CLEARY HOARE SOLICITORS
clearlaw@clearyhoare.com.au
www.clearyhoare.com.au
BRISBANE
LEVEL 1
1 BREAKFAST CREEK ROAD
(CNR LONGLAND STREET)
NEWSTEAD QLD 4006
PO BOX 2684
FORTITUDE VALLEY BC
QLD 4006
T 07 3230 5222
F 07 3252 1355
SYDNEY
PERTH

Our Ref: BMH:DLP:CLE82694

21 December 2018

Black Economy Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: blackeconomy@treasury.gov.au

Dear Sir/Madam

Submissions regarding Treasury's Consultation Paper "Improving black economy enforcement and offences"

Thank you for the opportunity to provide submissions in relation to Treasury's Consultation Paper dated 22 November 2018 titled "Improving black economy enforcement and offences" (**Paper**).

About us

Cleary Hoare Solicitors provides legal services with a particular focus on taxation matters. It has extensive experience dealing primarily with the Australian Taxation Office (**ATO**) and welcomes the opportunity to make the following submissions regarding the Paper. These submissions consider three recommendations proposed by the Paper:

- Reverse the onus of proof for some black economy offences to reduce barriers to prosecuting such offences (**Burden Recommendation**).
- Introducing new black economy offences and penalties, and changing existing offences to address the gap in the existing black economy offence and penalty regime (**Penalty Recommendation**).
- More effective prosecution processes, including the Australian Taxation Office (**ATO**) as a criminal law enforcement agency, and providing the ATO access to telecommunications metadata (**Telecommunication Recommendation**).

Background

The Paper appears to be based primarily on the Black Economy Taskforce Final Report dated October 2017 (**Report**). It is noted that the Report is 363 pages and covers a wide range of issues and recommendations. One wonders how any private organisation, let alone an interested individual, might have sufficient resources to consider the Report in detail and therefore understand the context of the Paper.

The context, of course, for both the Paper and the Report appears to be the cracking down on "black economy" and some notion of fairness and protecting the vulnerable members of

society. Further, that the black economy is rapidly changing and if policymakers do not urgently address the issues it creates, the entire economy will spiral swiftly to the bottom. Presumably, this is intended to invoke a lawless, anarchic society bound by no rules.

In reality, as identified in the Report, the black economy has "always been with us" and it "constantly" changes form as the landscape shifts. If that is the case, then:

- What compelling reason is there (if any) to discard existing legal principles?
- Have the policymakers considered government's role in shifting the landscape – that is, has it caused the landscape to shift and therefore the black economy to change, or is the black economy the driving force?

Finally, we have kept in mind that the initial investigation was carried out by the Board of Taxation and supported by Treasury and the ATO, which certainly colours the context of the Paper and proposed recommendations. For example, one queries how sturdy the foundations of the common law are when they can be usurped not for the protection of life, property and civil liberties, but to collect revenue? It is our opinion, and we are unlikely to be in a minority, that Executive revenue-collecting convenience ought not trump or erode fundamental rights and the rule of law, particularly where the issue has "always been with us".

With the above in mind, we turn to our submissions in respect of the three recommendations.

The Burden Recommendation

This recommendation considers whether it is appropriate to reverse the burden of proof for serious black economy offences, or particular elements of those offences. In summary, we submit that it is not appropriate.

Firstly, it is important to note that neither the Paper nor the Report provides a list of what offences are "black economy offences"; therefore, it is difficult to assess whether the reverse burden of proof should apply to "serious" black economy offences, or any for that matter. As to the elements of those offences, the same difficulty remains. It would appear that the Report and Paper assume a degree of certainty over the term "black economy" but it seems largely to be a catchword. The first question we would pose is: what offences or crimes are caught within the catchword "black economy"? Upon answering that question, we would be in a position to consider the Burden Recommendation in further detail.

Secondly, the burden of proof has been a hallmark of the common law system and it:

> "*…reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law is that the prosecution is to prove the guilt of an accused person. This was accepted as fundamental in* X7. *The principle is so fundamental that "no attempt to whittle it down can be entertained" albeit its application may be affected by statute expressed clearly or in words of necessary intendment."* (*Lee v The Queen* [2014] HCA 20 at [32])

Simply because the legislature **can** whittle down that fundamental common law principle does not necessarily mean that it **should**; where it does, there ought be a serious examination of the reasons for such whittling down and consultation among the public at large, including academia.

We note the objective of this recommendation is to "reduce barriers to prosecuting black economy offenders" and the primary problem being addressed is the difficulty in obtaining

knowledge of guilt because such knowledge is only privy to the defendant.[1] The comparison is then made to serious offences which undoubtedly attract universal condemnation – terrorism, drugs and child sex offences (though "drugs" appear to be generating some support in certain circumstances). Noting that the Report and Paper both fail to finish the comparison, it is worth expanding with the following question which we pose: are revenue offences of the same kind as child sex offences? We submit no.

Thirdly, part of the rationale behind the recommendation is to reduce "excessive burdens" and "improve the likelihood" of the offences being prosecuted, which will lead to "cost effective high-volume enforcement".[2] The implementation considerations then note "appropriate safeguards must accompany the changes" so as to not "remove due process". This recommendation will remove due process ipso facto. Further, the points addressed by the rationale could have applied to any offence at any time, whether 5 years ago or 105 years ago, which leads us back to the original point that the black economy offences have always been with us and there has not been a need to remove due process hitherto.

Fourthly, any consideration of imposing a reverse burden of proof must include the pre-existing powers the ATO has with respect to gaining the relevant knowledge. For example, Division 353 of the *Taxation Administration Act 1953* (Cth) empowers the Commissioner to obtain any information he requires, or attend any premises to obtain copies of documents he requires, to make a decision about taxation affairs. This power overrides fundamental legal principles concerning self-incrimination and confidentiality. A failure to comply constitutes an offence of absolute liability. We submit that these powers are clearly sufficient to achieve the objective and there ought be no further erosion of fundamental legal principles or civil liberties.

The Penalty Recommendation

The focus of our submission on this recommendation is the consideration of travel bans. In summary, we submit that travel bans ought not be imposed unless there have been flagrant breaches of the taxation laws amounting to fraud or evasion, or the taxpayer has accepted, but refuses to pay, a tax liability.

The issue which the recommendation seeks to address is framed as taxpayers not engaging with the tax system, refusing or avoiding to face authorities in respect of paying their "fair share of tax" and costing the government and Australians significant amounts due to "lengthy action by authorities". On the face of it, one still queries what the actual issue is:

- What does "engagement" with the tax system mean? Does it mean paying whatever amount the ATO require the taxpayer to pay (or deem the taxpayer to pay)?
- What "authorities" are the taxpayers refusing or avoiding to face? Only the ATO or other authorities? And is "face" intended to mean returning an email or a phone call?
- What does "fair share of tax" mean? Fair according to whom? An officer at the ATO or the law?
- What "action" is considered to be lengthy? The audit process or Court/Tribunal proceedings?

[1] Page 189 of the Report, page 11 of the Paper
[2] Page 190 of the Report, page 11 of the Paper

As to the last query, it is our experience that the ATO is the primary cause of the delay with respect to the "action". Further, it is our experience that the ATO do not necessarily audit for the purpose of uncovering an offence which has been committed, but audits with the hope of uncovering an offence and, if unsuccessful, finds an offence which may withstand a degree of scrutiny. It is this action which incurs significant cost to the government and Australians. Failing a useful description of the real issue, it is difficult to consider this recommendation.

Notwithstanding the above, any recommendation to impose travel bans on "delinquent" taxpayers, with the hope of "incentivising re-engagement", should not be entertained unless it applies to liabilities which have been determined independently. For instance, where the ATO causes an assessment to be issued, or an amended assessment to be issued, is that sufficient to trigger the power? Can the power be exercised where the taxpayer objects to the assessment? We submit that, if a taxpayer objects to an assessment, the ATO has no power to issue a travel ban until determination of the dispute and evidence that the taxpayer has refused to repay the liability.

We note the Paper refers to a US law which permits travel bans if there are significant tax debts, being $51,000 or more. We submit that, if such a law is passed in Australia, the amount ought be higher and that it **not include** penalties and interest charges.

Finally, there are other practical difficulties with the travel ban concept:

- where taxpayers are required to work overseas due to insufficient employment opportunities in Australia;
- where taxpayers have relatives who reside overseas;
- where taxpayers seek medical treatment overseas.

How will the recommendation deal with those issues? Who will have authority to issue the travel ban and will personal liability attach to any exercise of authority by that person? In addition to our submissions above, we consider there to be practical issues that ought not be resolved by a disinterested public servant employed by the revenue-collecting authority.

The Telecommunication Recommendation

The issue this recommendation seeks to address is the perceived hindrance to the ATO of requiring a joint investigation with the Australian Federal Police (**AFP**) to obtain telecommunication information. In summary, we submit that the ATO should **not** be included as a criminal law-enforcement agency in the *Telecommunications (Interception and Access) Act 1979* (Cth) (**TIAA**).

The Report notes that the ATO lost direct access to telecommunications data and considers it ought be amended to conduct investigations in a timely manner. This paints a miserable picture of the reasons for amendments made in 2015 to the TIAA. In March 2015, the government passed a bill to significantly amend the TIAA and the Explanatory Memorandum noted that the Bill would engage the protection against arbitrary or unlawful interference with privacy contained in Article 17 of the *International Covenant on Civil and Political Rights*.[3] It also stated that that right was permissibly limited in the circumstances because:

[3] Revised Explanatory Memorandum to Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015, para 62. It also noted the right to the presumption of innocence, which relates to the Burden Recommendation.

- there was a legitimate objective; [4]
- the legitimate objective was the protection of national security, public safety, addressing crime and protecting the rights and freedoms of individuals;[5]
- the data was specified and required to advance criminal and security investigations;[6]
- the circumstances permitting access were specified and the TIAA reduced the range of agencies with access;[7]
- there was a pressing social need for law enforcement agencies to investigate and prosecute crime;[8]
- the Commonwealth Ombudsman retained oversight;[9] and
- other agencies with lesser relevance to law and security purpose could obtain access.[10]

It is not simply that the ATO was "forgotten"; there were serious privacy concerns which needed to be borne in mind when achieving real national security, public safety and crime-preventing objectives. We pose the question: as compared to, for instance, the AFP, what aspect of the black economy warrants a serious intrusion on a fundamental right to privacy? Notwithstanding other government agencies have been included as criminal law-enforcement agencies under the TIAA, inclusion of new agencies ought be made on a case-by-case basis and after broad consultation.

Both the Report and Paper appear to caste the issue as one of urgent and timely access to data for the purpose of early detection, but both sidestep the fundamental issue: why is the ATO not satisfied with the timeliness of the AFP? That issue ought be addressed before fundamental rights are trampled on for the sake of convenience.

If the ATO was included as a relevant agency, it must be subject to oversight by the Ombudsman and it must have an obligation to report to the Parliamentary Joint Committee on Intelligence and Security. Further, it must put in place measures to prevent abuses by ATO officers and its inclusion must be on the basis that it could only obtain data for serious criminal offences with minimum prison terms of at least 3 years.

We note the Report and Paper also consider broadening the ATO's power to provide timely access to banking information for the purpose of criminal investigations. The primary reason put forward by both is that it would reduce the burden on the AFP so that it could focus on more serious crime. The acknowledgment that crimes investigated by the ATO are not as serious as those investigated by the AFP itself suggests a good reason why the ATO's powers should remain and not be enlarged.

The unfortunate reality of implementing this recommendation is that the powers will be misused in order to investigate other matters not related to their reasons for implementation. "Black economy" as a concept is so broad it could potentially apply to any taxpayer who transacts with another. The temptation to state that black economy matters are being

[4] Para 65
[5] Para 66
[6] Para 67
[7] Para 67
[8] Para 68
[9] Para 72
[10] Para 73

investigated along with others so that telecommunications data can be obtained is unavoidable and the line will be transgressed.

Conclusion

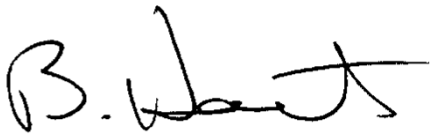
We respectfully submit that there does not appear to be any compelling or cogent reason to adopt any of the recommendations considered in these submissions.

If one were to stand back and consider all the proposed recommendations put together and their effects, the ATO would appear to be a quasi-police force with powers to investigate, prosecute, judge and enforce regardless of fundamental rights. As suggested at the start, if the recommendations are adopted, it is very likely that they will simply cause the landscape to change again, with the result that further fundamental rights will be usurped for the sake of collecting revenue rather than protection of life, property and civil liberties.

If recommendations are adopted, we strongly recommend new legislation, similar to State and Federal police powers and responsibilities legislation, to clearly define the limits of ATO officers' powers and responsibilities and impose liability (with the ability to commence legal proceedings) against individual ATO officers for any excess. If ATO officers (including the Commissioner) are to have quasi-police powers, they ought be subject to similar enforcement action where such powers are abused.

We would be wiling to participate in any further consultation either in person or by correspondence, please contact the writer or Daniel Paratore of our office if you wish us to clarify or expand on any of our submisssions.

Yours faithfully



Brett Hart
Cleary Hoare Solicitors