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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TREASURY LAWS AMENDMENT (BLACK ECONOMY TASKFORCE
MEASURES NO. 1) BILL 2018

EXPLANATORY MEMORANDUM

(Circulated by authority of the Hon Kelly O'Dwyer MP,
Minister for Revenue and Financial Services
Minister for Women
Minister Assisting the Prime Minister for the Public Service)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ABN	<i>Australian Business Number</i>
ATO	Australian Taxation Office
Bill	Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2018
CCA 1995	<i>Criminal Code Act 1995</i>
Commissioner	Commissioner of Taxation
Criminal Code	The Criminal Code contained in Schedule 1 to the CCA 1995
TAA 1953	<i>Taxation Administration Act 1953</i>
TPRS	<i>Taxable Payments Reporting System</i>

General outline and financial impact

Schedule 1 – Electronic sales suppression tools

Schedule 1 to this Bill prohibits the production, distribution and possession of sales suppression tools in relation to entities that have Australian tax obligations. Schedule 1 also prohibits the use of electronic sales suppression tools to incorrectly keep tax records.

Date of effect: The amendments contained in Schedule 1 commence from the day after this Act receives the Royal Assent.

Proposal announced: 2017-18 Budget.

Financial impact: The measure is estimated to have an unquantifiable gain to receipts over the forward estimates period comprising:

<i>2016-17</i>	<i>2017-18</i>	<i>2018-19</i>	<i>2019-20</i>	<i>2020-21</i>
-	*	*	*	*

- Nil

* Unquantifiable

Human rights implications: Schedule 1 to the Bill does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 1, paragraphs 1.102 to 1.110.

Compliance cost impact: Nil to low.

Schedule 2 – Third party reporting

Schedule 2 to this Bill requires entities providing courier or cleaning services that have an ABN to report to the ATO information about transactions that involve engaging other entities to undertake those courier or cleaning services for them.

Date of effect: The amendments contained in Schedule 2 apply from 1 July 2018.

Proposal announced: 2017-18 Budget.

Financial impact: The measure is estimated to result in a gain in tax receipts of \$132 million over the forward estimates period. This includes an estimated increase in goods and services tax receipts of \$56 million over the forward estimates period.

<i>2016-17</i>	<i>2017-18</i>	<i>2018-19</i>	<i>2019-20</i>	<i>2020-21</i>
-	-\$6m	\$6m	\$48m	\$84m

- Nil

The estimated receipts from the expansion of the TPRS have been revised down compared with the estimates published in the 2017-18 Budget. The original costing was overstated due to shortcomings in the underlying data that was used. An adjustment has been included in the 2017-18 Mid-Year Economic and Fiscal Outlook to reflect the revenue gain expected for this measure.

Human rights implications: Schedule 2 to the Bill does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 2, paragraphs 2.21 to 2.29.

Compliance cost impact: low.

Chapter 1

Electronic sales suppression tools

Outline of chapter

1.1 Schedule 1 to this Bill prohibits the production, distribution and possession of sales suppression tools in relation to entities that have Australian tax obligations. Schedule 1 also prohibits the use of electronic sales suppression tools to incorrectly keep tax records.

1.2 All legislative references in this Chapter are to the TAA 1953 unless otherwise stated.

Context of amendments

1.3 The black economy is a significant, complex and growing economic and social problem. In 2012, the Australian Bureau of Statistics estimated that the black economy in Australia could be as large as 1.5 per cent of Australia's gross domestic product, or around \$25 billion.

1.4 In response to this problem, the Government established the Black Economy Taskforce, chaired by Mr Michael Andrew AO. In its Interim Report the Taskforce noted that a range of trends, vulnerabilities and other considerations suggest that the black economy could be larger today.

1.5 In May 2017, the Government released the Black Economy Taskforce's Interim Report, which contained a number of initial recommendations based on the experience of foreign jurisdictions, extensive consultation with stakeholders and anecdotal evidence the taskforce had received.

1.6 The prohibition on sales suppression technology and software was announced in the 2017-18 Budget as part of the Government's acceptance of recommendations for immediate action from the Black Economy Taskforce's Interim Report.

1.7 Transaction data recorded by modern point of sales (POS) systems are a key component of businesses' sales and accounting systems. This data is particularly important for tax audit purposes as it provides a contemporaneous record of transactions against which accounts and tax returns can be audited.

1.8 The importance of the records kept by POS systems has led to the development of tools ('electronic sales suppression tools') that

facilitate tax evasion by suppressing or falsifying records of transactions resulting from these systems.

1.9 Currently, the taxation law contains a variety of offences as well as civil and administrative penalties relating to record keeping and tax evasion. These include penalties for providing false or misleading information to the Commissioner (Division 284 in Schedule 1) and incorrectly keeping records with the intent of misleading the Commissioner (sections 8L and 8T).

1.10 Although these offences may apply to entities that use electronic sales suppression software to incorrectly keep records, the current maximum penalties for the offences under the TAA 1953 are not high enough to adequately reflect the seriousness of using a tool with a principle function of misrepresenting an entity's tax position.

1.11 The Criminal Code contained in Schedule 1 to the CCA 1995 also contains offences relating to forgery and providing false documents to the Commonwealth. The manufacture of electronic sales suppression tools may be captured by the Criminal Code under the offence for possessing, making or adapting a device for making forgeries (which can be punishable by imprisonment for up to 10 years – see section 145.3 of the Criminal Code).

1.12 However these provisions require either an intention that the device will be used to commit an offence of forgery or only apply to Commonwealth documents. These requirements can be difficult to satisfy in the case of electronic sales suppression tools.

1.13 Electronic point of sale records are generally not Commonwealth documents (for the purposes of the Criminal Code, Commonwealth document means, broadly, a document purporting to be made by a Commonwealth entity or official – see section 143.3 of the Criminal Code). Even where an electronic sales suppression tool that was developed overseas is used to falsify records that are kept for Australian tax purposes, it may be difficult to demonstrate that the tool was made or supplied specifically with the intention of defrauding the Commonwealth, rather than other jurisdictions.

Summary of new law

1.14 Schedule 1 to this Bill introduces amendments to deter the production, distribution and use of electronic sales suppression tools. To achieve this outcome, the amendments create specific offences in relation to the:

- production and supply of electronic sales suppression tools; and
- possession or use of such tools by entities that are required to keep or make records under an Australian taxation law.

1.15 Entities that would otherwise commit an offence in relation to the production, distribution or possession of an electronic sales suppression tool are entitled to a defence from the relevant offence if the purpose of their conduct is to prevent or deter tax evasion or enforce an existing law.

1.16 Administrative penalties also apply to the production or supply, possession and use of electronic sales suppression tools.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>It is an offence to produce or supply an electronic sales suppression tool. The penalty for this offence is 5,000 penalty units.</p> <p>Entities that produce or supply an electronic sales suppression tool are also liable to an administrative penalty of 60 penalty units.</p>	No equivalent.
<p>It is an offence for entities that are required to keep or make records under an Australian taxation law to possess an electronic sales suppression tool. The penalty for this offence is 500 penalty units.</p> <p>Entities that are required to keep or make records under an Australian taxation law that possess an electronic sales suppression tool are also liable to an administrative penalty of 30 penalty units.</p>	No equivalent.

<i>New law</i>	<i>Current law</i>
<p>In addition to the existing offences, it is also an offence for entities that are required to keep or make records under an Australian taxation law to use an electronic sales suppression tool to incorrectly make or keep such records.</p> <p>The penalty for this offence is 1,000 penalty units.</p> <p>Entities that are required to keep or make records under an Australian taxation law that use an electronic sales tool to incorrectly make or keep such records are also liable to an administrative penalty of 60 penalty units.</p>	<p>There are various offences related to incorrectly keeping records that are required to be kept under an Australian taxation law.</p>

Detailed explanation of new law

1.17 Schedule 1 to this Bill introduces Subdivision BAA into the TAA 1953.

1.18 The object of this Subdivision is to deter the production, use and distribution of tools to manipulate or falsify electronic point of sale records to facilitate tax evasion. [*Schedule 1, item 2, section 8WAA*]

1.19 The amendments achieve this objective by introducing new offences for the production, supply, possession and use of electronic sales suppression tools.

1.20 The offences are strict liability offences with high penalties. Electronic sales suppression tools serve no legitimate function as they are specifically designed to understate income and assist in avoiding tax obligations. Such behaviour undermines the integrity the tax system. Strict liability and high penalties will discourage this behaviour.

1.21 The new offences target each stage of the supply chain for electronic sales suppression tools, ie. the manufacture and production, supply, possession and use. The severity of the penalties applying at each of these stages reflects the fact that parties involved in the supply chain are at least as, if not more, culpable as the end user.

1.22 Administrative penalties for these actions are also inserted into Division 288 in Schedule 1.

Electronic sales suppression tools

1.23 A critical element of each of the new offences and administrative penalties is the term ‘electronic sales suppression tool’. This term is used by the amendments to describe the various tools that can be used to manipulate or falsify electronic point of sales records.

1.24 The starting point for the definition of ‘electronic sales suppression tool’ is that it is a device, software program or other thing, or any part or combination of such things. [*Schedule 1, item 2, section 8WAB*]

1.25 For simplicity, the various things captured by the definition of electronic sales suppression tool are collectively referred to in general terms as ‘tools’.

1.26 The reference to a part or a combination of devices, programs or other things enables the definition to distinguish between a legitimate sales system and particular features that are introduced to legitimate systems for the purpose of manipulating or falsifying records.

1.27 For example, a modification to a device or standard business software can fall within the definition of electronic sales suppression tool even if the device or program as a whole does not. In such cases, a modification is a ‘tool’ for the purposes of the amendments, and prohibited conduct undertaken in relation to the modification can constitute an offence, even though the overall software or device may also function to complete normal business reporting requirements. As such, otherwise compliant point of sales systems may be manufactured with some component or feature which is an electronic sales suppression tool that will fall within the scope of these amendments.

1.28 To be an electronic sales suppression tool, a particular tool must have certain capabilities and functions in relation to particular records.

1.29 The tool must be capable of ‘falsifying, manipulating, hiding, obfuscating, destroying, or preventing the creation’ of records that an entity is required to keep or make under a taxation law. [*Schedule 1, item 2, paragraph 8WAB(a)*]

1.30 In this respect, the focus on ‘capability’ is specifically intended to avoid the need to demonstrate actual use in respect of a particular record in order for a tool to be an electronic sales suppression tool (although it is a necessary condition for the offence about use).

1.31 Although ‘capability’ is a necessary condition, for a tool that has such capability to be an electronic sales suppression tool, a reasonable person must be able to conclude that one of the tool’s ‘principal functions’ is to ‘falsify, manipulate, hide, obfuscate, destroy, or prevent’ the creation of certain records. [*Schedule 1, item 2, paragraph 8WAB(b)*]

1.32 The principal function test operates in conjunction with the capability requirement to ensure that the definition does not extend to an ordinary system or specific features of an ordinary system that could be used to erase, hide or manipulate records. This aspect of the test takes into account the context of a particular tool to exclude ordinary and legitimate features of point of sales systems from the definition, even those which are capable of abuse with some effort.

Example 1.1– scope of sales suppression tool

Maggie operates a restaurant and uses a standard POS software to record her sales transactions. Each transaction is stored in a database and is automatically allocated a sequence number.

Maggie’s POS software has a pre-installed training mode and transactions made in training mode are stored in a separate database. Maggie uses training mode to teach new staff how to enter sales transactions into the POS system and modify or delete transactions that are inadvertently made in error.

Maggie contacts Tom, a local software supplier, to enquire about upgrading her POS software. Tom offers her two versions of the same POS software; one is the standard software upgrade developed by the manufacturer, whilst the other has an additional function which allows Maggie to modify or delete sales transactions data from the main database, without trace, by rearranging the sequence numbers.

The additional function to delete and re-sequence sales transactions can be isolated from the standard POS software program and a reasonable person would conclude that its principal function is to manipulate and hide sales transaction records and under declare income. As such, this additional function is an electronic sales suppression tool.

1.33 The records that an electronic sales suppression tool must be capable of affecting are ones that are required to be kept or made under a taxation law and that are created by a system that is or includes an electronic point of sale system. [*Schedule 1, item 2, paragraph 8WAB(a)*]

1.34 The reference to a system that is or includes electronic point of sales systems ensures that the definition focusses on tools that affect or modify a business’ sales or accounting systems. The data that is produced by these systems can either create an entity’s tax records or provide input into its tax records, and is particularly important for tax audit purposes as it provides a contemporaneous record of transactions against which accounts and tax returns can be audited.

1.35 The requirement for a tool to be capable of affecting a record can be satisfied where a tool directly affects a record that is required to be kept, as well as where a tool affects the inputs that are used in creating such records. For example, a tool that removes records of individual sales would satisfy the requirement about falsifying records that an entity is

required to keep to the extent that those records rely on aggregated sales figures.

1.36 The types of records that a tool must have the capability of affecting are those records that an entity is required to make or keep under a taxation law. In this respect, the term ‘taxation law’ takes on its general meaning from the TAA 1953, which includes any Act or legislative instrument of which the Commissioner has general administration, subject to a modification to exclude the *Excise Act 1901*.

Example 1.2 – records that must be kept under a taxation law

Megan operates a retail business that specialises in catering equipment. Megan is required by law to keep records that explain all of her sales transactions.

Megan uses an electronic point of sale system that records her sales data. Although there is no legal requirement for this sales data to be kept in the form that it is, Megan feeds the sales data into her accounting system to produce tax records. Megan therefore uses the aggregate sales data to satisfy her record keeping obligations.

Megan installs a tool in her point of sales system and uses it to modify or delete individual sales transactions. Megan’s use of the tool results in an under reporting of the aggregate sales data which is an input to the creation of tax records and hence affects the records that she is required to keep. As such, a tool of this kind would fall within the definition of an ‘electronic sales suppression tool’.

1.37 Consistent with that definition and with other offences related to record-keeping in the TAA 1953, these amendments do not extend to the records that an entity is required to keep under the *Excise Act 1901*. In the context of these amendments, it is not necessary to extend the rule about electronic sales suppression tools to records required to be kept under the *Excise Act 1901* because sales suppression does not affect the liabilities that an entity has in respect of excise (this is because excise is levied on manufacture rather than sale).

1.38 Schedule 1 to this Bill also makes a consequential amendment to the dictionary in subsection 995-1(1) of the ITAA 1997 to insert the definition of ‘electronic sales suppression tool’. [*Schedule 1, item 1, subsection 995-1(1)*]

1.39 Although this definition is introduced into the TAA 1953, it is also used in the amendments that are made to Schedule 1 to the TAA 1953, which relies on the definitions in the ITAA 1997. This approach ensures that the definitions in each part are directly linked.

Production and supply of electronic sales suppression tools

1.40 The amendments make it an offence for a person to manufacture, develop, or publish an electronic sales suppression tool. The penalty for this offence is 5,000 penalty units. [*Schedule 1, item 2, subsection 8WAC(1)*]

1.41 Because the definition of electronic sales suppression tool can apply to a part of a device or other thing, the modification of another device or other thing can amount to the manufacture, development or publication of an electronic sales suppression tool.

1.42 This could be the case where the thing being modified is not an electronic sales suppression tool, as well as where the modification enhances the functionality of an electronic sales suppression tool. In both cases, it is intended that such modifications (and potentially the entire device, software or program) fall within the scope of the offence for manufacture, development and publication.

1.43 The amendments also make it an offence for a person to supply, make available for use, or provide a service involving the use of an electronic sales suppression tool. The penalty for this offence is 5,000 penalty units. [*Schedule 1, item 2, subsection 8WAC(2)*]

1.44 Both offences focus on the production and supply of electronic sales suppression tools. The various actions are ones that can be undertaken by entities that seek to facilitate the use of sales suppression technology. The offences are consistent with the fact that, with the exception of the circumstances covered by the applicable defences, there are no legitimate reasons for an entity to produce, manufacture or supply an electronic sales suppression tool.

1.45 Both offences are offences of strict liability. [*Schedule 1, item 2, subsection 8WAC(4)*].

1.46 This means that it is not necessary to establish fault if a person has produced or supplied an electronic sales suppression tool, or provided a service in relation to such a tool. Similarly, the offences do not require any knowledge about the intended or actual use of an electronic sales suppression tool.

1.47 This approach ensures the offences apply regardless of whether the manufacturer or supplier knows or intends that the electronic sales suppression tool will be used in relation to records that are required to be kept under Australian taxation law.

1.48 Applying strict liability to these offences is appropriate because it substantially improves the effectiveness of the prohibition on electronic sales suppression tools. The provision will act as a significant and real deterrent to those entities who seek to profit by facilitating tax evasion and

fraud through the tools' production and supply. Because an electronic sales suppression tool's principal function is, by definition, to facilitate tax evasion, there are no reasons for an entity to produce or supply such a tool beyond those covered by the applicable defences explained below. The ability to prosecute at the fraud's facilitation level will significantly reduce the instances of fraud at the user level.

1.49 Although the maximum penalties for these offences exceed the upper threshold for penalties for strict liability offences as set out in Chapter 2 of the Attorney General's Department *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the severity of the penalties is justified because they relate to intentional and systematic fraud and tax evasion.

1.50 In this respect, the maximum amount of the applicable fine is aligned with the civil penalty of 5,000 penalty units that can be applied to the promoters of tax exploitation schemes under Division 290 and similarly high penalties that are imposed on breaches of directors' duties under the *Corporations Act 2001*.

1.51 The penalties are also subject to section 4D of the *Crimes Act 1914*, meaning that the specified amounts are the maximum penalties that can be imposed.

1.52 If a person does produce, supply or provide a service involving such a tool, they will not commit an offence if they can show they have made an honest mistake of fact satisfying the requirements of the defence under section 9.2 of the Criminal Code.

1.53 A person who would otherwise commit an offence for producing or supplying an electronic sales suppression tool is also entitled to a defence if the purpose of their production or supply was to deter or prevent tax evasion or to enforce a taxation law. This offence-specific defence is explained in further detail below.

1.54 Under the Criminal Code, entities that assist in the commission of an offence to manufacture or supply an electronic sales suppression tool may also be liable to be charged with the offence. Under section 12 of the Criminal Code an entity that aids, abets, counsels or procures the commission of the offence are liable to be charged with the offence.

Extended geographical jurisdiction offences for production and supply

1.55 The offence for manufacturing or modifying an electronic sales suppression tool applies to offences committed outside of Australia if the electronic sales suppression tool is used at any time to modify records that an entity is required to keep or make under an Australian taxation law.
[Schedule 1, item 2, subsection 8WAC(5)]

1.56 The offence for the supply of an electronic sales suppression tool, or the provision of a service involving such a tool, also applies to offences outside of Australia if the tool is supplied or made available for use to an entity that is required to keep records under an Australian taxation law. In such circumstances it does not matter if the entity that is required to keep the records is the person who uses the tool – what is relevant is that the use was in respect of the records that the entity was required to keep. [Schedule 1, item 2, subsection 8WAC(6)]

1.57 The extension of the offences in this manner ensures that overseas manufacturers, suppliers and producers are able to be held responsible for their role in facilitating the evasion or fraud of Australian tax obligations.

1.58 This extension is achieved through the application of section 15.4 of the Criminal Code (extended geographical jurisdiction – category D) to the offences, and is justified because of the connection between the recipient of the supply or provision and their Australian tax obligations.

Example 1.3 - manufacture and supply of an electronic sales suppression tool outside of Australia

Luke, a software developer in Iceland, develops an electronic sales suppression tool that alters point of sales transactions by removing them entirely from an entity's sale records. He advertises the tool for sale online and it is purchased by Hans, who owns a bar in Perth, Australia.

Hans installs the electronic sales suppression tool on the point of sales registers at his bar and uses the tool to modify his transaction records.

Even though Luke is not in Australia, he has committed an offence by manufacturing an electronic sales suppression tool that is used to modify records that are required to be kept under Australian taxation law.

Luke has also committed the offence of supplying an electronic sales suppression tool to a person, and because he has supplied it to a person that has record-keeping obligations under Australian taxation law the offence applies to him despite his geographical location.

Possession of electronic sales suppression tools

1.59 Currently, a person who acquires or possesses an electronic sales suppression tool does not commit an offence unless it can be shown that they have falsified a record that they are required to keep or make under a taxation law. As electronic sales suppression tools are specifically designed to fraudulently modify or prevent the creation of such records, the application of such tools in respect of records can be difficult to detect.

This is despite the fact that their principal function is, by definition, to be used in this way.

1.60 The amendments provide a strong deterrent to the possession of electronic sales suppression tools by making it an offence for a person who is required to keep records under a taxation law to acquire, possess or control such a tool. The penalty for this offence is 500 penalty units.

[Schedule 1, item 2, subsection 8WAD(1)]

1.61 The offence for possessing an electronic sales suppression tool is an offence of strict liability. [Schedule 1, item 2, subsection 8WAD(3)].

1.62 This means it is not necessary to prove fault in determining whether a person has committed an offence for possessing an electronic sales suppression tool. Strict liability is appropriate in this case because electronic sales suppression tools do not serve a purpose other than for fraud and tax evasion. The effectiveness of the prohibition on possessing an electronic sales suppression tool is substantially enhanced by making it clear that there is no reason for an entity to have possession of an electronic sales suppression tool, other than those covered by the applicable defences.

1.63 As with the offences for production and supply, the maximum penalty for this offence exceeds the upper threshold for penalties specified in the *Guide to Framing Commonwealth Offences*. The amount of the penalty is justified on the basis that the offence relates to systematic fraud and tax evasion.

1.64 In this respect, the maximum penalty is aligned with the penalties for producing and supplying electronic sales suppression tools (which in turn is comparable to the existing penalties for the promoters of tax exploitation schemes and breaches of directors duties), but scaled down appropriately to account for the fact that an offence in respect of possession relates to the conduct of one entity, whereas supply and manufacture can facilitate the conduct of multiple entities.

1.65 As with the offences for producing or supplying an electronic sales suppression tool, the penalties for possession are subject to section 4D of the *Crimes Act 1914*, meaning that the specified amounts are the maximum penalties that can be imposed.

1.66 Similarly, a person will not commit an offence for possessing an electronic sales suppression tool if they can show they have made an honest mistake of fact satisfying the requirements of the defence under section 9.2 of the Criminal Code.

1.67 Pursuant to section 12 of the Criminal Code, an entity that assists in the commission of an offence for possessing an electronic sales suppression tool may also be charged with the offence.

Incorrectly keeping records using an electronic sales suppression tool

1.68 The amendments make it an offence for a person who, with the use of an electronic sales suppression tool, has incorrectly kept, made or altered a record that they are required to keep under a taxation law. The penalty for this offence is 1,000 penalty units. [*Schedule 1, item 2, subsection 8WAE(1)*]

1.69 This new offence applies in conjunction with the current offences related to record keeping (specifically sections 8L, 8Q, 8T and section 382-5 in Schedule 1). However, the penalty for this new offence is intentionally far greater than the penalties for those offences, reflecting the fact that there no legitimate reasons for an entity to use an electronic sales suppression tool in keeping or making records.

1.70 For this offence to apply in respect of an entity that is required to keep or make records, the relevant records must have been incorrectly kept, made or altered with the use of an electronic sales suppression tool. In contrast to the offence for possession, this element of the offence means that actual use of the tool is required. This requirement is appropriate given that the penalty for the offence is greater than, and can be applied in conjunction with, the offence for possession.

1.71 However, it is not necessary for the actual use of the tool to be undertaken by the entity whose records are incorrectly kept, made or altered. In certain circumstances, it could be that a third party is the one that applies the tool in respect of a person's records. In such cases, the person that is required to keep or make the records is the entity that has committed the offence in respect of their records (although the entity that actually used the records may have committed a separate offence for possessing an electronic sales suppression tool, or for providing a service involving such a tool).

Example 1.4 - incorrectly keeping records using an electronic sales suppression tool

Brenda is the owner of a homewares retail business operating out of two premises in suburban Melbourne.

Her business uses a networked point of sale system that allows her to monitor transactions in real-time and meet her business and taxation reporting requirements.

Brenda receives ongoing technical support from Stuart, a representative of the POS manufacturer. Stuart advises Brenda that, for a fee, he can provide a service that will remotely delete transactions from Brenda's sales records, or even erase, purge or destroy the hard drive those records are stored on. To perform this service, Stuart advises Brenda that she must give him permission to remotely access her system, and tell him which transactions she wants removed.

Brenda accepts Stuart's offer and arranges for him to delete specified records of transactions at the conclusion of each week's trading. Stuart provides the service by gaining remote access to Brenda's database and employing the use of a software-based sales suppression tool to amend the records.

By acquiring Stuart's services, Brenda has committed the offence of incorrectly keeping records using a sales suppression tool. This is because she has kept, made or altered the records 'with the use of' the tool even though the actual use is undertaken by Stuart.

Stuart has also committed offences for providing a service involving the use of an electronic sales suppression tool and for possessing such a tool.

1.72 The offence in relation to the use of an electronic sales suppression tool is an offence of strict liability. [*Schedule 1, item 2, subsection 8WAE(2)*].

1.73 This means it is not necessary to prove fault in determining whether a person has committed an offence. Strict liability is appropriate in this case because the effectiveness of the prohibition on keeping or making records with the use of an electronic sales suppression tool is substantially enhanced by making it clear that there is no legitimate reason for an entity to have used such a tool.

1.74 As with the offences for production and supply, the maximum penalty for this offence exceeds the upper threshold for penalties specified in the *Guide to Framing Commonwealth Offences*, the amount of the penalty is justified on the basis that the offence relates to systematic fraud and tax evasion.

1.75 In this respect, the maximum penalty is also aligned with the other penalties in relation to electronic sales suppression tools. While the penalty is scaled down relative to the offence for production and supply (which relates to facilitating the conduct of multiple entities), it is also greater than the penalty for possession. This approach reflects that the offence for use involves demonstrating that a result of the use was the incorrect keeping or making of taxation records.

1.76 As with the other offences involving electronic sales suppression tools, a person will not commit an offence for possessing an electronic sales suppression tool if they can show they have made an honest mistake of fact satisfying the requirements of the defence under section 9.2 of the Criminal Code.

1.77 Pursuant to section 12 of the Criminal Code, an entity that assists in the commission of an offence for possessing an electronic sales suppression tool may also be charged with the offence.

Defence against offences involving electronic sales suppression tools

1.78 A person does not commit an offence in relation to the production, supply or possession of an electronic sales suppression tool if the applicable conduct that is undertaken in relation to the tool is for the purpose of preventing or deterring tax evasion, or for enforcing a taxation law. [Schedule 1, item 2, subsections 8WAC(3) and 8WAD(2)].

1.79 As per subsection 13.3(3) of the *Criminal Code 1914*, an entity seeking to rely on this defence bears the evidential burden in proving that the purpose for which they undertook the relevant conduct.

1.80 Framing the circumstances in which an entity does not commit an offence as an offence-specific defence is appropriate because the person who undertakes particular conduct is best placed to lead evidence about why their conduct was for the purposes of preventing or deterring tax evasion or enforcing a law.

1.81 These defences are available to entities that have legitimate reasons for undertaking particular conduct in respect of an electronic sales suppression tool. The purposes that are permitted by this defence are consistent with the overall objects of Subdivision BAA, which as noted above is to deter the use and distribution of electronic sales suppression tools.

1.82 It is intended that these defences be available to entities such as researchers who make and develop tools for the purpose of assisting law enforcement authorities (for example, who develop counter-tools or tools designed to provide better information about how the technology operates). Similarly, the defences are intended to provide protection to whistle-blowers that alert authorities to the existence or use of electronic sales suppression tools, as well as to authorities that confiscate such tools or develop or use them for law enforcement purposes.

1.83 The defences do not apply to the offence for using an electronic sales suppression tool to incorrectly keep or maintain records. The scope of the offence for use already restricts the offence to entities whose own tax records have been incorrectly kept or made using an electronic sales suppression tool. Such use is fundamentally inconsistent with the purpose of preventing or deterring tax evasion as it inherently involves the actual commission of tax evasion.

1.84 However, because the offence for use requires the use to result in tax records being incorrectly kept or made, the use of such a tool by a researcher or law enforcement authority in a simulation or training capacity that did not affect actual taxation records would not constitute an offence.

Example 1.5 - defence for manufacturing and supplying an electronic sales suppression tool

Emily is an independent contractor who has been engaged by the Australian Federal Police to develop an electronic sales suppression tool to help law enforcement authorities understand the operation of such tools, before they conduct undercover operations.

Emily develops an electronic sales suppression tool and provides a copy of it to the Federal Police so they can conduct training exercises.

Although Emily has manufactured an electronic sales suppression tool, possessed the tool and supplied it to law enforcement authorities, she has not committed any offences because her conduct was ultimately undertaken for the purpose of preventing or deterring tax evasion, through her assistance to the Australian Federal Police.

Administrative penalties for prohibited conduct

1.85 Administrative penalties also apply to the conduct that is prohibited by the various offences introduced through Subdivision BAA.

1.86 Such penalties apply to an entity that manufactures, develops or publishes an electronic sales suppression tool, or that supplies or makes available a tool or a service involving such a tool. The penalty for such conduct is 60 penalty units. *[Schedule 1, item 3, subsection 288-125(1)]*

1.87 Administrative penalties also apply to an entity that is required to keep or make a record under a taxation law and that acquires, possesses or controls an electronic sales suppression tool. The penalty for such conduct is 30 penalty units. *[Schedule 1, item 3, subsection 288-130(1)]*

1.88 An entity is also liable to an administrative penalty if they are required to keep or make a record under a taxation law, and they keep, make or alter such a record with the use of an electronic sales suppression tool in a way that results in the record being incorrectly kept or not being made or kept. The penalty for such conduct is 60 penalty units. *[Schedule 1, item 3, section 288-135]*

1.89 Consistent with other administrative penalties that overlap with criminal offences, section 8ZE applies to these administrative penalties and excludes any liability for the administrative penalty in the event of criminal prosecution commencing.

1.90 Existing administrative penalties relating to a failure to keep records or provide documents are generally 20 penalty units. However, in the case of these offences, the amount of the applicable penalty units reflects that the relevant conduct in respect of an electronic sales suppression tool is more serious given that the conduct relates to systemic tax evasion.

1.91 The specific defences for conduct undertaken for the purpose of preventing or deterring tax evasion or enforcing a taxation law also apply in respect of the administrative penalties involving the production or supply, and the possession of an electronic sales suppression tool.

[Schedule 1, item 3, subsections 288-125(3) and 288-130(3)]

1.92 These offence-specific defences apply to the administrative penalties in the same manner as explained above.

1.93 The Commissioner is also able to use the general powers available to remit administrative penalties where the circumstances make it appropriate to do so.

1.94 Administrative penalties also apply to an entity that aids, abets or counsels another entity in undertaking conduct that would result in an administrative penalty for the production, supply, possession or use of an electronic sales suppression tool. The amount of the administrative penalty is the same as the penalty that would apply for the primary conduct. *[Schedule 1, item 3, subsections 288-125(2), 288-130(2) and 288-135(2)]*

1.95 The specific extension of administrative penalties to entities that aid, abet or counsel another entity reflects the automatic extension of criminal charges to ancillary offences under section 12 of the Criminal Code (that is, offences for aiding or abetting the commission of a primary offence).

1.96 To ensure consistency with the offences that are introduced through Subdivision 8BAA, the various references to records that are required to be kept or made under a ‘taxation law’ in respect of these administrative penalties are limited so that they do not apply to records that are required to be kept under the *Excise Act 1901*. *[Schedule 1, item 3, paragraphs 288-125(1)(b), 288-130(1)(a) and 288-135(1)(a)]*

1.97 These carve-outs reflect the fact that electronic sales suppression tools are not relevant to the record keeping requirements under the *Excise Act 1901*, as excise is levied at the manufacturing level, rather than the retail level.

Application and transitional provisions

1.98 The amendments in Schedule 1 apply from the day after the Act receives the Royal assent (which is the same time as the Act commences).

1.99 However, the offence for possession of an electronic sales suppression tool, as well as the associated administrative penalty, does not apply to an entity if:

- the entity acquired the electronic sales suppression tool or right to use the tool before 7.30pm on 9 May 2017;

- as soon as practicable after commencement, the entity notifies the Commissioner in the approved form of the acquisition or possession of the electronic sales suppression tool; and
- the entity complies with any direction of the Commissioner to deal with the tool in a particular way by the earlier of the date specified in the Commissioner direction, or 6 months after Royal Assent.

[Schedule 1, item 4]

1.100 These transitional arrangements are introduced to provide persons with the opportunity to avoid committing an offence for possessing an electronic sales suppression tool that was acquired before the measure was announced in the 2017-18 Budget. The transitional relief only applies in respect of the offence and related administrative penalty for possession. It does not extend to the production, supply or use of such a tool after the Act containing these amendments receives the Royal Assent.

1.101 Similarly, although a person will not commit an offence under these amendments for conduct involving an electronic sales suppression that occurs prior to the commencement of the amendments, a person that uses an electronic sales suppression tool in keeping or making records may nevertheless have committed one or more of the existing offences related to incorrectly keeping records.

Example 1.6 - transitional application for possession of an electronic sales suppression tool

Elizabeth owns and runs a hairdressing salon. In January 2017 Elizabeth purchased an electronic sales suppression tool through a friend and has been in possession of it since then.

She uses the electronic sales suppression tool to modify her transactions for the month of June 2017. The law banning the development, supply and possession of electronic sales suppression tools commences in early 2018.

Elizabeth notifies the Commissioner in the approved form that she is in possession of an electronic sales suppression tool, a few weeks after the law commences. The Commissioner instructs her to remove the tool within a month of receiving the notice, which she does.

As Elizabeth has complied with the Commissioner's direction by the specified date, she has not committed an offence for possessing an electronic sales suppression tool because of the transitional application.

However, Elizabeth may have committed an offence under existing taxation laws due to her using the tool to under declare her income in the month of June, and may be liable for one or more penalties.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Electronic sales suppression tools

1.102 This Schedule is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

1.103 Schedule 1 to this Bill prohibits the production, distribution and possession of sales suppression tools in relation to entities that have Australian tax obligations. Schedule 1 also prohibits the use of electronic sales suppression tools to incorrectly keep tax records.

1.104 Schedule 1 to this Bill achieves this outcome by introducing offences of strict liability with high penalties. Applying strict liability to these offences covered by these amendments is appropriate because it substantially improves the effectiveness of the prohibition on electronic sales suppression tools.

1.105 The amount of the penalties are comparable to the penalties that currently apply to existing offences for promoting tax exploitation schemes under Division 290 of Schedule 1 to the TAA 1953 and in respect of breaches of directors' duties under the *Corporations Act 2001*.

1.106 The amendments are designed to act as a significant and real deterrent to those entities who seek to profit by facilitating tax evasion and fraud through the tools' production and supply.

1.107 The amendments provide offence-specific defences that ensure that entities who undertake certain conduct in relation to an electronic sales suppression tool are protected from committing an offence where their conduct is undertaken to prevent or deter tax evasion, or to enforce a taxation law. These defences operate in conjunction with the general defences for honest and reasonable mistakes.

1.108 Because an electronic sales suppression tool's principal function is, by definition, to facilitate tax evasion, there are no legitimate reasons outside of those covered by the applicable defences for an entity to produce, supply, possess or use such a tool.

Human rights implications

1.109 Schedule 1 to this Bill does not engage any applicable rights or freedoms.

Conclusion

1.110 This Schedule is compatible with human rights as it does not raise any human rights issues.

Chapter 2

Third party reporting

Outline of chapter

2.1 Schedule 2 to this Bill amends the TAA 1953 to require entities providing courier or cleaning services that have an ABN to report to the ATO information about transactions that involve engaging other entities to undertake those courier or cleaning services for them.

2.2 All legislative references in this Chapter are to the TAA 1953 unless otherwise stated.

Context of amendments

2.1 The black economy is a significant, complex and growing economic and social problem. In 2012, the Australian Bureau of Statistics estimated that the black economy in Australia could be as large as 1.5 per cent of Australia's gross domestic product, or around \$25 billion.

2.2 In response to this problem, the Government established the Black Economy Taskforce, chaired by Mr Michael Andrew AO. In its Interim Report the Taskforce noted that a range of trends, vulnerabilities and other considerations suggest that the black economy could be larger today.

2.3 In May 2017, the Government released the Black Economy Taskforce's Interim Report, which contained a number of initial recommendations based on the experience of foreign jurisdictions, extensive consultation with stakeholders and anecdotal evidence the taskforce had received.

2.4 In the 2017-18 Budget, the Government announced that it would adopt the initial recommendations of the Taskforce. One of the initial recommendations was to extend the operation of the TPRS to contractors in the courier and cleaning industries.

2.5 The TPRS is a transparency measure applying to the building and construction industry. It requires businesses in the building and construction industry to report payments they make to contractors for building and construction services to the ATO. Evidence suggests that this program has improved contractor tax compliance in the building and construction industry.

2.6 As a result of the success of the TPRS in the building and construction industry, the Interim Report of the Black Economy Taskforce recommended extending its operation to two other high-risk sectors: cleaning and couriers.

Summary of new law

2.7 Schedule 2 to this Bill introduces amendments to require entities that provide courier or cleaning services to report to the ATO details of transactions that involve engaging other entities to undertake those courier or cleaning services for them.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Entities that provide courier or cleaning services are required to report to the ATO details of transactions that involve engaging other entities to undertake courier or cleaning services for them.	No equivalent.

Detailed explanation of new law

Entity required to report

2.8 The amendments require that entities that have an ABN and make a supply of a courier or a cleaning service to report information to the Commissioner. Entities that do not make a supply of courier or cleaning services are not required to report information. [*Schedule 2, item 1, table items 11 and 12 of section 396-55 to Schedule 1 of the TAA 1953*]

Transactions that are required to be reported

2.9 An entity providing a courier or cleaning service is required to report information to the Commissioner about transactions where the entity has provided consideration (within the meaning of the GST Act) to another entity wholly or partly for cleaning or courier services. Consideration includes any payment, or any act or forbearance, in connection with a supply of anything and any payment, or any act or forbearance, in response to or for the inducement of a supply of anything (as defined in section 9-15 of the GST Act). Usually consideration will be a monetary payment, but it may also include other forms of non-cash

benefits and constructive payments. *[Schedule 2, item 1, table items 11 and 12 of section 396-55 to Schedule 1 of the TAA 1953]*

2.10 Entities are required to report information in the approved form to the Commissioner either annually, or at such other times as the Commissioner determines by legislative instrument.

2.11 The general rules that apply to information that must be reported under Division 396 apply to this regime. This includes that where an entity has given the Commissioner a report that they have become aware has a material error in it, they must give the Commissioner an updated report within 28 days of becoming aware of the error. Similarly, where an entity has failed to give a report, or a corrected report, to the Commissioner by the time required, an administrative penalty may be imposed (see subsection 286-75(1)). An administrative penalty may also be imposed if the report includes any false or misleading statements (see subsection 284-75(1)).

2.12 Entities are not required to report in relation to transactions where they and the entities providing cleaning or courier services are members of the same consolidated group or Multiple Entry Consolidated group. Entities are also not required to report payments under Division 12 of Schedule 1 of the TAA 1953 (PAYG withholding payments) under the TPRS as those payments are subject to their own reporting regime within that Division. *[Schedule 2, item 1, table items 11 and 12 of section 396-55 to Schedule 1 of the TAA 1953]*

2.13 This is consistent with the exceptions that apply to transactions that are required to be reported by the building and construction industry.

2.14 In addition, a government related entity (within the meaning of the GST Act) may be required to report information about when they provide consideration to an entity for a supply of services, including a courier or cleaning service (section 396-55, table item 2).

Definition of a courier or cleaning service

2.15 The terms ‘courier’ and ‘cleaning’ are not defined, and are intended to take their ordinary meaning.

2.16 A courier service is intended to include any service where an entity collects goods from and delivers them to another place. These goods may include parcels, packages, letters, food, flowers or any other goods. The goods may also be transported by a number of different means, including by car, truck, van, motorcycle, motorised scooter, bicycle, on foot, or other means of transportation.

2.17 A cleaning service is intended to refer to any service where a structure, vehicle, place, surface, machinery or equipment has been subject to a process in which dirt or similar material has been removed

from it. Some examples of this include office cleaning, road sweeping or street cleaning, swimming pool cleaning, park and facilities cleaning, or event cleaning.

2.18 The Commissioner may exempt entities from their reporting obligations under the third party reporting regime. For example, the Commissioner may exempt a class or classes of entity from reporting information when the application of a reporting requirement to those entities is unnecessary to assist the Commissioner. Alternatively, a particular entity may be exempted based on specific circumstances that may impact on that entity's ability to report in a particular year.

Application and transitional provisions

2.19 The amendments in Schedule 2 commence on the day after the amendments receive Royal Assent. *[Clause 2]*

2.20 These amendments apply to consideration that is provided on or after 1 July 2018, whether under an existing ongoing arrangement or otherwise, and regardless of the time the supply occurred and the service is provided. However, it does not apply where the entity is merely liable to provide consideration prior to 1 July 2018, if no consideration is provided on or after 1 July 2018. *[Schedule 2, item 2]*

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Third party reporting

2.21 This Schedule is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

2.22 Schedule 2 to this Bill amends Schedule 1 to the TAA 1953 to require that entities that provide courier or cleaning services to report to the ATO details of transactions that involve engaging other entities to undertake those courier or cleaning services for them.

Human rights implications

2.23 The amendments made by this Schedule engage the prohibition on arbitrary or unlawful interference with privacy contained in Article 17 of the International Covenant on Civil and Political Rights (ICCPR), as entities that provide a courier or cleaning service will need to provide a range of personal information to the ATO that they collect in the ordinary course of business.

2.24 These reporting obligations are compatible with the prohibition, as they are neither arbitrary nor unlawful. In addition, they are aimed at a legitimate objective of ensuring that entities in the courier or cleaning industries comply with their taxation liabilities and are an effective and proportionate means of achieving that objective by requiring only the minimum amount of information necessary to identify relevant taxpayers and transactions.

2.25 The United Nations Human Rights Committee has stated, in their General Comment No. 16, that:

- ‘unlawful means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which must itself comply with the provisions, aims and objectives of the Covenant [the ICCPR]’; and
- ‘the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances’.¹

2.26 The objective of requiring reporting by entities that provide a courier or cleaner service is to improve overall taxpayer compliance in the courier and cleaning industry by gathering information regarding their potential tax-related liabilities from entities that can provide it to the Commissioner without significant regulatory burden.

2.27 Legislative reporting regimes, such as third party reporting, provide more certainty and consistency of treatment for entities than the alternative, where the Commissioner collects information under his or her general information gathering powers on an ad-hoc basis. The information to be reported by entities under third party reporting is typically limited to that information they already hold that has been collected in the ordinary

¹ United Nations Human Rights Committee, *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, available at: <http://www.refworld.org/docid/453883f922.html>.

course of their business. Taxpayer information held by the ATO is subject to strict confidentiality rules that prohibit tax officials from making records or disclosing this information unless a specific legislative exemption applies.

2.28 The amendments allow the Commissioner to exempt entities from reporting where, for example, the Commissioner does not expect to be able to productively use the information or where reporting the information places a disproportionately high compliance cost on the third party relative to the benefit of providing the information to the ATO.

Conclusion

2.29 This Bill is consistent with Article 17 of the ICCPR on the basis that its engagement of the right to privacy will neither be unlawful nor arbitrary. To this extent, the Bill complies with the provisions, aims and objectives of the ICCPR.