

21 December 2018

Attention: Georgina Prasad

Black Economy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Subject: Submission regarding improving black economy enforcement and offences.

Taxpayers Australia Limited, trading as Tax & Super Australia (TSA) welcomes the opportunity to lodge its submission on behalf of its members to the Treasury concerning the Government's request for feedback and comments in relation to improving black economy enforcement and offences.

TSA is a not-for-profit organisation that has assisted accountants, tax and superannuation professionals for nearly a century. A summary of our organisation is contained in Appendix 1 for your reference.

Our members, who are mostly registered tax agents, have been voicing their concern for some time regarding the difficulties they encounter with providing professional tax services in an environment where the black economy exists. They welcome any actions targeted at improving the black economy.

Our submission has been driven by the priorities and concerns of our members, while being premised on an overarching objective of achieving a suitable balance of fairness, efficiency and simplicity in the administration of the taxation system.

Whilst we have reviewed the 26 questions you put forward in your consultation paper and noted responses where applicable, we have also provided further information based on specific feedback from our Members, which we consider is valuable input from a Member base actively involved in the tax profession.

We trust that the views contained in our submission are of value and that it will assist Treasury in its ongoing response and actions in combatting the adverse effects of the black economy.

On behalf of our members, we would be pleased to assist if any future opportunities arise for us to consult on this issue.

Should you have any further questions or require any clarification, please contact our

Senior Tax Specialist. His contact details are provided below:

Michael McCarthy
Senior Tax Specialist
Tel: (03) 8851 4555
Email: mmccarthy@taxandsuperaustralia.com.au

Yours Sincerely,

A handwritten signature in black ink, appearing to be 'Moti Kshirsagar', written over a horizontal line that extends to the right.

Moti Kshirsagar
Chief Executive Officer Tax
& Super Australia

Member feedback:

Tax & Super Australia approached its members to obtain their valuable insight into improving black economy enforcement and offences. Following are the main points and opinions put forward by our members:

- “Is more ATO audit activity required?” There was a resounding “YES” to this question. In particular, members noted that:
 - The ATO could make use of the “asset betterment” tests at its disposal. (Refer question 5 of the consultation paper questions for further information on this).
 - The ATO appears inactive in investigating tax evasion. Members request ATO to be more proactive in initiating and conducting audits.
 - The ATO needs to do full in- depth audits of business and promote to the business world, the types of audits that will be conducted.
 - The audits need to be targeted so that there is lesser chance of an honest small cash business operator being caught up in unnecessary increases in workload and costs, if selected for an audit.
 - More spot audits required for certain industries that pose a higher black economy risk.
 - Being more active and increased follow-up action from the ATO in getting non-lodgers of income tax returns to lodge the returns in a timely manner.
 - A member response was, “Anyone who has done auditing knows that you do not just audit those you know that have problems (slow payers/lodgers) but that you must also audit a % of those with no visible problems so word gets out that audits do occur”. Another member noted: “Visible enforcement is the key to compliance for some”. Our members are encouraging the ATO to conduct audits.
 - Another member feedback: “ATO needs to ramp up site visits, cash business audits, wealth position vs income reviews, etc.”.

In summary, our members want the ATO to conduct regular audits and be seen to be doing so.

- Penalising non-compliant taxpayers is the basis of the consultation paper. Our member base also had a strong preference for providing incentives for those that adopt or have already adopted entirely non-cash business models. This could include safe harbours from audit activity if businesses exceed industry benchmarks.
- Members had a reasonably strong preference for a “period of grace” for cash-economy entities. Aided by the immense increase in data availability, firmer action can then be taken after a certain time period to enforce the laws, much like the Tax Practitioners Board’s current action on practitioner tax obligations.
- “Should it be compulsory to pay wages into bank accounts to increase transparency?” This was a resounding “YES”.
- In a previous Black Economy Taskforce submission, our organisation supported the concept of removing large denominations such as the \$100 bank note from circulation. It would of course be prudent and necessary to give due consideration to the most viable and effective way to implement such a demonetisation without any adverse consequence to the economy and the valuation of the Australian dollar.

- Our organisation has also previously supported a “cash withdrawal tax” equal to or marginally higher than the GST rate for withdrawals over a certain threshold to curb large withdrawals of cash.
- We have also previously recommended raising awareness of the black economy in the community. Our recommendation included, the ATO, in connection with the Government, develop a comprehensive communications plan with a view to raising awareness of the criminal nature of the issue among all stakeholders and the serious consequences of criminal proceedings and prosecution. Regarding this:
 - Certain industries were highlighted by our members as being more prone to the risk of the black economy i.e., mobile services, hairdressing and beauty services, food and drink industries, market stalls, home renovations and trades (where two quotes can be provided, one for cash with no GST and one legitimate with GST). Our members did note that for certain other businesses, cash transactions have in fact diminished due to the digital evolution.
 - An awareness program could be raised to inform the community that while a 10% discount may be provided by suppliers for cash, if this cash is not declared as income by the supplier, it is not only the GST that is not paid to the ATO, but also the income tax not paid, both which illegally benefit the supplier at the expense of other businesses in competition that are significantly disadvantaged by being compliant. The business doing the right thing is also more likely to be compliant with other obligations such as compulsory superannuation payments for employees, which provides a greater benefit to the community. Why should compliant businesses be disadvantaged?
 - A cultural shift is required. Therefore, an awareness program would need to be sustained. Education is required for non-business consumers to obtain invoices from the supplier which document tax compliant details. One of our members noted: “It is not just the black economy – it is a culture that has grown due to no fear of the ATO any more”. Page 273 of the Black Economy Taskforce final report (Oct. 2017) stated:

“Ultimately, the campaign needs to be meaningful. Framing the issue in terms of the loss to the community such as hospitals or schools forgone due to the black economy, or higher tax burdens for others can be very powerful if presented intelligently and credibly.

The Business Council of Australia noted: “A number of other factors affect compliance, such as attitudes towards government more generally and tax system fairness, and views on the appropriateness of government delivery and funding of services. This implies that improvements in these attitudes can help lift compliance and allow the same amount of revenue to be collected at lower rates from a broader, and less distortionary, base.”

International experiences.

The New Zealand Government has initiated a program aimed at addressing black economy behaviors’ which was implemented with a 10-year funding commitment.”

It may be so that we can learn from New Zealand’s approach.

- A significant review of the effects of the introduction of single touch payroll reporting and the black economy should be undertaken to ensure the introduction of STP doesn’t have an adverse effect where businesses do not take up this obligation and opt instead for paying wages outside of their accounting records.
- Fair Work Australia has been active in prosecuting cases in relation to breaches in their applicable laws. Are these cases being passed on to the ATO for a review of potential breaches in relation to tax laws?
- Could there be householder reporting of cash payments to trade businesses for services paid for over a certain threshold, or a limit on the amount allowed to be paid in cash (using say \$500 as the threshold)? The old

prescribed payments system that was ceased upon the introduction of the GST rules in 2000 previously applied for householders engaging certain traders for certain construction projects. The reporting obligations would be a disincentive for making cash payments. (One member's feedback was "bring back the PPS system, it worked!").

- Another member's suggestion was: "All businesses operating under the average benchmarks by more than 20% should be sent a lifestyle questionnaire that forces them to be transparent in their cost of living. If it is proven that they are spending more than they declare as earnings they should have to explain where the shortfall is coming from to boost their lifestyle expenses".
- On ABNs, some member feedback was: "Once people register for an ABN, that they be required to provide Eftpos facilities for their customers" and "I would like to see a rule that anyone who has an ABN, if they have not lodged their tax return before the end of the next financial year, that their ABN is automatically suspended...".

Following are our responses to the specific questions raised in the consultation paper:

List of questions from consultation paper:
<i>Question 1: Are there any other key hallmarks you think should be considered when developing new, or amending existing black economy offences and penalties?</i> <i>Nothing further to add.</i>
<i>Question 2: Should the existing administrative penalties for repeat or serious tax offences be further scaled? If so, how and in what circumstances?</i> <i>Strongly agree. We consider that as a minimum, the third-tier approach mentioned at the bottom of page 8 of your consultation guide for repeat offenders apply.</i>
<i>Question 2A: What are your views on introducing other tier of administrative penalties? Is it consistent with the framework introduced in Part II?</i> <i>As per 2) above, it makes sense to have a tiered approach for repeat offenders. In these situations, the current penalty regime may not be having the desired effect if repeat offending is occurring, therefore a ramping up of penalties would be justified. We also consider this course of action would be consistent with the framework in Part II, particularly in relation to being proportionate and fair.</i> <i>Member feedback is that heavier penalties are encouraged.</i>
<i>Question 3: Are there other gaps in existing enforcement regimes, such as tax evasion offences under the Tax Administration Act or elsewhere, where new mid-range offences could be introduced?</i> <i>Our members have indicated that mid-range offences do require targeting. The recent tax gap announcement by the Government for individuals not in business indicated that a lot of minor noncompliance adds up to a large amount of uncollected revenue overall. Our members have indicated that ATO audit activity in this area has declined. An increase in ATO audit activity and the imposing of penalties in this area would be welcomed.</i> <i>Based on our members' feedback and our understanding of their views on the black economy, we consider that they would welcome with open arms Government action that creates a level playing field for all in business. However, for those that are currently doing the right thing and complying with the tax laws, it would be unfair to burden them with increasing tax legislation and the additional costs of compliance that inevitably follows.</i>

Question 4: Should the requirement under section 8ZE of TAA1953, for all administrative penalties to be withdrawn where criminal proceedings are commenced against a taxpayer, be amended to suspend all administrative penalties pending the outcome of criminal proceedings?

We consider it should be suspended and subject to payment where a taxpayer is found to be not guilty of criminal proceedings, however, was still in breach of an administrative requirement of the tax act.

Question 5: Which elements of serious black economy offences should reversing the onus of proof apply to?

Our members noted that the ATO could make better use of the default or arbitrary assessment of amounts that the Commissioner considers should have been assessed which, under section 167 ITAA 1936, becomes the taxpayer's taxable income. Our understanding is that for these assessments the onus is then the taxpayers to object against the default assessment and prove the assessment is excessive. The term "assets betterment" was raised by our members as a tool the ATO could use to issue a section 167 default assessment (i.e., incl. preparing source and application of funds statements, reviewing asset ownership and lifestyles). Member suggestion is these "asset betterment" reviews would need to be done by qualified and experienced ATO staff and that "they worked years ago".

Question 6: Should the onus of proof for some elements of black economy offences be reversed and borne by the defendant instead of prosecution as recommended by the Taskforce?

One member's response regarding reversing the onus of proof was: "The users of services be required to report their using of 'cash' services. For example, using a plumber and paying cash requires you to lodge a form. If you do not and the plumber is caught, you could be liable for say 50% of the amount paid as a penalty. Perhaps a minimum reportable amount!". Implicating both the service provider and the customer could be an effective deterrent.

Question 7: What are the issues in reversing the onus of proof for some black economy offences?

We have raised the point in a previous submission that the ATO should review the adequacy of their legal powers to conduct forensic audits and examination of POS systems. This could be expanded into other areas of the black economy.

Question 8: What non-financial penalties could be considered to enhance compliance with tax law?

Ongoing ATO audit monitoring for non-compliant taxpayers until a "clearance" is obtained. (i.e., being able to satisfy that ongoing compliance is being achieved).

Question 9: Are there any limitations, risks or unintended consequences that may result from implementing non-financial penalties?

Nothing further to add.

Question 10: In what circumstances should a travel ban scheme apply to Australian taxpayers?

Your consultation guide on page 13 indicated that there is evidence that New Zealand has achieved success when applying travel restrictions on people who have accrued large amounts of outstanding fines where warrants have been issued. A similar restriction could be applied in Australia.

Question 11: Would the introduction of arrangements in Australia to prevent travel by taxpayers with large tax debts improve compliance with Australia's tax law?

We consider it would be an effective deterrent.

Question 12: Is it appropriate to require additional record keeping in relation to substantial gambling winnings or gifts?

We consider it is where a reasonable threshold is applied. Record keeping should be easier for taxpayers due to the increased online methods of gambling available. Casinos could be made responsible for issuing a gambling winnings receipt for amounts over a reasonable threshold.

Question 13: Alternatively, should the Commissioner be able to request taxpayers with substantial winnings to undertake further record keeping in relation to their gambling activities going forward (e.g. by way of written notice)?

If gambling winnings over a reasonable threshold are not incorporated into record keeping requirements, then we consider that as a minimum that records of gambling activities going forward be maintained by those taxpayers' who claim that past queried omitted income was the result of gambling winnings.

Question 14: What level of increase to the civil penalties would serve as an appropriate deterrent to stop employers from engaging in sham contracting arrangements?

While increasing civil penalties may assist in stamping out sham contracting, feedback from our members is that actually charging the penalties currently available would also act as an effective deterrent — i.e. our member feedback is that if more penalties were issued, this would filter through to the community that there is a real risk that the non-compliance will be detected with a resulting penalty charge. Increasing penalties without a corresponding perception that there is a likelihood of being caught out, loses the effectiveness.

Question 15: Is the existing 'reckless' threshold for prosecuting employers involved in sham contracting appropriate? Should this legal threshold be lowered to 'reasonableness' test?

We consider that it could be lowered to a "reasonableness" test. However, we also acknowledge that there can be difficulty in the business environment of distinguishing between an "employee" and an "independent contractor" in certain situations where a distinction either way can be reasonably legally challenged. With this in mind, a tiered approach to penalties for "reckless" and "reasonable" could be considered.

Question 16: Are there any issues with providing the Commissioner with powers to access third party information for the purposes of investigating tax-related criminal offences?

We consider this will assist in streamlining the process for the ATO in tackling the black economy, by removing the full reliance and relieving some of the resources of the AFP.

Question 17: What safeguards would need to be in place to protect privacy concerns and ensure that there are appropriate checks and balances?

AFP would be best placed to provide guidance on this.

Question 18: Are there any issues with government agencies using web data tools, such as internet scraping to monitor black economy behaviours?

Relevant information obtained this way should be shared among the Government agencies, if not already doing so, for maximum effect.

Question 19: Should the period of freezing orders under PoCa be extended from three days to 14 days? Are there any impediments to granting this extension?

As per your consultation guide on page 18, the 14-day extension should have variation eligibility to allow withdrawals from the frozen account to meet certain reasonable expenses, including living expenses, business expenses and payments for specified debt, so as not to cause undue hardship for those entities being investigated.

Question 20: Should the period of freezing order under PoCa allow for further extension beyond 14 days until the relevant financial institution has provided data sought by enforcement authorities? Are there any impediments to granting this extension?

As per 19 above in relation to allowing withdrawals to meet certain reasonable expenses.

Question 21: Are there any impediments in giving discretion to courts to freeze only specific transactions or funds in relation to a bank account or person?

As per 19 above in relation to allowing withdrawals to meet certain reasonable expenses.

Question 22: Should the ATO be able to access historical telecommunications data? If so, what type of telecommunications data should be able to be accessed?

We consider this will assist in streamlining the process for the ATO in tackling the black economy, by removing the full reliance and relieving some of the resources of the AFP.

Question 23: How should access to telecommunications data be obtained by the ATO and what safeguards should apply?

By following/learning from the current processes and safeguards used by the AFP.

Question 24: Would there need to be any specific limitations to address particular circumstances or specific concerns?

The AFP should be able to advise in this regard.

Question 25: What are the benefits of, or any impediments to conferring a tax jurisdiction on the Federal Circuit Court of Australia to hear and determine taxation matters?

If this can assist in more timely processing and judgement of black economy matters, then this is a positive. Having a visible presence in regional areas is also a good thing and may assist in getting the message out to the population.

Question 26: What are the benefits of, or any impediments to conferring a jurisdiction on the Federal Circuit Court of Australia to hear criminal matters relating to the black economy activities?

As per 25 above.

APPENDIX 1:

About Tax & Super Australia

Taxpayers Australia Limited trading as Tax & Super Australia is a not-for-profit organisation committed to a fairer and more transparent taxation system for every Australian taxpayer.

Our aim is to provide taxation practitioners, superannuation professionals, small businesses and individuals with up-to-date, informative and above all understandable information about Australian taxation.

As a community benefit organisation, Tax & Super Australia is independent and unaffiliated with any political or commercial groups, advertising or sponsoring organisations. We are a member-based organisation, and our loyalty is dedicated to our members.

Tax & Super Australia has been a trusted source of tax knowledge and expertise since 1919 - we are one of the original, if not the first, of such associations in the world.

Our membership and subscriber base comprise tax and superannuation professionals as well as individuals and small businesses. Our plain English approach means that information is not obscured by confusing jargon or heavy technical and overly academic language, while still ensuring that tax issues are comprehensively clarified.