

21 December 2018

Black Economy Division
The Treasury
Langton Crescent
PARKES ACT 2600

BY EMAIL: Blackeconomy@treasury.gov.au

Dear Sir / Madam,

BLACK ECONOMY – INCREASING THE INTEGRITY OF GOVERNMENT PROCUREMENT

1. Thank-you for the opportunity to respond to the “*Black Economy – Increasing the integrity of government procurement*” issues paper dated November 2018 (**Issues Paper**).
2. We are concerned that the proposal for the introduction of Statements of Tax Record (**STRs**) contained in the Issues Paper is far too narrow and – without significant strengthening - risks being little more than a meaningless bureaucratic hurdle that pays lip-service to the issues raised in the Black Economy Taskforce’s Final Report.
3. The Australian Government is a significant influencer of the Australian building and construction industry as a major procurer of construction services for infrastructure and community projects. It has the opportunity to significantly address the underlying features of the black economy that plague the building and construction industries, including by adopting processes that:
 - a. consistent with the objectives of the *Fair Work Act 2009*, promote collective agreements that reflect and support best practice industrial relations and employment practices;
 - b. prevent the victimisation of employees as a result of their choice to be a member of a union, and promote the important and legitimate role of unions and union delegates;
 - c. support right of entry by authorised union officials for the purpose of investigating suspected breaches of industrial awards, agreements and legislation (including in relation to black economy offences), including allowing access to relevant employer records, and ensuring health and safety on site;
 - d. ensure that any work which is to be sub-contracted is performed by bona fide contractors only, including by requiring contractors to provide information that will allow government

agencies to verify that the terms and conditions of a procurement contract (including sub-contracted work) are being met. Fundamentally, this should include preliminary checks as well as auditing processes which encourage union involvement in the identification and eradication of sham contracting practices;

- e. prevent non-conforming and non-complying building products; and
 - f. ensures companies pay tax in Australia.
4. If, as the Issues Paper suggests, the Government wishes to “lead by example”, then its procurement processes ought to reflect these principles.
5. Moreover, the current *Code for the Tendering and Performance of Building Work 2016* does nothing to support these principles. Rather, it deems clauses of enterprise agreements ‘non-compliant’ where they recognise workers’ representative rights to consultations on matters such as conflict resolution, major workforce change, dismissal and redundancy, the lawful engagement of temporary foreign workers, training, health and safety, use of labour hire, hours worked, casualisation, security of employment, use of contractors and the prevention of sham contracting, flexibility, apprentice recruitment and government procurement. The Code must be repealed.
6. Accordingly, we view the proposal set out in the Issues Paper– limited as it is to the Statements of Tax Records - to be deeply insufficient, and a lost opportunity.

Statements of Tax Record

7. The CFMEU has previously made a number of relevant submissions to the Black Economy Taskforce which include (but are not limited to):
- a. a submission to the Black Economy Taskforce which focussed on the impact of the ‘black economy’ on the construction industry (**the CFMEU’s August 2017 submission**); and
 - b. a submission in response to the Issues Paper issued by Treasury on 15 May 2018 seeking feedback on the development of a Procurement Connected Policy (**PCP**) (**the CFMEU’s May 2018 submission**).
8. The CFMEU’s May 2018 submission noted our concern that the introduction of STRs was, in the form of the proposal at the time, too narrow. Having read the current Issues Paper, we continue to express this concern. In particular, the Issue Paper overlooks our previous submissions relating to:
- a. the apparent failure to incorporate consideration of reportable payments detailed from the taxable reporting system (**TPRS**), which was introduced by the ATO in the 2012-2013 tax year in the construction industry. The exchange and scrutiny of TPRS data between the ATO and various agencies is a critical component to the identification of businesses operating in the black economy. If TPRS data indicates any potential non-compliance, there is no reason why this data should not mitigate against an assessment of a ‘satisfactory tax record’ in the context of the construction industry;

- b. the absence of appropriate ongoing requirements relating to contractors and sub-contractors engaged further down the supply chain, including those who may not be identifiable at the time of a tender. In this regard – in the construction industry - careful scrutiny should occur in relation to:
 - i. any mismatches in data provided under the TPRS, which may identify contractors and sub-contractors who appear to have omitted income from their tax returns;
 - ii. the validity of indicators such as ‘return not necessary’ in data provided by a contractor or sub-contractor who is reported to be in receipt of business income; and
 - iii. any TPRS data which indicates that a missing or invalid ABN has been reported;
 - c. the absence of any mechanism to exclude known phoenix operators, including by screening directorships of new companies where the director has been the subject of an adverse administrator’s report following an insolvency event by a previous company;
 - d. the failure of the STR to require the disclosure of prior proceedings which have resulted in a contravention or conviction for an offence relating to sham contracting, phoenixing, tax evasion, bribery or corruption being made out against a business, a director or a related corporate entity. These are matters which should immediately and automatically result in exclusion from the tender process; and
 - e. the exclusion of construction projects valued under \$4 million. The features of the black economy within the construction industry are not confined to large scale projects; they appear on projects ranging from small household renovations to projects worth billions of dollars. The most vulnerable workers impacted by the Black Economy are just as likely to be engaged on smaller projects and at the end of supply chains.
9. We have also previously suggested that further improvements could be made by utilising the reporting data from the TPRS to determine the extent to which taxpayers to whom amounts are paid as contractors are in fact deriving all or most of their income from a single source over extended periods. This would make significant inroads into the problem of sham contracting and disguised personal services income.
10. We repeat these concerns.

The Issues Paper

11. The stated criteria for the successful issuing of a STR, as set out in the Issues Paper, include:
- a. the tenderer being “up-to-date with registration requirements which may including being registered for an Australian Business Number (ABN) and GST, and having a Tax File Number”;

- b. lodgement of 90% of all income tax returns, Fringe benefit Tax Returns and Business Activity Statements that were due in the last four years (or the period of operation if less than four years), except where there are undefined “reasonable delays”;
 - c. the requirement that the tenderer does not have greater than \$10,000 or greater in outstanding debt on the date that the STR is issued; and
 - d. none of the above where the tenderer does not have a record with the ATO at all, or has a record of less than four years.
12. In relation to (a), we have previously made a submission (dated September 2018) in response to the Treasury Issues Paper relating to the re-design of the ABN system released in 20 July 2018. We repeat our ongoing concerns that the manipulation of the ABN system continues to facilitate and legitimise sham contracting, wage theft and phoenix behaviour and requires urgent reform.
13. In relation to (b) and (c), we consider that any outstanding return or debt should prevent the issuing of an STR.
14. The criteria at (d) is particularly concerning given that the proposal set out in the Issues Paper does not grapple at all with phoenixing behaviour, which is one of the reasons why an entity may not have the length of records required. In such cases, verification of the identity of directors should occur in order to avoid those individuals from further benefitting from their misbehaviour.
15. In general, it is incredibly disappointing that the Issues Paper is premised upon the idea that any further criteria that centres on the hallmarks of the black economy would only be considered after “learnings from the first year of operation”. There is no reason why a desire for a “smooth transition” should mean that no regard is had to compliance with superannuation and PAYG obligations, court ordered penalties imposed on directors, and convictions for phoenixing behaviour, bribery or corruption. We would also add sham contracting to this list.
16. If the Government was serious about tackling the black economy, STRs:
- a. should require the verified identification of directors, and exclude entities from the tendering process where a director has been the subject of an adverse administrator’s report following an insolvency event by a previous company; and
 - b. in addition to being contingent on the absence of contraventions or convictions of the laws relating the matters raised above, also be contingent upon:
 - i. the absence of adverse orders in tax-related proceedings, including any history of director disqualifications, garnishee notices, or non-compliance with directions notices; and
 - ii. the exclusion of tenderers who have previously entered into enforceable undertakings in order to avoid tax-related prosecutions.

17. We are further concerned that limiting the STR requirement to first tier subcontractors only is too narrow. It ignores the reality that the most vulnerable workers are engaged at the end of increasingly-complicated contracting structures. Head contractors should have a responsibility to ensure that the contractors and sub-contractors engaged by it are operating within the taxation system, as well as the same obligation the industrial and safety context. This ought to be a key component in any assessment of a satisfactory tax record, and should not be subservient to the concept of minimising burden on business. Accordingly:
- a. STRs should be obtained from all contractors or sub-contractors before they are engaged, and provided to the government automatically (rather than upon request); and
 - b. any contraventions or convictions relating to tax avoidance, sham contracting or phoenixing behaviour by contractors and sub-contractors should appear on the STR of the entity they are contracted to, and on that of the head contractor.
18. We also repeat our concern that there is no reason why verifiable tax compliance / STR requirements should be limited to Commonwealth Projects that have an estimated value of over \$4 million (inc. GST). Responsible procurement policies ought to require compliance at all levels.
19. Finally, we note that – in addition to the matters referred to above – the Issues Paper also overlooks environmental, social and governance (**ESG**) standards that ought to be the subject of consideration for any government tender, including in relation to occupational health and safety. In this regard we have read, and support, the submission of the ACTU.

Yours sincerely,



Dave Noonan
National Secretary
CFMEU - Construction and General Division