

EXPOSURE DRAFT EXPLANATORY MATERIALS

Currency (Restrictions of the Use of Cash) Act 2019

Currency (Restrictions on the Use of Cash—Excepted Transactions) Instrument 2019

The *Currency (Restrictions of the Use of Cash) Act 2019* (the Act) establishes the cash payment limit and makes it an offence to make or accept a payment or series of connected payments in cash in excess of this limit.

Subsections 10(5) and 11(3) of the Act provide that the offences for breaching the cash payment limit do not apply to payments of a kind specified by the Treasurer by legislative instrument, or payments made or accepted in circumstances specified by the Treasurer by legislative instrument. As a result, it is a defence to these offences should it be shown that such the payment is of a kind specified or occurred in circumstances that have been specified.

The purpose of the *Currency (Restrictions on the Use of Cash—Excepted Transactions) Instrument 2019* (the Instrument) is to specify kinds of payments and circumstances in which certain payments are made or accepted for the purposes of subsections 10(5) and 11(3).

Broadly, the payments not subject to the cash payment limit are:

- payments related to personal or private transactions (other than transactions involving real property);
- payments that must be reported by an entity under anti-money laundering and counter-terrorism legislation, provided, broadly, the entity with a reporting obligation complies (or is reasonably believed to have complied) with their obligations under that legislation;
- payments made or accepted by a public official in which the public official is legally required to make or accept a cash payment in the course of their duties;
- payments that only exceed the cash payment limit because the payment is part of a transaction involving collecting, holding or delivering cash and this is undertaken in the course of an enterprise of collecting or delivering cash (i.e., providing cash-in-transit services);
- payments that only exceed the cash payment limit because payment is or includes an amount of digital currency; and
- payments that occur in situations where no alternative method of payment could reasonably be used.

Further details of the instrument are set out in [Attachment A](#).

There are no conditions specified in the Act that need to be satisfied before the power to make the instrument may be exercised.

The instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

This instrument commences on 1 January 2020 – the day when the offences in the Act also commence.

Details of the Currency (Restrictions on the Use of Cash—Excepted Transactions) Instrument 2019

This attachment sets out further details of the *Currency (Restrictions on the Use of Cash—Excepted Transactions) Instrument 2019* (the Instrument).

Preliminary

Section 1 – Name of Regulations

This section provides that the title of the instrument is the *Currency (Restrictions on the Use of Cash—Excepted Transactions) Instrument 2019*.

Section 2 - Commencement

This section provides that the instrument commences on 1 January 2020.

Section 3 - Authority

This section provides that the instrument is made under the *Currency (Restrictions on the Use of Cash) Act 2019* (the Act).

Section 4 - Definitions

This section defines the meaning of a number of the terms used in the instrument.

These terms are discussed further in the context of the relevant exceptions.

Excepted transactions

Section 5 – Personal or private transactions

The first exception to the cash payment limit is for payments for personal or private transactions. This includes:

- payments solely for supplies or acquisitions that are *not* made in the course of an enterprise; and
- payments that are made or received by an entity in circumstances where that entity reasonably believes that the payment is solely for supplies or acquisitions that are *not* made in the course of an enterprise.

Enterprise has the same broad meaning as in the *A New Tax System (Goods and Services Tax) Act 1999*. An entity will be undertaking an enterprise if, for example, it carries on a business (or in the form of a business), offers real property for rent, is a charity or other recipient of gifts that are deductible for income tax, operates a superannuation fund or is the Commonwealth, a State or a Territory or an entity established for public purposes under an Australian law.

Effectively, the only circumstances in which an entity will not be carrying on an enterprise is where the entity is acting in a wholly private or personal capacity. The purpose of this exception is to exclude these private activities occurring outside a commercial or regulatory context, such as private gifts (but not donations to charities), inheritances and occasional private sales of assets (for example, the private sale of a used car).

The first case in which this exception applies is based on the actual nature of a payment. In this case the exception applies based on the objective nature of a payment and protects both the entity making the payment and the entity accepting the payment.

The second exception is based on the reasonable belief of the entity about the circumstances of the payment. This means that if an entity reasonably, but incorrectly believes, that the other party to a transaction is not acting in the course of an enterprise then the exception to the cash payment limit will apply to the payment for that entity, and that entity only.

For example, if an individual sells their car to another individual reasonably believing the other individual has acquired the car for private use after undertaking reasonable inquiries such as searching the Australian Business Register, then the exception applies, even if this belief is incorrect as the other individual in fact acquired the car for use in a business they are carrying on.

In general, whether a belief is reasonable will depend on the circumstances of the transaction and the parties. However, a reasonable belief must be a belief about facts – it does not protect an entity ignorant of the law or of the legal implications of facts.

As this exception is connected to the belief of the relevant entity about the other party the exception may apply to a party making the payment, but not the entity accepting the payment, or vice versa. While a party may be reasonably unaware about the circumstances of another entity, it is unlikely that it would ever be reasonable for an entity to be unaware that the entity is acting in the course of an enterprise.

Section 6 – AML/CTF reporting entities

The second exception to the cash payment limit is for payments made or accepted in circumstances in which an AML/CTF entity is required to provide a threshold transaction report under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*).

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, among other things, establishes a reporting regime under which AML/CTF reporting entities that provide designated services must report details about cash payments they receive of \$10,000 or more in what is referred to as a threshold transaction report. Significant civil and criminal penalties apply to entities that fail to correctly report transactions.

Designated services under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* are listed in section 6 of that Act. Among other things, designated services broadly include financial services such as accepting deposits, payments made as a withdrawal and foreign currency exchange.

From 1 January 2021, the scope of reporting under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* will change – see the exposure draft of the

Currency (Restrictions on the Use of Cash) (Consequential Amendments and Transitional Provisions) Act 2019 at www.treasury.gov.au/consultation. These changes will mean that threshold transaction reports are only required for certain designated services – the acceptance of deposits by approved deposit taking institutions, payments of amounts withdrawn from bank accounts with approved deposit taking institutions and certain foreign currency exchange transactions. As a result, only transactions involving those kinds of services would be covered by this exemption from this time.

However, this exception does not apply to a payment made or accepted by an entity if the relevant AML/CTF reporting entity was required to be enrolled on the Reporting Entities Roll and the entity knew, reasonably suspected or reasonably should have known that the AML/CTF reporting entity involved in the transaction was not so enrolled.

As this requirement is connected to the knowledge or suspicion of the relevant entity about the other party, it may result in a transaction being a specified transaction for only one of the parties to the transaction. Again, it is unlikely to ever be reasonable for an entity to be unaware that the entity itself is required to be enrolled and not so enrolled.

This ensures that this exception does not apply in relation to entities that are not complying with their obligations under the AML/CTF law, while at the same time ensuring that entities that deal with such entities in good faith are not penalised.

The purpose of the cash payment limit is to prevent the use of cash to avoid creating records about economic activity. To the extent the transaction is subject to the rigorous AML/CTF reporting regime, it does not give rise to these concerns. This exception recognises this, and effectively permits the use of cash in context where appropriate records are generated.

Section 7 – Public officials

The third exception to the cash payment limit is for payments made or accepted by public officials where the public official reasonably believes that making or accepting a payment or payments involving cash is necessary for the performance of their duties under an Australian law (but not merely to satisfy a debt owed to a Government).

Public official is used with its ordinary meaning, consistent with its use in the *Public Governance, Performance and Accountability Act 2013* and elsewhere in Commonwealth law. It includes officials of the Commonwealth, State, Territory and local governments.

For the exception to apply, the official must reasonably believe that it is necessary to make or accept the payment as cash to fulfil their duties as required by law. It is not sufficient that a payment needs to be made – there must be a legal requirement that the payment involve cash or cash must be the only reasonable payment method in the circumstances.

This requirement will be satisfied if, for example, the official's function involves the distribution of notes or the sale of coins as an employee of the Reserve Bank of Australia or the Royal Australian Mint – the function of these entities requires the distribution of cash. It would also be satisfied if the official was a police officer making the payment in the course of an undercover operation where using an alternate payment method would compromise the effectiveness of the operation.

The requirement cannot be satisfied if an official merely made or accepted a payment of cash for a debt owed to a government even if the payment was legally required. While such payments may be required, it is not necessary that the payment be made in cash.

In general, whether a belief is reasonable will depend on the circumstances of the transaction and the parties. However, a reasonable belief must be a belief about facts – it does not protect an entity ignorant of the law or of the legal implications of facts.

This exception ensures that the public officials undertaking functions requiring the making or accepting cash payments are not guilty of an offence in situations where there may otherwise be a conflict of law.

Section 8 – Cash in transit

The fourth exception is for payments that only exceed the cash payment limit because of a payment that occurs in the course of the movement or delivery of an amount of cash, where the payment is an incident of the transport of the cash rather than consideration or a gift.

It is not clear that the movement of physical currency involves a payment. However, as it is not possible to confirm this for all potential arrangements for the transport of physical currency, this exception has been included for the avoidance of doubt.

Effectively, the exception ensures that the offences relating to the cash payment limit do not apply to transactions merely because the transactions involve the movement of physical currency. These sorts of payments that may occur when physically moving cash are not relevant to the black economy as they do not involve use of cash as consideration.

This exception does not apply to the extent that the transaction would be in breach of the cash payment limit for other reasons, such as the consideration for the transport being a cash payment of more than \$10,000.

Section 9 – Digital currency

The fifth exception is for payments that only exceed the cash payment limit because the transaction involves a payment that is or includes an amount of digital currency.

The exception means that only the amount of physical currency in the payment is relevant for working out if the payment exceeds the cash payment limit.

Digital currency is a new and developing area in the Australian economy. Unlike physical currency, it does not have a firmly established regulatory framework or industry structure. This makes it difficult to apply the cash payment limit in a way that would not largely prevent the use of digital currency in Australia or significantly stifle innovation in the sector. At the same time, there is little current evidence that digital currency is presently being used in Australia to facilitate black economy activities. Given this, the Government has decided at the present time to effectively carve digital currency out from the cash payment limit.

This position will remain under ongoing scrutiny to ensure that the exemption for digital currency payments remains appropriate in light of the current use of digital currency in the Australian economy.

Section 10– No alternative payment method

The final exception is for payments that form part of a transaction for which cash is the only payment method available for reasons beyond the reasonable control of any of the parties to the transaction and for which it not reasonable to delay payment.

This exemption is only expected to apply in exceptional circumstances. It is increasingly unusual for no other payment method to be available, where this is not the result of a choice by one of the parties. It is also increasingly unusual for no other payment method to be available without involving unreasonable costs (noting the costs associated with dealing with large amounts of cash).

It is even more unlikely that it would not be reasonable for the parties to agree to delay payment of such a significant amount until a reasonable non-cash payment method was available, noting that the value of the transaction must equal or exceed \$10,000.

For a delay in payment to be unreasonable it must be necessary for the transaction to proceed before an alternative payment method could be made available. In most cases, the timing of payment is not critical for reasons beyond the control of both parties to the transaction. A delay does not become unreasonable merely because it may result in one of the parties to the transaction changing their mind about proceeding with the transaction or choosing instead to enter into a similar transaction with someone else.

The circumstances in which this exception can apply are effectively limited to the purchase of supplies for isolated areas following natural disaster and other urgent transactions occurring after significant and prolonged disruptions to communications and transport infrastructure.