



Tax Insights

Black economy measures draw a wide net

Snapshot

New legislation directed at black economy behaviour is likely to impact many ordinary business dealings.

On 20 September 2018, [Treasury Laws Amendment \(Black Economy Taskforce Measures No. 2\) Bill 2018](#) was introduced into the House of Representatives. The Bill covers a wide range of measures drawn from recommendations from the [Black Economy Taskforce Final Report](#) and includes measures to:

- Deny an income tax deduction for certain employee/contractor payments if the associated withholding obligations have not been complied with; and
- Require entities providing road freight, information technology or security, investigation or surveillance services to report to the ATO under the Taxable Payment Reporting System.

Denial of deduction for employee/contractor payments

To encourage compliance under PAYG withholding tax provisions, the Bill proposes to deny a deduction for certain payments if withholding or related notification requirements are not complied with at all. The amendments broadly apply to payments made and non-cash benefits provided on or after 1 July 2019.

The relevant withholding tax provisions are:

Relevant provision of the Tax Administration Act 1953	Broad description of relevant payment	Application
12-35	Payments of salary, wages, commission, bonuses or allowances paid to an individual as an employee	Failure to withhold or failure to remit and notify the Commissioner
12-40	Payments of remuneration to a company director, or member of committee of management	
12-47	Payment to religious practitioner	
12-60	Payment under a labour hire arrangement	
12-190	Payment for a supply ¹ where the payee has not quoted its ABN	
14-5	Provision of a non-cash benefit that- if the benefit had been paid in cash- would have been subject to withholding.	Failure to remit and notify the Commissioner

Importantly, a deduction is only denied where:

- No amount has been withheld at all²; or
- After withholding an amount, a taxpayer fails to notify the Commissioner by the due date in the approved form³.

This is due to the fact that the Government considers that a failure to withhold any amount at all is the most significant risk to revenue, and presumably the most relevant indicator of black economy behaviour.

¹Excluding supplies of goods and supplies of real property

² If the amount required to be withheld, or the amount required to be paid to the Commissioner is nil, the provisions do not apply.

³ Where applicable, this would include an obligation to disclose under Single Touch Payroll. Single Touch Payroll provisions mandate same-day reporting for wages, directors fees, and payments to religious practitioners.

Accordingly, the Bill provides concessions directed at those taxpayers assumed to be outside the black economy but making errors. Under the proposed changes;

- Withholding an incorrect amount; or
- Notifying the Commissioner of an incorrect amount; or
- Remitting an incorrect amount to the Commissioner;

should not affect the entitlement to a deduction.

Voluntary notification

The Bill also provides that a deduction that would otherwise be denied under these new rules is maintained in the original income year, if a taxpayer voluntarily notifies the Commissioner, in the approved form, of their failure to withhold an amount or a failure to correctly notify the Commissioner of the amount, and does so before the Commissioner commences an audit or other compliance activity in relation to any tax law in the relevant period.

Note however that the normal provisions and penalties under the PAYG withholding provisions continue to apply.

Errors in respect to contractor payments

The explanatory memorandum notes that the Government recognises that there are situations where an employer honestly believes persons are acting as contractors but this position is not upheld by the Commissioner. The Bill does not deny a deduction in such circumstances.

Deloitte comment

Whilst the Bill provides safeguards for businesses who make employee/contractor classification errors or calculation errors, the impact of these proposed changes on mainly compliant businesses should not be underestimated.

For instance, a business that makes an unusual payment such as an employee bonus, commission payment or allowance may be exposed where its systems do not adequately capture or identify the expenditure as subject to withholding. Likewise businesses who make predominately small payments to employees (below the PAYG withholding thresholds) may not appreciate that a minor increase in payment could require withholding.

As rectification and notification is only an exception prior to an audit or other compliance activity, taxpayers could be inadvertently caught out. The window for a voluntary disclosure closes when the Commissioner advises of an examination of a taxpayer's affairs relating to any tax law: the proposed examination need not relate to PAYG related matters.

Businesses should carefully review their systems and procedures to ensure that they are compliant with their PAYG withholding obligations and consider what additional controls and testing are needed to provide comfort.

These provisions are primarily designed to penalise businesses operating in the black economy, to ensure that income of the payee is properly reported so that income tax obligations and eligibility to means tested government funded entitlements are properly assessed. What these provisions will fail to capture are those payments completely unreported as expenses or paid partly within the payroll system and partly out of the system. These businesses may still remain operating outside the legitimate economy until either the ATO or other regulators commence compliance activities or an organic or regulatory shift to electronic payments forces a change in behaviour (making it more difficult to hide both income and cash payments).

Reporting of payments for road freight, IT or security, investigation or surveillance services

The Taxable Payment Reporting System (TPRS) was introduced in 2015. The objective was that “The Commissioner can require certain entities to give information about transactions that could reasonably be expected to have tax consequences for other entities”.

While the reporting obligation is on the payer, the target is the recipient of the identified payments. The goal was that, over time, individuals and other self-assessment taxpayers (i.e., the recipients of such amounts) would change how they interact with the tax system.

The TPRS requires taxpayers in various industries to report payments made to other parties.

The TPRS covers a range of payments, including payments in the building and construction industry, and has been extended to the cleaning and courier industries from 1 July 2018. In this current Bill, the TPRS is further extended to the identified high-risk industries of road freight, information technology (IT) and security, investigation or surveillance services from 1 July 2019.

Entities required to report

An entity will have reporting obligations if all of the following apply. It:

- Makes a supply of “road freight service”, “IT service”, or “security, investigation or surveillance service”;
- Makes payments to another entity for the supply of “road freight service”, “IT service”, or “security, investigation or surveillance service”; and
- Has an Australian business number (ABN).

That is, in addition to the ABN requirement, the provisions require that two conditions are satisfied:

- Entity required to report: an entity makes a supply of a specified services (e.g. IT service), whether to an external customer or to a related group member: and
- Transactions that are required to be reported: the entity pays consideration to another entity for the supply of the same service, whether the supply is to the entity (contractor), a customer of the entity (sub-contractor) or otherwise.

There is no requirement that the other entity be an Australian resident or that the payment be assessable to that other entity.

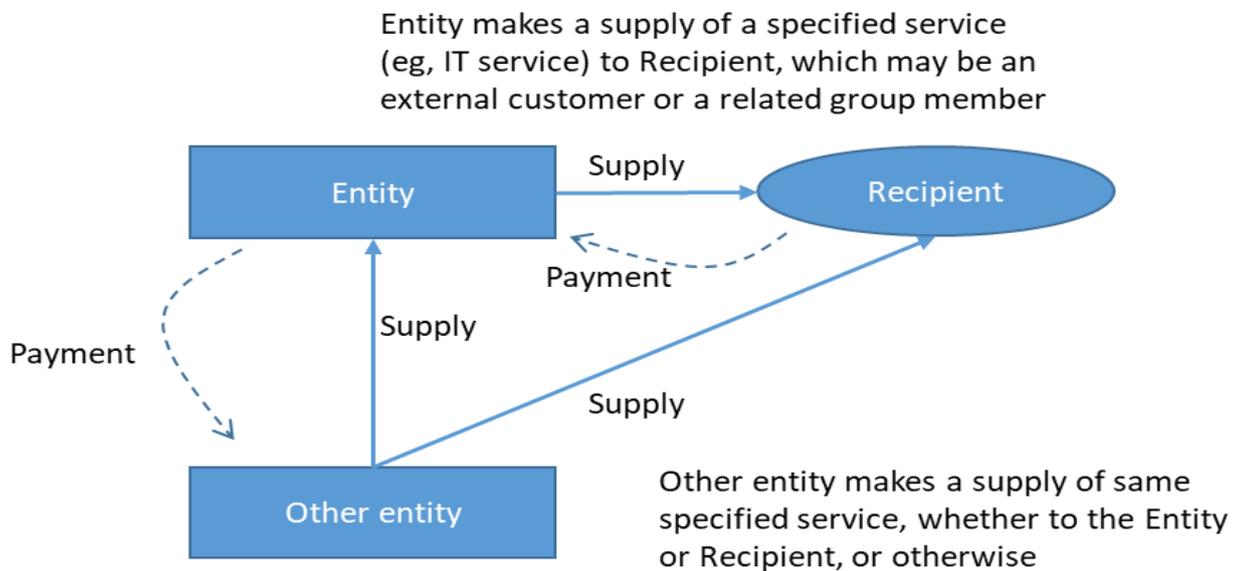
Part or ancillary supply

Businesses will need to consider if the customer service provided can be split into separately identifiable parts. If at least one of those parts is a reportable service (a mixed supply⁴), then only that part will be a reportable supply. This will be the case where the reportable service is a significant component, or could realistically be made as a separate supply.

⁴ The Commissioner's views on whether the integrated supply of delivered goods is a mixed or composite supply is contained in Goods and Services Tax Determination GSTD 2002/3 *Goods and services tax: how do I account for GST when I supply taxable goods, non-taxable goods and delivery services together?*

Where the relevant reportable service is merely ancillary or incidental to another product or broader service the business provided (a composite supply), then it will not need to be included in the taxable payment annual report.⁵

An example of an affected arrangement



Penalties for non-compliance

Where an entity fails to give a TPRS report to the Commissioner by the time required, an administrative penalty for failing to lodge a document in time may be imposed⁶. The administrative penalty will be scaled up based on the classification of the entity.⁷ An administrative penalty may also be imposed if the report includes any false or misleading statements⁸.

Scope

The terms “road freight”, “IT”, and “security, investigation or surveillance” are not defined and are intended to take their ordinary meaning. However, the explanatory memorandum (EM) provides extensive guidance as follows.

Road Freight

The term “road freight” has been combined with the third party reporting table item that covers courier services to broadly cover any service where goods are transported over road. The EM notes that road freight will include services such as road freight transport, log haulage, road freight forwarding, taxi trucks, furniture removal and road vehicle towing. Other modes of freight transportation such as via boat or aeroplane would not be reportable

⁵ [See guidance in LCR 2018/D6 Expansion of the taxable payments reporting system to contractors in the courier and cleaning industries](#)

⁶ Section 286-75 Tax Administration Act 1953

⁷ Significant Global Entity

⁸ Section 284-75 Tax Administration Act 1953

as road freight. (The road proviso does not apply to courier services, which may involve transport other than by road, such as on a bike path).

Information technology

The term "information technology" service involves the provision of expertise in relation to computer hardware or software to meet the needs of a client. These services can be performed on site or remotely, and include services that support or modify the operation of hardware or software. Some examples of services include: technical support, computer facilities management, internet and web design consulting, computer software or hardware consulting, software development, computer network systems design and integration, software installation, computer programming, software simulation and testing, systems analysis.

The explanatory memorandum notes that where software is used by an entity to provide a service other than an IT service, the mere use of software in these circumstances does not make the service an IT service. For example, the use of software to provide accounting, project management or word processing service is not an IT service.

Security, investigation and surveillance services

The term "security" refers to protection from, or measures taken against, injury, damage, espionage, theft, infiltration, sabotage and will include services such as lock smithing and security guards.

The term "investigation" refers to a searching inquiry in order to ascertain facts (typically through a detective or enquiry agency). An investigation service does not refer to services such as online search engines or databases, or the making of general enquiries such as requesting a person's name, address etc.

The term "surveillance" refers to a general watch or observation over an area or location by persons or devices such as cameras.

Transactions that are required to be reported

Entities are required to report information to the Commissioner about transactions where they have provided consideration to another entity wholly or partly to provide the identified service (such as a payment to a contractor or subcontractor). The other entity could be a sole trader (individual), partnership, company or trust.

Exception for payments to which PAYG withholding applies

The system operates as a complimentary system to the PAYG withholding system. Accordingly, entities are not required to report any payments to which the PAYG withholding provisions⁹ require an amount be withheld.

Exception for members of a consolidated group

Entities are not required to report payments made to members of the same consolidated group or MEC group.

⁹ Division 12 of the *Tax Administration Act 1953*

10% transitional provision in relation to road freight & courier services

From 1 July 2019¹⁰, otherwise reporting entities will be exempt from reporting where:

- The total payments received for both courier and road freight services are less than 10 per cent of the entities relevant GST turnover (i.e. this is a minor line of business for the entity);
- The reporting entity is not required to report under another category of the TPRS provisions (such as government related entities)); and
- The entity has not chosen to prepare and give the report.

Deloitte comments

As noted above, the measure is seeking to identify the recipient of the identified payments. Where such recipients are operating in the black economy or not otherwise disclosing the amounts, the reporting will enable the ATO to target the non-disclosure of such amounts. However, the reporting obligation sits with the payer, which will typically be mainstream businesses not operating in the black economy.

Entities will need to carefully consider the scope of both:

- The services they provide (are they a reporting entity?); and
- The services provided by other entities in consideration for payment by the entity (are there reportable transactions?).

In many cases, it will be evident that an entity is a reporting entity as it provides the relevant services, such as where it is in the business of providing the identified services (e.g. a software business provides IT services to third party customers). In other cases, it will be less obvious that the entity provides the relevant services, such as where the identified services are de minimis or incidental to the main activity.

Another example that could fall within scope is where groups set up centralised internal functions in a special purpose vehicle, e.g. to provide IT services or transport functions to group entities.

In all of those cases, there could be a reporting obligation where that same entity makes a payment to another entity (outside of the tax consolidated group) for the supply of that same service by another entity. The other entity could be a genuine third party or could for example be an offshore-related entity or partly owned joint venture vehicle.

In addition, applying these tests to both entities will be challenging in some cases as the terms "road freight", "IT", or "security, investigation or surveillance" are not defined in legislation.

¹⁰ Or commencement of the schedule (whichever is later)

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