation, sick leave, annual leave and long service leave entitlements. It is important that amnesties are applied according to clear criteria and the reasons why one taxpayer is given the benefit of an amnesty and another is prosecuted, should be transparent.
97. In the suggested case of a cash only business, the reforms suggested in this submission will overcome the problem of small businesses electing to remain cash only for the future. The suggested reforms will result in a multitude of businesses reporting greater incomes in future years as opposed to past years. This may give rise to the inference that income was under declared and lead to compliance action. Amnesties do not need to be declared for such businesses for the purpose of ensuring future compliance. If voluntary disclosures are encouraged, then this will give rise to contentious problems of proof. Will the taxpayers' assurances be accepted entirely as to what income was received and not declared? At a minimum, asset betterments would need to be conducted in order to determine whether or not a voluntary disclosure should be accepted and secondly, that penalties are remitted in response to that disclosure.

### **Withholding Arrangements**

98. This topic does give rise to a number of issues which go beyond the cash economy. In the case of the cash-in-hand workforce, there is no PAYG which is intended to be remitted. In the case of non cash payment of wages, phoenix arrangements may result in companies being liquidated with no tax withholdings being passed on to the ATO. Separate to this submission, consideration should be whether the ATO's Single Touch Payroll system provides for real time forwarding of PAYG to the ATO at the same time as workers receive their net pay. In the case of independent contractors, the absence of cash will give transparency to such transactions. On the subject of independent contractors, the recent practice of employees being sacked and then being re-hired as independent contractors warrants further and separate attention. Such practices often lead to totally unjustified tax deductions and income splitting among family members who do not offer any services in the new 'business'. The absence of employer funded superannuation in these cases, will most likely lead to an increased Government welfare burden when these independent contractors retire.

### **Whole of Government Use of Data/Privacy**

99. The majority of transactions today are conducted electronically rather than by cash. This already gives rise to privacy considerations and we don't need a transition to a completely cashless society before privacy considerations arise. A major privacy consideration on the part of consumers is who will have access to information about individual spending habits? In the Black Economy Final Report, the application of the *Privacy Act 1988* (Cth) to consumers and in particular Australian Privacy Principle 6 (Use of Information) and Australian Privacy Principle 7 (Direct Marketing) should be discussed. The *Privacy Act 1988* focuses heavily on the use and misuse of information relating to the credit worthiness of an individual.
100. The expansion of electronic commerce means that more personal information about individual consumers will be available to both Merchants and financial institutions. The dissemination of this information for direct marketing purposes is one concern. Another concern is the unauthorised dissemination to third parties such as the media. The Final Report should address the adequacy of the *Privacy Act 1988* (Cth) regime and whether or not that regime needs to be strengthened to protect consumers. Irrespective of the recommendations made in this submission, the transition to a cashless society is gathering momentum. Whilst agencies such as the ATO will have an interest in aggregated information in relation to the income of a taxpayer, other organisations such as the media or direct marketing companies may be more interested in the detail of particular purchases of goods and services.

#### **Phoenix Taskforce**

101. The problem of phoenix activity is widely acknowledged. To the extent that cash is available in phoenix arrangements such as the use of a labour hire cash in hand workforce, the greater the difficulty on the part of investigators to unravel what has occurred. The ready availability of cash can only make the mischief in phoenix arrangements more difficult to detect.

#### **Beneficial Ownership Reforms**

102. Without a Register of Trusts similar to companies registers, the legal and beneficial owners of trusts are difficult to ascertain. The existing anonymity which the current law gives to trusts is only compounded by the added anonymity given by cash. Until there is wholesale trust law reform, the reform of the cash economy may provide the means by which the egregious use of many trusts can be detected. The existence of a trust may be revealed by tracing funds from to and from identified bank accounts. The prevalent use of cash can only limit the making of such investigative connections.

#### **Support for Non-Cash Payment Methods (New Payments Platform and Payment Card Fees)**

103. The Final Report should address the issues raised in the Interim Report under this heading in greater detail. The NPP infrastructure will give rise to numerous payment methods such as phone to phone payments without the red tape of needing to key in BSB and Account numbers. The prospects of a cashless future need to be addressed. Does the increased liquidity in the banking system as a result of very few cash withdrawals mean that interchange and surcharge fees can be reduced to the benefit of all consumers?
104. As the Interim Report states, 'payment services providers are already offering cheap point of sale equipment to small businesses'. Such equipment includes compact mobile phone size devices. The cost and type of this equipment

should be discussed. Examples should be given of how a tradesperson on site can quote and accept a card payment instead of cash and what will be the cost difference between the two modes of payment. The unit cost of cash transactions as compared with electronic transactions should be compared. The cost of expanding mobile EFTPOS type payments should be compared with the cost of maintaining the ATM network, and the savings to be made in the eventual shutting down of the ATM network. A cashless society will involve a reduction in armed robberies and greater difficulty in the conduct of illicit activities such as drug trafficking. At the retail level there will be a benefit in food handling services if payment is made in a tap and go fashion as opposed to handing over cash. Paper currency is often heavily contaminated with bacteria. One scientist has suggested that there is a case for 'laundering' all money.<sup>24</sup>

105. Relevant to this debate is the Reserve Bank's 2016 Consumer Payments Survey which shows that there is a continuing decline in the use of cash with 37 percent of payments being made in cash as compared with 47 percent in 2013. This decline is said to be due to consumers using contactless payments for lower value transactions. Interestingly, the 2016 survey also showed that Australians aged over 65 were embracing electronic payments with only 51 percent using cash in 2016 whereas in 2007 cash was used by 78 percent of Australian aged over 65.

#### **Social Norms/Changing the Social Contract**

106. The strongest argument in favour of the reforms put forward in this submission is that there is a need to create a level playing field between all taxpayers so that everyone pays their fair share. This means acknowledging that PAYG taxpayers have for a long time felt aggrieved that they are carrying a disproportionate share. It also means acknowledging that no revenue agency can have full oversight in those low visibility transactions (especially on private property) where a discount is offered and accepted for cash. Even if the black economy is not extensive as some studies suggest, it is the case that there is a perception in the community that it is widespread and that there are businesses which are not paying their fair share of tax.
107. The time has come to both facilitate non cash transactions and to significantly reduce the need to make a trip to the local ATM. It is time to acknowledge the absurdity of Australians having their income go into bank accounts, and then after they have withdrawn that same income from ATM's, for the ATO to take on the insurmountable task of trying to trace all the ATM withdrawals into downstream taxable transactions. In a transitioning economy in which cash is slowly becoming redundant, it should be the case that cash has a residual role to play over the next 10 to 20 years. Cash should be available for incidental expenses such as small purchases, parking meters, vending machines or be available for the elderly who are struggling with electronic commerce. At the same time, it should be accepted that high value low visibility cash transactions are not only avoidable, they give rise to a perception in the community that they are being conducted for the purpose of tax evasion.
108. This debate is not complete without a comprehensive analysis of the size of the cash economy. There is no conclusive basis to accept the ABS estimate

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<sup>24</sup> See Dina Fine Maron *Dirty Money The Public Health Case for a Cashless Society* Scientific American 3 January 2017 at <https://www.scientificamerican.com/article/dirty-money/>

that the cash economy is only 1.5 percent of GDP. The risk that it may be up to 14 percent of GDP as suggested by the OECD or somewhere between 1.5 percent and 14 percent is real. The honest answer is that there is a degree of speculation in all of the estimates and that in all likelihood, Australia's black economy is far greater than 1.5 percent of GDP. This should provide a mandate for reform. A failure to collect revenue has a real impact on the provision of essential services such as health, education and welfare. It also has an impact on the budget bottom line and on national debt. There are savings to be made to the benefit of the entire community in making the reforms suggested in this submission. There is also a price to be paid in taking no action. It should not be taken as a given, that Australia is immune from the sovereign debt crises that have afflicted overseas countries. The fact that national debt is projected to increase to \$725 Billion over the next 10 years, means that the issue of tax reform needs to be addressed.<sup>25</sup>

### **Consumer Focused Action**

109. This recommendation is potentially quite draconian. The loss of consumer rights and warranties for engaging in cash transactions without a receipt should be a last resort. A brake on cash withdrawals, especially ATM withdrawals, as advocated in this submission will obviate the need to go down this path.
110. Not only does the absence of a valid receipt as a basis for the loss of warranty protection give rise to problems of proof (was the receipt simply lost or not given in the first place on account of the transaction being made for cash) it can also have far reaching consequences. For example, should there be no claim in the case of an electrician who defectively wires a house for cash and without a receipt? What if the house burns down injuring or killing the contracting party and non contracting parties such as other family members? Insurance contracts disclaim liability if there is any illegality attached to the claim. The enforcement of the taxations laws has never required a compromise of the Australia Consumer Law. The Final Report should consider the potential to change consumer behaviour by reducing access to cash withdrawals, instead of adopting this Interim Report recommendation.

### **Whistleblowers**

111. Enforcing compliance in the cash economy does require public cooperation. Any measures which encourage whistleblowers to come forward should be encouraged.

### **Sectoral and Other Targeted Strategies**

112. The Interim Report identifies a number of high risk sectors including building and construction, restaurants and cafes, hair and beauty salons, child care, disability services, aged care, labour hire, horticulture and abattoirs. These sectors combined suggests that the black economy is well in excess of the 1.5 percent of GDP estimate given by the Australian Bureau of Statistics. The Interim Report also suggests that property owners should take some responsibility for the activities which take place on their land and sanctions are suggested where there is some degree of knowledge or wilful blindness on the part of landowners.

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<sup>25</sup> See David Uren, *Ten Year Debt Surge to Put Nation \$725bn in the Red* (May 11 2017) at <http://www.theaustralian.com.au/budget-2017/budget-2017-10year-debt-surge-to-put-nation-725bn-in-the-red/news-story/fc69238453aa794e30d171de897830c2>

113. Imposing compliance obligations on the consumer landowner is difficult. There is no prohibition on payment in cash and there is no obligation to seek a receipt. Short of explicit collusion between the consumer and the service provider (to the effect that a discount will be given because the income will not be declared), there is no offending by the consumer. The fact that the service provider chooses at a subsequent point in time not to declare the income in a tax return, does not mean that the consumer is implicated. Even if there is collusion between the parties, or if there is an express legal requirement to seek a receipt, it is extremely difficult for any revenue agency to monitor these low visibility transactions. There is no point in any new offence provisions if they cannot be proven. The better strategy is to adopt the compliance regime suggested in this submission. The better strategy is to legislate for the provision of electronic payments in these situations and to deter consumers from paying in cash by imposing limits on cash withdrawals.

### **Voluntary Compliance**

114. The Interim Report suggests that the ATO should encourage compliance by informing taxpayers about the risks they face through small business benchmarks. Given that the cash economy taxpayer population is now estimated at 1.6 million taxpayers, the Final Report should comment on the capacity of the ATO to audit and investigate this taxpayer population. The Inspector-General Review into ATO's Use of Benchmarking to Target the Cash Economy July 2012 made the following observations:
- 1.4 million taxpayers in the cash economy operating in the 'cash business segment'.
  - Small business benchmarks for 100 industries encompass 900,000 businesses.
  - 76,000 businesses 'are significantly outside the benchmarks'.
  - ATO's compliance activities: 30,000+ letters, 9000+ phone reviews, 7000+ correspondence audits.<sup>26</sup>
115. New apps and tools are suggested to promote compliance and reporting by employees. Time will tell whether the promotion of such voluntary measures will be effective. If there are now 1.6 million taxpayers operating in the 'cash business segment' and there are '7000+ correspondence audits', with presumably less full cash economy audits (inclusive of the use of access and information gathering powers), this indicates that the current compliance activity has a very limited reach.
116. The benchmarking process utilised in the ATO, is an approach based on the use of assumptions. Benchmarking for coffee shops may be based on a comparison of the ratio of wholesale purchases to retail sales e.g. ratio of coffee beans to coffee cups. This would involve an assumption that all wholesale purchases are recorded in books of account and will be evidenced by cheque or electronic funds transfers. For the coffee shop, a benchmark is set where X number of coffees will result in Y dollars based on coffee bean purchases. However if coffee bean purchases are made in cash without

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<sup>26</sup> Inspector-General of Taxation Review into the ATO's use of benchmarking to target the cash economy A Report to the Assistant Treasurer July 2012 page 8. The Inspector-General of Taxation Report in Table 3 (page 50) makes references to 'escalation for prosecution' as an option in the case of correspondence audits, special field audits or cash economy audits. No further details in the Report are given in respect of prosecutions actually undertaken.



receipts, then this benchmarking process will fail to reflect the turnover of the business.

117. If benchmarking is based on turnover, then there is an assumption that all turnover will be declared. If a cash register is left idle and every sale is rung up as 'No Sale' or a cash box/drawer is used instead of the cash register, how can there be an accurate record of turnover?

### **Education**

118. A transition to a fully electronic cashless society does involve persuading the community that this is in everyone's interests. Education campaigns are necessary as there is likely to be resistance to change. The benefits for the individual as a consumer need to be emphasised. The benefits to the individual as a consumer of Government benefits also need to be emphasised. The community needs to be educated about the implications and consequences of making no changes in relation to the cash economy.

### **Working With Other Governments: State and Local**

119. The suggested Federal/State collaboration provides an opportunity for information sharing. Inspections of businesses by state authorities such as Worksafe, liquor licensing or health inspections, may result in evidence of cash economy non compliance. It is important that there are agency to agency exchanges of information in such cases. Opportunities for multi-agency collaboration is also likely to occur as businesses which are non compliant in one area of the law, are often non-compliant in other areas.

### **Working with Industry Associations and Tax Professionals**

120. Whilst ignorance of the law is no excuse, it adds impact to any prosecution in relation to a new law reform measure, if the courts are satisfied that the changes in the law have been brought to the attention of the community as well as Industry Associations and Tax Professionals. If all of these groups have been given an adequate opportunity to understand the changes and adapt to them, then prosecution action against deliberately non complying individuals will be justified in the eyes of the judiciary.

### **Non-Cash Black Economy Payment Methods**

121. The facilitation of electronic commerce as suggested in this submission does not mean that non cash methods such as cryptocurrencies will start to appear. The *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) (AMLCTF) .has been amended to make e currencies a reportable currency. If cryptocurrencies become a problem in the future, then the AMLCTF is likely to be the appropriate legislation to prohibit such conduct. Cryptocurrencies if established, are likely to be used by criminal syndicates rather than by ordinary consumers and traders.

### **Vulnerable and Other Groups**

122. It is an important consideration how vulnerable groups such as the elderly will transition to a cashless economy. Whilst technologies such as smartphones can be developed to assist these individuals, the more immediate solution would be to increase tap and go limits to say \$300 per day so that regular purchases can be made without needing to remember a PIN.
123. Lessons can also be learnt from other jurisdictions such as Denmark on how best to transition to a cashless society. According to media reports the elderly

in Denmark are adapting to both card payments and smartphone payments.<sup>27</sup> As stated in the Reserve Bank's 2016 Consumer Payments Survey, 49 percent of Australians aged over 65 are now making payments electronically. A daily ATM limit of \$500 addresses the immediate problem of vulnerable groups struggling with the transition to non cash payments.

### **Prosecutions**

124. At paragraphs 15 to 23 of this submission the deficiencies in applying existing offence provisions to the cash economy is discussed. At paragraphs 59 to 81 the deficiencies in sales suppression offences are discussed. It is not enough to simply frame an offence provision so that it proscribes particular conduct. The offence provision must be fit for purpose. Either the offence provision or associated regulatory provisions must facilitate the gathering of evidence so that the charge can be proven. In framing any charge, it is appropriate to ask, how will the prosecution prove it beyond a reasonable doubt?

### **Options for Using Biometric Data**

125. Biometrics such as fingerprinting or iris scans need to be explored in order to reduce the incidence of fraud in relation to electronic commerce. Lost or stolen credit cards are usually used for unauthorised 'tap and go' purchases until the cards are cancelled. Enhanced payment technology which results in either credit cards or smartphone payment devices being useless in the hands of anyone other than the person to whom the card or device was issued, should be encouraged. The problem of the elderly or vulnerable groups either remembering PIN numbers or being victims of fraud can also be addressed by such measures.

### **A Data Strategy for the Black Economy**

126. Whilst a data strategy for the black economy is commendable, the work on the size of the black economy demonstrates the difficulties in gathering data on this clandestine sector of the economy. The solution is a gradual transition to a cashless society. Having said that, a data strategy is needed for a cashless society on account of the greater volume of transactional data that will be generated as well as the fact that a degree of deliberate non compliance will continue. There will continue to be businesses which will understate their sales or overinflate their expenses. Strategies will need to be developed to data match and identify suitable cases for audit and investigation. '

### **Creating an Institutional Legacy**

127. It is commendable to think about a whole of Government institutional legacy. That legacy should be the elimination of the black economy by facilitating the transition towards a cashless economy. Even that transition, is not an end in itself. A cashless economy involves harnessing and developing new payment technologies. It requires new strategies to address fraud ranging from internet transactional fraud to the misuse of lost or stolen credit/debit cards. There is also a need to develop a strategy to harness the data for revenue and law enforcement purposes that the New Payments Platform will provide. Even in a cashless economy, not everyone will be a willing, compliant participant.

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<sup>27</sup> See: *No Wallet No Worries Denmark Considering Cash Free Shops* The Guardian 14 May 2015 at <https://www.theguardian.com/world/2015/may/14/no-wallet-no-worries-denmark-considering-cash-free-shops>

128. A significant reduction in cash in the economy will cause considerable inconvenience to organised crime and financiers of terrorism. It is these individuals that will look to developing cryptocurrencies as an alternative to cash. Whilst a separate offence regime under the AMLCTF is likely to be developed, as this submission seeks to emphasise, the creation of new offences is not enough in itself. There must be the means to prove these offences. In the case of cryptocurrencies, there will be no effective prosecutions if these transactions cannot be detected, decoded and the parties to the illicit transactions identified. If this is an emerging threat, then the investment in the technology to detect this activity is the first priority.
129. A lasting institutional legacy ought to be a recognition of the fact that the current black economy and a transition to a cashless future economy, present whole of Government issues and that all Government agencies, businesses and the broader community need to work together for a common good. The issues, challenges and opportunities do not end with the Black Economy Taskforce Final Report. There is a need for an ongoing investment in the future of our currency and our commerce.
130. Finally, it is important that this debate does not become polarised between two choices—a laissez-faire cash economy in which suppliers of goods and services are totally unregulated in their choice of payment methods, and a cashless society in which we have dispensed with cash altogether. This submission puts forward a regulatory model which manages the transition to a cashless future in a manner which is fair to all participants in the cash economy and which will attract the confidence and trust of the Australian community.

**Dr Cosmas Moisisdis**

1 August 2017