

# Ensuring Equitable Payment Options: A Legal Perspective on Banning ‘No Cash’ Policies in Australia

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## Abstract

This article examines the legal case for banning ‘no cash’ policies at retailers in Australia, with a focus on fostering inclusivity for unbanked individuals and empowering consumers. The analysis explores three potential options for implementing such a prohibition: leveraging anti-discrimination laws, utilizing consumer protection laws or enacting new legislation. From a legal standpoint, the article argues that retailers should be mandated to accept cash when consumers seek to purchase essential goods and services. Drawing upon relevant legal frameworks, the article highlights the importance of protecting the rights of unbanked individuals and ensuring consumer choice. It explores the potential impacts on financial inclusion and consumer empowerment while considering the risks of financial crime. By delving into these considerations, this article aims to contribute to the ongoing discourse surrounding ‘no cash’ policies, offering insights and recommendations for policymakers and legal practitioners alike in their pursuit of a fair and inclusive society.

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“With these pieces of paper, made as I have described, he [Kublai Khan] causes all payments on his own account to be made; and he makes them to pass current universally over all his kingdoms and provinces and territories, and whithersoever his power and sovereignty extends. And nobody, however important he may think himself, dares to refuse them on pain of death. And indeed everybody takes them readily, for wheresoever a person may go throughout the Great Kaan’s dominions he shall find these pieces of

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Email: [cccourtland@hotmail.com](mailto:cccourtland@hotmail.com). I am grateful to the anonymous reviewers and editors for enhancing this article’s quality and to my colleagues and Veronika Boldinova for fruitful discussions about cash.

## Previous Positions:

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paper current, and shall be able to transact all sales and purchases of goods by means of them just as well as if they were coins of pure gold’.

Marco Polo<sup>1</sup>

## I Introduction

In today’s increasingly digital era, the role of cash as a means of exchange has encountered significant challenges. While the global landscape embraces a shift towards cashless transactions, certain jurisdictions have recognized the necessity of safeguarding the rights of cash-dependent individuals by enacting legislation that mandates retailers to accept cash. These jurisdictions understand the importance of financial inclusivity and consumer choice, aiming to prevent discrimination against individuals without access to alternative payment methods.

During the COVID-19 pandemic, an alarming trend emerged as more retailers globally, including in Australia, implemented ‘no cash’ policies. These policies, which restrict or eliminate cash transactions, pose a significant risk of excluding cash-dependent consumers from accessing essential goods and services. A non-exhaustive list of ‘essential’ goods and services encompasses necessities such as food, clothing, shelter (including related items like furniture and white goods) and transportation.

This urgent issue highlights the need to protect the rights and inclusivity of cash-dependent consumers by mandating retailers to accept cash for everyday essential items. This article explores legal perspectives and viable options for legislation to ban ‘no cash’ policies, emphasizing the impact on consumer rights, financial inclusivity and broader societal implications. By addressing this issue promptly, we can safeguard the interests of cash-dependent individuals, ensuring accessibility to essential goods and services for all, regardless of their preferred payment method.

This article examines the legal issues surrounding the prohibition of ‘no cash’ policies by retailers in Australia. It is argued that cash continues to provide societal benefits, despite a downward trend in the use of cash. It facilitates financial inclusion for vulnerable populations, ensures transactional privacy and serves as a reliable backup during emergencies or technological disruptions.<sup>2</sup> Requiring retailers to accept cash should not significantly burden or pose substantial risks to most Australian retailers, thanks to existing safeguards such as video surveillance systems and cash management solutions.

It is essential for the Australian government (hereinafter, ‘Commonwealth’) to strike a balance between consumer protection and addressing retailers’ concerns, considering that many retailers may prefer to operate in a cashless manner. Therefore, the introduction of a cash mandate for retailers would be subject to specific limitations, such as implementing a cap on the amount of cash that retailers *must* accept from consumers (for instance, a limit of \$10,000 per transaction).

To address concerns regarding illicit activities, it would be crucial to impose a reporting requirement similar to those stipulated in Australia’s existing anti-money laundering (AML) laws<sup>3</sup> on

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1. Marco Polo and Rustichello of Pisa, Second Book, Part I, Chapter XXIV: ‘How the Great Kaan Causeth the Bark of Trees, Made into Something Like Paper, to Pass for Money over All His Country’, in *The Book of Ser Marco Polo: The Venetian, Concerning Kingdoms and Marvels of the East*, tr Colonel Sir Henry Yule, (London: John Murray, 1903) vol 1.
  2. For example, on June 1, 2018, the Visa network experienced a significant outage that disrupted card transactions across various parts of the world. 5.2 million payments across Europe failed during the 10-hour outage: Finextra, ‘Visa Says 5.2m Payments Failed during 10 Hour Outage’, *Finextra* (online, 19 June 2018) <<https://www.finextra.com/newsarticle/32277/visa-says-52m-payments-failed-during-10-hour-outage>>.
  3. *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (‘AML/CTF Act’).

retailers accepting a sum of cash over \$10,000. By setting a reasonable threshold such as \$10,000, the aim is to deter money laundering, terrorist financing and tax evasion by curbing the potential misuse of untraceable cash transactions. This restriction would seek to strike a balance between protecting consumers' cash payment rights and mitigating the risks associated with cash-based criminal activities.

The contention put forth in this article is that the prospect of Australia transitioning into a cashless society in the near future is improbable and unappealing. Without a publicly funded alternative provided by the government, such as a retail central bank digital currency (rCBDC), it falls upon the Commonwealth to ensure the acceptance and usability of cash for purchasing essential goods and services. This outcome can be achieved by imposing fines on retailers that implement 'no cash' policies.

This article examines recent cash usage trends in Australia, explores the motivations behind retailers adopting cashless policies and presents the primary arguments for prohibiting 'no cash' policies and implementing a cash mandate. It considers three potential options for prohibiting 'no cash' policies in Australia, including a prohibition of these policies under existing consumer laws and anti-discrimination laws, as well as an option for introducing new legislation dedicated to banning 'no cash' policies for retailers. Moreover, this article seeks to contribute to the ongoing discourse and provide valuable insights for policymakers and legal practitioners alike.

## II The Laws for Legal Tender

This section provides a concise overview of the existing laws in Australia regarding legal tender and examines the circumstances under which a retailer can successfully implement a 'no cash' policy.

### A A Definition of Legal Tender

There is no definition of the term 'legal tender' in the *Australian Constitution* ('*Constitution*') or legislation.<sup>4</sup> The definition provided by Stephen J in the High Court of Australia (HCA) decision in *Watson v Lee* provides some guidance: 'legal tender' is 'the prescription of that which is, at any particular time, to be a lawful mode of payment within a polity'.<sup>5</sup> This means that legal tender is whatever the Commonwealth determines, at any particular time, can be used by people, businesses and the government as a lawful mode of payment within Australia. In essence, legislature determines what is regarded as legal tender, and the only thing that is currently considered legal tender in Australia is 'cash', which encompasses Australian dollar (AUD) notes<sup>6</sup> and coins.<sup>7</sup>

4. Commonwealth of Australia Constitution Act 1900 (Imp) 63 & 64 Vict, c 12, s 9. It is also surprising that the term 'legal tender' is not defined in the transnational guidelines published by the Bank for International Settlements, the Organization for Economic Cooperation and Development, the World Bank or the International Monetary Fund.

5. *Watson v Lee* 144 CLR 374, 398 (Stephen J). Followed in *Travellex Ltd v Commissioner of Taxation* [2008] FCA 1961 [27] (Emmett J) ('*Travellex*'): 'Legal tender is such money, in the legal sense, as the polity defines in legislation that organizes the monetary system'. Followed in *Leask v Commonwealth of Australia* (1996) 140 ALR 1 31 (Gummow J). In *Skyring v Commissioner of Taxation (Cth)* (2007) 244 ALR 505, Greenwood J said something similar at 511: Legal tender 'is the act of tendering, in the performance of a contract, or in the satisfaction of a claim, that which the law prescribes or permits and at such time and place as the law prescribes or permits'.

6. The term 'notes', 'banknotes', 'bills' and 'paper money' are used interchangeably.

7. Although cash is the only form of legal tender currently recognized in Australia, the Commonwealth could amend the list in the future. For example, it may create a central bank digital currency.

## B Situations Where a Debt Has Been Incurred

The law is straightforward in a situation where a debt has been incurred. When it comes to settling a debt, a debtor has the *right* to use legal tender, and the creditor has an *obligation* to accept, unless both parties have mutually agreed beforehand upon an alternative payment method. Currently, AUD notes and coins are the sole forms of recognized legal tender in Australia.<sup>8</sup> As a result, debtors are entitled to discharge their debts using cash, and creditors are obligated to accept it.

This rule was explained by Professor Arthur Nussbaum, who wrote that '[l]egal tender... is money which a *creditor is not privileged to refuse* if it is tendered by a debtor in payment of his *debt*'.<sup>9</sup> This rule was confirmed by the HCA in *Travellex Ltd v Commissioner of Taxation*:

A tender, in *discharge of a debt*, made in any currency that, at the time of tender, is lawful money, will be effective to *discharge the debt* (*Jolley v Mainka* (1933) 49 CLR 242 at 259). An essential quality of money that is *legal tender* is its *sufficiency to discharge a debt* (*Jolley's Case* at 261). Accordingly, a *money debt* incurred in a polity that is payable in that polity may be *discharged* by a payment of currency that is *legal tender* in that polity.<sup>10</sup>

Furthermore, the Reserve Bank of Australia (RBA) recognizes this rule on their website: '[R]efusal to accept legal tender in payment of an *existing debt*, where no other means of payment/settlement has been specified in advance, *conceivably could have consequences in legal proceedings*; for example, the creditor may be unable to enforce payment in any other form'.<sup>11</sup>

The following example demonstrates how this rule works in practice. Imagine Jim visits a restaurant, enjoys a meal and is presented with a bill amounting to \$30. At this point, Jim has already become a debtor, since he has consumed the meal, and he now owes the restaurant \$30. The restaurant has performed their side of the contract by serving the food, while Jim still needs to perform his side of the contract by making a payment. In this scenario, Jim possesses the right to discharge his debt using cash, and the restaurant is obliged to accept it as the valid form of payment.

Although there is currently no restriction on the sum that can be paid with notes, s 16 of the *Currency Act* provides a restriction on the usage of coins to protect a creditor from having to accept a large quantity of coins from the debtor. A creditor is only required to accept from a debtor a payment of up to \$5 if using any combination of 5, 10, 20 and 50 cent coins,<sup>12</sup> or a payment not exceeding 10 times the face value of the coin if \$1 or \$2 coins are offered. In other words, a creditor is under no circumstances *required* to accept more than \$20 in coins. A payment in coins above these limitations is not considered legal tender, and a debtor cannot force the creditor to accept them.

This rule ensures that creditors are not saddled with the burden of being required to accept a large number of coins. This rule also prevents a debtor from being able to make a 'revenge' payment, which is a situation where a debtor pays the creditor a debt using small denomination coins to try and punish the creditor. As coins are heavy, it becomes a time-consuming and cost-incurring burden for the creditor to have to count, store and transport the coins to the bank. For example, in 2013, a noteworthy incident occurred in Adelaide when an aggrieved individual attempted to settle a

8. *Reserve Bank Act 1959* (Cth); *Currency Act 1965* (Cth) ('*Currency Act*').

9. Arthur Nussbaum, *Money in the Law: National and International* (Brooklyn: The Foundation Press, 1950) 45–46 (emphasis added).

10. *Travellex* (n 5) [28] (Emmett J) (emphasis added).

11. 'Legal Tender', *Reserve Bank of Australia Banknotes* (Web Page) <<https://banknotes.rba.gov.au/legal/legal-tender/>> (emphasis added).

12. *Currency Act* (n 8) s 16(1)(a).

\$60 parking fine owed to the Adelaide City Council by tendering 1,200 five-cent coins as payment. However, as per the legislation, the court held that this form of payment was not sufficient to discharge the debt.<sup>13</sup>

The impact of this rule under Australian law is significant, particularly in contrast to the United States (US) where no such restriction exists. In the US, 31 US Code § 5103<sup>14</sup> designates all coins as ‘legal tender for all debts, public charges, taxes and dues’ and does not impose any restrictions. This difference in legislation became evident in a notable incident in 2017 involving a dissatisfied debtor in Virginia who managed to pay a tax bill amounting to approximately \$3,000 to the Department of Motor Vehicles (DMV) using 300,000 pennies, weighing approximately 726 kg. To transport the coins, the debtor enlisted the help of 11 individuals and utilized five wheelbarrows. Subsequently, the staff at the DMV had to dedicate seven hours to counting the coins.<sup>15</sup>

### C Situations Where a Debt Has Not Been Incurred

The law is different in situations where a debt has not been incurred between two counterparties.<sup>16</sup> In these cases, the parties are unilaterally permitted to choose the method of payment that suits their business needs. Australia has followed the English tradition of permitting freedom of contract and party autonomy in contractual dealings, which provides contracting parties with significant leeway to negotiate their own terms and conditions, including the payment method.

The party autonomy approach is confirmed on the RBA’s website, which says that:

Australian banknotes and coins do not necessarily have to be used in transactions and *refusal to accept payment in legal tender banknotes and coins is not unlawful*... It appears that a provider of goods or services is at *liberty to set the commercial terms* upon which payment will take place *before* the ‘contract’ for supply of the goods or services is entered into ... If a provider of goods or services specifies other means of payment *prior* to the contract, then there is usually *no obligation for legal tender to be accepted* as payment.<sup>17</sup>

13. Daniel Piotrowski, ‘Adelaide Man Tries to Pay City Council Parking Fine with 5c Pieces’, *news.com.au* (online, 16 September 2013) <<https://www.news.com.au/finance/money/adelaide-man-tries-to-pay-city-council-parking-fine-with-5c-pieces/news-story/d2fff183de9eb57b9e73e58db2d266cb>>. Nevertheless, there may be situations where the parties decide to contract out of the limitation in s 16 of the *Currency Act* (n 8), as a creditor may want to receive more than \$20 in coins, particularly if they want small change for their cash intensive business.

14. 31 US Code § 5103 (1982).

15. ‘US Man Pays Tax Bill Using Five Wheelbarrows of Coins’, *BBC* (online, 12 January 2017) <<https://www.bbc.com/news/world-us-canada-38603615>>.

16. For instance, Black’s Law Dictionary distinguishes between a ‘payment of debts’ from a ‘payment of goods [and services]’, which would cover situations where a debt has not been incurred. ‘Legal tender’ is ‘[t]he money (bills and coins) approved in a country for the *payment of debts*, the *purchase of goods* and other exchanges for value’: Bryan A Garner (ed), *Black’s Law Dictionary* (Thomson Reuters, online 10<sup>th</sup> ed, 2014) (emphasis added).

17. ‘Legal Tender’ (n 11) (emphasis added). This rule has also been confirmed by Professor Benjamin Geva, who has said that: ‘While Nussbaum overlooks the creditor’s *right to stipulate in advance*, expressly or by implication, a mode of discharge that excludes payment by legal tender’: Benjamin Geva, ‘Legal Aspects Relating to Payment by E-Money: Review of Retail Payment System Fundamentals’ (2000–2001) *5 Yearbook of International Financial and Economic Law* 255, 261 (emphasis added).

The party autonomy approach has a drawback as it tends to prioritize the requirements of businesses over those of unbanked<sup>18</sup> and underbanked<sup>19</sup> individuals. This is due to businesses frequently possessing greater bargaining power than retail consumers, allowing them to dictate payment terms that align with their commercial interests. A consumer may be placed at a disadvantage where a retailer refuses to enter into a contractual relationship with a prospective customer for the sale of goods or services. For example, this may occur when the retailer has a ‘no cash’ or ‘card only’ policy, and the customer is unable to pay for goods or services with a cash substitute. In these situations, the retailer may refuse to enter into a contract with the purchaser who wants to pay in cash. For consumers located in regional Australia or the suburbs of larger cities, this could necessitate travelling a considerable distance to locate a retailer accepting cash to acquire necessary goods or services.

In regional Australia, for instance, the accessibility of alternative providers accepting cash may be limited. Consumers in these areas might face challenges in finding a retailer that accommodates their preferred payment method. This geographical limitation introduces a layer of asymmetry, wherein the consumer’s ability to exercise choice is constrained by the availability and proximity of businesses adhering to different payment policies. Similarly, in specific suburbs, the prevalence of a ‘no cash’ trend among retailers could further limit consumer choices. If most retailers in a particular area adopt similar no cash policies, the minority of consumers who prefer or rely on cash transactions may find themselves disproportionately disadvantaged. This localized convergence of payment preferences among retailers contributes to an imbalance that affects certain consumers more significantly than others.

The issue arises for the following reason. Under traditional contract law principles, a vendor and a customer must reach an agreement for there to be a contract between the parties. A valid agreement requires both an ‘offer’ and an ‘acceptance’ before a contract is formed. In the case of many goods and services sold in the retail context, the goods on display and the services advertised are regarded as an ‘invitation to treat’ and not as an offer being made by the retailer.<sup>20</sup> The goods on the shelves are not an offer that can be accepted by the customer simply by picking them up. Instead, the retailer is essentially saying to the customer at the check-out, ‘make me an offer’, which the retailer can then accept or reject. Therefore, the formation of a contract occurs only when the retailer agrees to accept the customer’s offer, and a retailer retains the discretion to decline the offer from a customer intending to pay with cash.

This understanding has been confirmed by Charles Proctor, who has written in the UK context that ‘[t]he legal tender status of notes only becomes relevant where there is a *debt* to be discharged,

18. The term ‘unbanked’ pertains to adults who either lack access to or choose not to utilize conventional financial services such as savings accounts, credit cards or personal checks: Allie Grace Garnett ‘What It Means to Be Unbanked or Underbanked’, *Encyclopedia Britannica* (online, 3 March 2023) <<https://www.britannica.com/money/unbanked-and-underbanked>>.

19. The term ‘underbanked’ describes individuals or families who possess a bank account but frequently depend on alternative financial services, such as money orders, check-cashing services and payday loans, instead of traditional loans and credit cards, to handle their finances and make purchases. This reliance on alternatives may stem from limited access to accessible and affordable banking services or a personal preference or necessity to utilize non-traditional financial options: *ibid*.

20. *Grainger & Sons v Gough* [1896] AC 325; *Fisher v Bell* [1961] 1 QB 394; *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401; *Partridge v Crittenden* [1968] 2 All ER 421.

and there can be no such debt if the other party has declined to enter into a contract of sale in the first place'.<sup>21</sup> Consequently, the freedom of contract approach permits retailers to successfully enforce 'no cash' policies in Australia without providing the customer with any recourse. A retailer can simply reject the customer's cash offer if the store has a 'no cash' policy.<sup>22</sup> The same would apply in a situation where a retailer refuses to provide a service, such as a haircut, to a customer who wants to pay with cash. In such situations, no contract or debt is established between the retailer and the customer, and the customer does not acquire a right to pay with cash.

Nevertheless, a customer may still be able to pay with cash in these situations if they are cunning. For instance, a customer could ignore the 'no cash' sign at a restaurant and consume the meal anyway — assuming the restaurant charges after consumption — thereby becoming a debtor and acquiring a right to pay with cash. A customer could also become a debtor in a supermarket by consuming the food right off the shelves and then paying for it in cash at the check-out. However, this is not a practical or realistic solution in most circumstances, and it may even lead to a retailer blacklisting a customer. For instance, you cannot consume raw chicken or use laundry detergent in the store, and you cannot consume the weekly groceries you want to buy for your family in one go. A court may also find that a customer who was aware of the 'no cash' policy has agreed to comply with this policy as an express or implied term of the contract.

In sum, the rule for when a debt has not been incurred permits a vendor to set the terms of the sales contract and specify the method of payment that will be accepted. This rule places many retailers in a powerful position by permitting them to choose the forms of payment that are accepted. A retailer can choose to have, for example, a 'cash only' policy or a 'no cash' policy.

### III A Move Toward Cashlessness

There are several valid reasons why an increasing number of retailers are introducing 'no cash' policies. First, some retailers are concerned about cash being stolen during robberies or by their own employees. For example, the National Retail Association has cited a global study from the New York Times published in 2009 which found that while the average shoplifter steals about USD \$438, an employee who steals will take on average \$1,890.<sup>23</sup> Furthermore, it has been reported by Money Australia that retailers in Australia lost \$750 million from employee theft in 2018.<sup>24</sup> Second, there is the risk for retailers of being handed a counterfeit note, and retailers must spend time training their employees to be able to identify fake notes.

Third, there are operational reasons for not accepting cash. As most retailers would like to maintain enough change in the various denominations to facilitate transactions with their customers, this requires the retailer to make regular visits to the bank to make cash deposits and withdrawals,<sup>25</sup>

21. Charles Proctor, 'Legal Tender under English Law' in Robert Freitag and Sebastian Omlor (eds), *The Euro as Legal Tender: A Comparative Approach to a Uniform Concept* (Walter de Gruyter GmbH, Berlin/Boston, 2020) 91, 93 (emphasis in original).

22. This is also the law in the UK and in most parts of the US: 'What is Legal Tender?', *Bank of England Knowledge Bank* (Web Page) <<https://edu.bankofengland.co.uk/knowledgebank/what-is-legal-tender/>>.

23. 'Internal Theft', *National Retail Association* (Web Page) <<https://www.nra.net.au/policy-advocacy/safe-retail/internal-theft/>>.

24. Trevor Moore, 'Employee Statistics' *MoneyAustralia* (Web Page, 11 August 2023) <<https://www.moneyaustralia.net/employee-statistics/>>. Although it is unclear what percentage of this figure is actual cash that is being stolen by employees.

25. Samuel Erlanger, 'A Cashless Economy: How to Protect the Low-Income' (2019) *Cardozo Law Review De-Novo* 166, 173–174.

which can be costly and time-consuming. Thus, some businesses have determined that accepting cash undermines their business operations and that it is too expensive and burdensome to accept.

Fourth, advances in technology, such as mobile payments, debit cards and credit cards and cryptocurrencies, and consumer trends have encouraged many retailers to accept newer forms of payment over cash. There are also some scenarios where it is just not feasible to accept cash because the retailer is using an electronic agent run by computer software and a smart contract<sup>26</sup> to execute the trade with the consumer. This would include a vending machine, an Automated Teller Machine (ATM), an online e-commerce platform such as Amazon, or an app on a smart device such as Uber or Airbnb.

The RBA has elaborated on this point on their website: ‘For example, some vending machines, parking metres and road toll collection points indicate by signs that they will not accept low denomination coins ... [or] any cash at all...’<sup>27</sup> ‘No cash’ policies have been justified in these situations because the machines are unmanned and online platforms do not have a physical presence, thereby making cash payments impracticable, if not impossible. Retailers may also fear that their machines will be the targets of robberies if they are heavily stocked with cash. Therefore, it is arguably a laborious task for retailers who execute their sales via an electronic agent to accept cash.

Fifth, businesses may increase their profits by going cashless because they can save time and process payments quicker at the check-out if the customer does not have to waste time looking for cash in their pockets and the cashier does not have to waste time counting the change. Cash alternatives, such as contactless card tap payments, could increase the number of sales of products and services to customers per year. Large retailers such as Starbucks and Amazon have calculated that ‘shaving seconds per order over a year can be more beneficial than the loss of cash buyers’.<sup>28</sup> Consequently, even though retailers incur a fee ranging from 0.5 per cent to 1.5 per cent of the transaction cost payable to the card issuer, which includes the banks, Visa and Mastercard, they still tend to prefer modern payment methods like card payments over cash.<sup>29</sup>

Finally, more businesses around the world introduced ‘no cash’ policies during the COVID-19 pandemic because of fear that the virus could be transmitted on the surface of notes and coins.<sup>30</sup> For these various reasons, there has been a downward trend in cash usage in many countries around the world, including Australia.

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26. ‘Smart contracts are coded programs that are used to automate pre-specified transactional events based on agreed upon contractual terms’. Mills, David, Kathy Wang, Brendan Malone, Anjana Ravi, Jeff Marquardt, Clinton Chen, Anton Badev, Timothy Brezinski, Linda Fahy, Kimberley Liao, Vanessa Kargenian, Max Ellithorpe, Wendy Ng and Maria Baird, ‘Distributed Ledger Technology in Payments, Clearing and Settlement’ (Finance and Economics Discussion Series No 2016–095, Board of Governors of the Federal Reserve System) 14.

27. ‘Legal Tender’ (n 11).

28. Erlanger (n 25) 174.

29. Many retailers pass these costs onto their customers (known as a ‘surcharge’), thus resulting in higher transactions costs for consumers: ACCC, ‘Card Surcharges’ (Web Page) <<https://www.accc.gov.au/consumers/pricing/card-surcharges>>.

30. ‘One reason for this dramatic shift in payment preferences and behaviour is community concern about transmission of the virus via banknotes’: Guttman et al, ‘Cash Demand During COVID-19’ (Reserve Bank of Australia Bulletin, March 2021) <<https://www.rba.gov.au/publications/bulletin/2021/mar/cash-demand-during-covid-19.html>>; see further Raphael Auer, Giulio Cornelli and Jon Frost, COVID-19, *Cash, and the Future of Payments* (BIS Bulletin, 3 April 2020) <<https://www.bis.org/publ/bisbull03.pdf>>.



## A Cash Usage Trends

There is evidence that some countries are on the verge of going cashless. For example, ‘Sweden and Norway are prominent examples of jurisdictions where cash is used for a relatively small proportion of consumer payments’ due to technological advances.<sup>31</sup>

As of 2018, Sweden’s outstanding value of bills and coins in circulation sat at one percent of Swedish gross domestic product (GDP). Most Swedes use either cards or Swish, the instant-payment application created by Sweden’s seven big banks and which has been downloaded by more than half of Sweden’s population of around ten million. Swedish banks feel the burden of cash... and have been dismantling ATMs and storing less cash on-site; around half of Sweden’s banks already do not accept cash deposits.<sup>32</sup>

There is also evidence in other jurisdictions indicating that the adoption of new digital payment methods has led to a decline in cash usage. In Kenya, M-Pesa has provided a cheap and easy way for 30 million (mainly ‘unbanked’)<sup>33</sup> customers to store and transfer digital money on a basic mobile phone since 2007.<sup>34</sup> Furthermore, ‘China is another example of a country in which there has been a marked increase in the relative use of electronic payment methods, facilitated by the widespread adoption of digital wallet services’ and a new rCBDC.<sup>35</sup>

In Australia, the RBA has reported that the use of cash for day-to-day payments has been in decline since the COVID-19 pandemic commenced in 2020.

The decline of transactional cash use accelerated over the three years to 2022, with cash accounting for 13 per cent of the total number of consumer payments, compared to 27 per cent in 2019... When measured by the value of consumer payments, the share of total payments made with cash declined more

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31. Tanya Livermore et al, ‘The Evolution of Consumer Payments in Australia: Results from the 2022 Consumer Payments Survey’ (Research Discussion Paper, Reserve Bank of Australia, November 2023) 6.
  32. ‘[C]ash is being squeezed out so quickly-with half the nation’s retailers predicting they will stop accepting bills before 2025 that the government is recalculating the societal costs of a cash-free future’: Erlanger (n 25) 180 at fn 105; Ryan Browne, ‘People in Sweden Barely Use Cash-and That’s Sounding Alarm Bells for the Country’s Central Bank’, *CNBC* (Online, 3 May 2018) <<https://www.cnbc.com/2018/05/03/sweden-cashless-future-sounds-alarm-bells-for-the-central-bank.html>>.
  33. The central bank of Kenya conducted a survey in 2016 estimating that 41 per cent of the Kenyan population had a bank account: George Obulutsa and Jan Harvey, ‘M-Pesa Helps Drives Up Kenyans’ Access to Financial Services — Study’, *Reuters* (Online, 3 April 2019) <<https://www.reuters.com/article/kenya-banking-idUSL8N21L2HK>>. Nevertheless, there is also evidence that cash is still widely used in Kenya. ‘During the first year of the COVID-19 pandemic, Kenya experienced an increase in the precautionary demand for cash as a store of value amid a crisis... Currency in circulation in Kenya went from KES246.78 billion (USD2.19 billion) in March 2020 to KES281.586 billion (USD2.49 billion) in March 2021, an increase of 14.1 per cent’: Manuel Bautista-González, ‘Cash in Kenya During the First Year of the Pandemic’, *Cash Essentials* (Online, 17 December 2021) <<https://cashessentials.org/cash-in-kenya-during-the-first-year-of-the-covid-19-pandemic/>>. Furthermore, a survey conducted by Visa ‘showed that an estimated (71 per cent) of businesses in Kenya use cash as a means of payment’: Victor Oluwole, ‘Kenya Ranks First in the Use of Digital Payments Across Africa, According to VISA’, *Business Insider Africa* (Online, 4 September 2022) <<https://africa.businessinsider.com/local/markets/kenya-ranks-first-in-the-use-of-digital-payments-across-africa-ahead-of-south-africa/pm35j1e>>.
  34. A basic mobile phone, as opposed to a smart phone, permits a user to transfer digital value over a basic phone connection (eg, by sending an SMS), as opposed to requiring a more sophisticated and expensive 3G, 4G or 5G connection. ‘Kenya has a population of about 50 million which means nearly the entire adult population operates on Safaricom’s mobile money platform M-Pesa’: ‘Safaricom Crosses 30 Million Monthly Active M-PESA Customers’, *Safaricom* (Online, 10 March 2022) <<https://www.theeastafrican.co.ke/tea/business/safaricom-m-pesa-crosses-30-million-active-users-in-kenya-3743258>>.
  35. Livermore et al (n 31) 6.

modestly from 11 per cent to 8 per cent. For in-person transactions, Australians halved their share of cash payments by number from 32 per cent to 16 per cent.<sup>36</sup>

The decreased use of cash during the pandemic can be attributed to several factors, including a decreased issuance of low-value notes — mainly \$5 and \$10 notes — by the RBA, a sharp decline in the number and value of withdrawals from ATMs due to closures of ATMs and bank branches,<sup>37</sup> a shift toward online transactions due to lockdowns and hygiene concerns with handling cash.<sup>38</sup>

More important, the RBA has reported that an increasing number of retailers are refusing to accept cash as a method of payment and are going cashless.

An RBA survey of retail businesses during September 2020 identified a small but statistically significant decline in cash acceptance... Although the vast majority of retail businesses continued to accept cash during the pandemic, the acceptance rate decreased by 3.6 percentage points to 95.8 per cent, compared with near-universal cash acceptance in February 2020. As such, the merchant and consumer surveys both highlight a decline in cash acceptance. Note that a small decline in cash acceptance by a few merchants could potentially lead to a larger decline in the ability for people to use cash.<sup>39</sup>

The data suggest that half of merchants that accepted cash in April 2022 planned on actively discouraging cash payments or displaying signage to that effect at some point in the future.<sup>40</sup>

The downward trend in the *acceptance* of cash by retailers in Australia is concerning. The RBA found in a survey in 2022 that ‘some people still use cash for a significant share of their in-person payments’.<sup>41</sup> ‘For example, around 5 per cent of [the surveyed] participants used cash for all their in-person transactions (‘all cash users’) in 2022...’.<sup>42</sup> Around 60 per cent ‘high cash users’ said that they would experience a ‘major inconvenience’ or ‘genuine hardship’ if cash became hard to use or access.<sup>43</sup> This means that some people who are truly cash dependent may already be struggling to purchase essential goods and services, with the problem likely getting worse in the near future. Furthermore, there is still a significant amount of AUD cash in circulation. ‘According to the RBA,

36. Ibid 7.

37. ‘The number of ATM withdrawals fell by around 50 per cent in the first 2 months of the pandemic in Australia. By the end of the year, withdrawals were still 20 per cent lower than before the pandemic in February 2020. The average withdrawal size increased at a slightly faster pace than its trend increase, which points to some demand for cash as a store of wealth. Access to cash also declined due to closures of ATMs and bank branches’: Guttman (n 30) 3 <<https://www.rba.gov.au/publications/bulletin/2021/mar/cash-demand-during-covid-19.html>>. The Senate launched an inquiry into bank branch closures in regional Australia in 2023: ‘Bank Closures in Regional Australia’, *Parliament of Australia* (Web Page) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Rural\\_and\\_Regional\\_Affairs\\_and\\_Transport/BankClosures](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Rural_and_Regional_Affairs_and_Transport/BankClosures)>.

38. Livermore et al (n 31) 9.

39. Guttman et al (n 30) 4 citing Luc Delaney, Nina McClure and Richard Finlay, ‘Cash Use in Australia: Results from the 2019 Consumer Payments Survey’ (Reserve Bank of Australia Bulletin, June 2020) <<https://www.rba.gov.au/publications/bulletin/2020/jun/pdf/cash-use-in-australia-results-from-the-2019-consumer-payments-survey.pdf>>.

40. Rochelle Guttman, Tanya Livermore and Zhan Zhang, ‘The Cash use Cycle in Australia’ (Reserve Bank of Australia Bulletin, March 2023) 47.

41. Livermore et al (n 31) 10.

42. Ibid 10.

43. Livermore et al (n 31) 11.

more than 2 billion banknotes are in circulation with a value of more than \$102 billion, which amounts to around \$4,000 in cash per Australian'.<sup>44</sup>

#### IV Reasons for Prohibiting 'No Cash' Policies

'No cash' policies have a disproportionate negative impact on minors and adults who are unbanked and underbanked because it can restrict their access to essential goods and services. A report published by the Centre for Social Impact for National Australia Bank in 2014 estimated that 16.9 per cent (approximately 3 million people) of the adult population in Australia were either 'fully excluded' (181,000 people) or 'severely excluded' (2,859,000 people) from financial services in 2013.<sup>45</sup>

[T]here are a large percentage of Australians — older people, homeless, mentally ill, technology-illiterate people, who still need the choice of cash. In April [2020], the Australian Banking Association (ABA) reported there were more than 500,000 customers who actively used a passbook account or transaction account with no linked debit card, meaning they are heavily reliant on cash... Australia is a big country with wide open spaces. Making digital transactions means having reliable access to mobile or internet services which just doesn't exist in some regional and remote areas. This means that those living in these areas would be disadvantaged.<sup>46</sup>

More recent figures published in the ACOSS/UNSW Poverty in Australia 2022 Report found that '[m]ore than one in eight people in Australia (13.4 per cent) lived below the poverty line in 2019–20... That amounts to 3,319,000 people'.<sup>47</sup> The figures are even more alarming in First Nations communities, which are severely underrepresented in financial services. It is estimated that 75 per cent of First Nations people living in the Northern Territory are unbanked or underbanked and have difficulty receiving financial services.<sup>48</sup>

Therefore, it is argued that the Commonwealth should adopt a policy of 'mandatory acceptance' that requires retailers to accept cash payments. This policy, far from being a new idea, has historical roots dating back to the Mongol Empire in the 13<sup>th</sup> century CE, and as discussed below, has already been adopted in other jurisdictions. This policy will ensure that cash-dependent citizens are able to pay for their goods and services using cash until a reasonable alternative method for making

44. Nicola Heath, Lara Heaton and Marc Fennell, 'Australia's Transition to a Cashless Society Raises Concerns About Financial Exclusion, Privacy and Safety', *ABC News* (Online, 23 August 2023) <<https://www.abc.net.au/news/2023-08-23/cashless-society-financial-exclusion-safety-privacy-concerns/102706718>>; Reserve Bank of Australia, *Reserve Bank of Australia Annual Report — 2022* (Report, 2022) <<https://www.rba.gov.au/publications/annual-reports/rba/2022/banknotes.html>>.

45. 'This figure comprises 1 per cent of adults who were fully excluded (they had no financial services products) and 15.9 per cent of adults who were severely excluded (they only had one financial services product)': Centre for Social Impact for National Australia Bank, *Measuring Financial Exclusion in Australia* (Report, April 2014) <<https://www.nab.com.au/content/dam/nabrdw/documents/reports/financial/2014-measuring-financial-exclusion-in-australia.pdf>>.

46. Sonia Hickey, 'Government's Plan to Criminalize Cash Payments Has Been Defeated' *Sydney Criminal Lawyers* (Online, 7 December 2020) <<https://www.sydneycriminallawyers.com.au/blog/governments-plan-to-criminalise-cash-payments-has-been-defeated/>>.

47. Peter Davidson, Bruce Bradbury and Melissa Wong, *Poverty in Australia 2022: A Snapshot* (ACOSS/UNSW Partnership Report, October 2022) 9 ('*ACOSS/UNSW Report*').

48. Dean Foley, 'The Reserve Bank of Australia Has No Real Solutions to Solve First Nations Access to Capital', *National Indigenous Times* (Online, 13 June 2022) <<https://nit.com.au/13-06-2022/3258/the-reserve-bank-of-australia-has-no-real-solutions-to-solve-first-nations-access-to-capital>>.

payments is provided by the government. The following section provides other reasons why ‘no cash’ policies should be prohibited.

### *A Cash Provides a Benefit to Society*

The argument posits that government-issued legal tender (ie, AUD cash) is created for the public benefit as a form of public good.<sup>49</sup> Given the Commonwealth’s constitutional authority over legal tender legislation and the use of taxpayer funds to print and mint cash, it bears the ultimate responsibility to ensure that retailers accept cash for transactions involving essential goods and services. In the words of the great economist John Maynard Keynes:

[I]t is a peculiar characteristic of money contracts that *it is the State or community*, not only which enforces delivery, but also which decides what it is that must be delivered as a lawful or customary discharge of a contract which has been concluded in terms of the money-of-account. *The State*, therefore, comes in as the authority of law which enforces the payment of the thing which corresponds to the name or description in the contract. But it comes in doubly when, in addition, it claims the right to determine and declare *what thing* corresponds to the name and to vary its declaration from time to time — when, that is to say, it claims the right to re-edit the dictionary. The *right is claimed by all modern States* and has been so claimed for some four thousand years at least.<sup>50</sup>

First, cash provides a benefit to members of the public because it facilitates commerce by providing a simple and unrecorded method for making payments. Second, cash is the only form of legal tender that currently exists in Australia. As cash is created and supplied by the government and it is paid for by taxpayers, it is the responsibility of the government to ensure that there are protections in place to ensure that cash can be used by members of the public to purchase essential goods and services.

Third, members of the public should arguably have an option to keep their daily transactions private from the government, from their bank and from their family members, provided these transactions do not violate the law, such as engaging in tax evasion, money laundering or purchasing illegal goods and services. The unrecorded nature of cash transactions promotes privacy rights and autonomy of the individual, as a person can freely engage in certain transactions with peace of mind and without the worry of leaving a paper-trail of their entire transaction history. For instance, a person may not want for there to be a record that they drank alcohol at a pub, bought a lottery ticket or gambled at the casino. Most other forms of payment, such as credit or debit cards, direct deposits or cryptoassets, leave a digital footprint and generate a digital record, which can enhance risks of a breach of privacy and give rise to cybersecurity risks.

Fourthly, in addition to cheques, cash represents the sole ‘offline’ payment method, as it can be exchanged physically without the need for any supplementary devices, such as a phone, access to electricity or an internet connection. In contrast, electronic fund transfers, debit and credit cards, as

49. However, according to the economist’s definition, cash would not be classified as a ‘public good’, as economists define a public good as something that is ‘non-rivalrous’ and ‘non-excludable’. Thus, the benefits that the public receive from, for example, national defence and public health initiatives are regarded as public goods because an individual cannot exclude other members of the public from receiving their benefits. On the other hand, cash can be exclusively possessed by the owner of specific notes and coins: ‘Public Goods’, *Stanford Encyclopedia of Philosophy* (Web Page, 21 2 July 2021) <<https://plato.stanford.edu/entries/public-goods/#ExamPublGood>>.

50. John Maynard Keynes, *A Treatise on Money. The Pure Theory of Money* (Basingstoke: Macmillan, 1971) 4 (emphasis added).

well as cryptoassets, are categorized as ‘online’ payment methods, typically requiring an electronic device connected to either a phone network or the internet for transaction processing. Although card payments may be conducted offline, for instance, by copying the information on the card (ie, taking an imprint of the card), this process may introduce settlement risk, as the payment may not be final until a later date. This can result in payment failure due to factors such as insufficient funds, insufficient credit or card cancellation before the payment is processed. Consequently, cash emerges as a reliable means of conducting transactions during power outages caused by natural disasters, cyber-attacks or software malfunctions.

Finally, some people favour cash payments for their straightforwardness and immediate refund benefits, particularly in situations involving returns or cancellations. For example, customers who pay in cash for items such as clothes that do not fit or services they wish to cancel can often receive a cash refund on the spot at the retailer. This direct and prompt return of funds contrasts with the delays and complications sometimes associated with card payments, where refunds via debit or credit cards can take weeks to process and appear in the customer’s bank account. Moreover, this delay necessitates that the consumer vigilantly monitor their account for the refund, a task made more burdensome by instances where banks fail to promptly credit the refunded amount. Therefore, cash transactions are the preferred option for those seeking simplicity and quick resolution in their transactions.

I *Fiat Currency*. The cash issued by the Australian government is ‘fiat currency’.<sup>51</sup>

A fiat currency is one that is ‘backed’ by a government. It is legal tender within the jurisdiction of the backing government but its value is not determined by reference to any commodity. A fiat currency has value only because the relevant government uses its power to enforce the currency’s use or because the exchanging parties agree on its value. The value of a fiat currency at any one time is usually determined by both factors.<sup>52</sup>

This means that AUD notes and coins possess no inherent value beyond the material they are made of, such as the metal they are minted from or the polymer they are printed on, since they lack backing by any valuable commodities like gold or silver.<sup>53</sup> Its value depends on the issuing government and the courts making laws that mandate its acceptance from members of the public for daily usage. Its value also depends on members of the public trusting that the issuing government will implement responsible economic, monetary and fiscal policies to maintain the domestic currency’s value. Professor Clayton P Gillette has highlighted that: ‘If currency, especially currency not backed by valuable commodities, is predicated on trust, then the absence of trust should dilute the acceptability of currency unless significant legal consequences follow from the refusal to take it ...’<sup>54</sup>

In Australia, the holder of a particular AUD note or coin essentially has a claim against the Commonwealth for the face value of the note or coin. In theory, this suggests that an individual could

51. ‘Paper money that, in contrast to hard currency, is not backed by reserves [of gold and silver] but instead derives its value from government regulation or law declaring it legal tender’: ‘Fiat Money’, *Black’s Law Dictionary* (Web Page) <<https://thelawdictionary.org/fiat/>>. ‘Fiat’ translates from Latin as ‘let it be done’.

52. Thomson Reuters, Law Relating to Banker and Customer (31 May 2022) [4.3235], Law Relating to Banker and Customer, Commentary, Payment, Credit and Exchange Mechanisms, Payment and Payment Systems, Particular Payment Systems, Digital Currency, Currency: Fiat and Representative, Last Review: 31/05/2022 (online). Conversely, ‘[r]epresentative currency represents a claim on a commodity...’.

53. Clayton P Gillette, ‘American Legal Tender Rules and Risk Allocation’ in Robert Freitag and Sebastian Omlor (eds), *The Euro as Legal Tender* (Walter de Gruyter GmbH, Berlin/Boston, 2020) 106.

54. *Ibid* 118.

approach the RBA to swap a \$100 note for another of the same denomination. However, in practice, such exchanges typically occur at a commercial bank, serving as an intermediary for the RBA. This is a legal fiction created so that members of the public can confidently accept the notes and coins issued by the RBA and the RAM. Therefore, a loss of public confidence in the ability to use AUD cash for transactions may lead to a decline in its value as legal tender and erode trust in the government.

Fiat currencies such as Australian cash provide a public benefit because cash can be used by individuals and businesses as a store of value during times of economic uncertainty, as was demonstrated during the pandemic. Cash can also be used to facilitate commerce between businesses and consumers. Hence, it is essential for the Commonwealth to provide a legal framework that supports and backs the usage of the cash that it issues to the public for everyday retail transactions. This is necessary to create public trust in cash, as it is no longer possible for individuals to redeem a tangible commodity such as gold from the Commonwealth in exchange for their cash. Consequently, the Commonwealth is not only legally obligated to accept cash for the settlement of 'public debts' like fines and taxes, but there should also be a definitive legal mandate for retailers to accept cash to settle 'private debts' and for the purchase of essential goods and services. This ensures that cash can continue to circulate freely as money in the community.

A government that issues fiat currency owes the public an obligation to ensure it is accepted for domestic purchases. In the case of the Commonwealth, it is argued that it has a constitutional obligation to provide a publicly funded payment mechanism to the Australian public, as it has been given an exclusive power in the Constitution to make laws with respect to legal tender. As long as the government keeps printing and minting cash and leaving existing notes and coins in circulation, there should be laws that guarantee its usage, or else the public could lose faith in the AUD.

If the Commonwealth decides to remove AUD notes and coins from circulation in the future and substitute physical cash with a new form of financial technology, such as an rCBDC or a mobile money related payments platform, it will also need a clear set of laws to support their usage. It is unreasonable, and possibly unconstitutional, for the government to stop supporting the usage of physical cash and continue to favour a party autonomy approach without some legal protections for retail consumers.

In sum, cash is intended to provide a benefit to the public. Since fiat currency is not backed by anything but a government promise, the Commonwealth should enact measures to ensure that AUD cash continues to function as money, or else the government's promise is meaningless, particularly to those individuals who are unbanked and are cash dependent.

## ***B The Downsides of Accepting Cash are Minimal***

It is argued that retailers who provide essential goods and services on a face-to-face basis should be required to accept cash from consumers because the disadvantages associated with accepting cash are minimal for most retailers. The benefits to society for prohibiting 'no cash' policies outweigh any disadvantages experienced by retailers.

First, a significant number of customers, especially in most urban areas in Australia, opt for cash-alternative payment methods, reducing the need for retailers to handle substantial amounts of cash in their stores and alleviating concerns about potential robberies. Additionally, retailers can implement a secure cash management system, such as a safety deposit box, where cash can be deposited but cannot be withdrawn without the owner's or a security company's key. Moreover, they have the option to engage a reliable cash collection service like Armaguard to regularly retrieve the accumulated cash on-site, thereby preventing cash build-up and minimizing the risk of the store becoming a target for robberies.

Second, retailers should not be more concerned that having cash on site will result in thefts from their employees. The risk of employee theft remains consistent regardless of the presence of cash, as determined employees are equally prone to stealing store inventory. The literature on employee theft suggests that individuals inclined to steal are opportunistic and may resort to stealing inventory if cash transactions are not an option. Contrary to the belief that accepting cash increases the risk of theft, implementing a cashless system does not necessarily deter theft; it merely changes the form of the stolen items. Additionally, stealing cash leaves a more visible trail of evidence compared to stealing inventory. When a cash transaction occurs, there is a direct exchange involving the customer, who becomes a potential witness. This creates an additional layer of accountability, as the customer can verify the exchange of cash for goods or services. In the case of stolen goods, the absence of an immediate and tangible record makes detection more challenging. The discrepancy between the goods sold and the lack of corresponding revenue might not be immediately apparent without a thorough inventory check, providing a potential window for theft to go unnoticed.<sup>55</sup>

Thus, transitioning to a cashless system will not effectively discourage employee theft. A cost-effective and straightforward solution to monitor employees is to install video cameras on the premises. It is not overly burdensome for retailers to require them to accept cash from consumers for the purchase of essential goods and services. Furthermore, the predominance of customers opting for card payments renders cash transactions exceedingly rare, significantly reducing the likelihood of accumulating cash on-site.

Third, retailers should leverage a cash mandate by offering ‘cash back’ services to customers, as is already offered at some retailers. This approach is particularly beneficial for larger retailers, and it helps address the reduction in ATMs by enabling customers to obtain cash directly through card transactions at retail locations. Additionally, it minimizes the need for frequent bank deposits, as retailers can provide cash back to customers when they have accumulated substantial cash on site. This strategy not only improves cash access for customers but also streamlines cash management for retailers.

### C Publicly Funded Alternatives to Cash

A mandatory acceptance policy can be justified because there are currently no publicly funded alternatives to cash. A non-exhaustive list of publicly funded cash alternatives include a rCBDC, an M-Pesa-style payment system that is created by the government and works using the existing telephone network, or machines that convert cash into a digital format that can be loaded onto a Stored Value Card (SVC).<sup>56</sup> However, this suite of alternatives should be implemented to complement cash payments rather than replace payments altogether.

55. ‘Internal Theft’, *National Retail Association* (Web Page) <<https://www.nra.net.au/policy-advocacy/safe-retail/internal-theft/>>.

56. The government also needs to ensure that SCVs are not being used for money laundering and tax evasion purposes, as it is easier to transport \$100,000 on an SVC than the equivalent in cash. In 2016, AUSTRAC published a report that there were 10 million active SVCs with a stored value of \$1.5 billion; Australian Transaction Reports and Analysis Centre (AUSTRAC), *Stored Value Cards: Money Laundering and Terrorism Financing Risk Assessment* (Report, 2017) <<https://www.austrac.gov.au/sites/default/files/2019-06/stored-value-cards-risk-assessment.pdf>>. Under the current *AML/CTF Act* (n 3), entities that issue SVCs have a legal obligation to submit a Transaction Threshold Report (*AML/CTF Act* (n 3) s43) for amounts over \$10,000, and a Suspicious Matter Report (SMR) (*AML/CTF Act* (n 3) s41) if there is a reasonable suspicion of money laundering, terrorist financing or tax evasion. The same report found that 17 entities submitted 916 SMRs with a total value of \$72.3 million in 2016: 7. Although this is encouraging, it is unclear whether entities are reporting all suspicious transactions. In the aftermath of the Wirecard scandal in Germany in 2020, it was reported that criminals were able to launder money using SVCs that could store hundreds of thousands of euros on a single card. ‘The Netflix documentary of the Wirecard SKANDAL!’, *FT Professional* (Web Page) <<https://enterprise.ft.com/en-gb/blog/the-netflix-documentary-on-the-wirecard-scandal/>>. Therefore, AUSTRAC will need to keep monitoring that retailers are complying with the AML/CTF laws.

Although the RBA ‘is actively researching... [rCBDC] as a complement to existing forms of money’, it will likely be many years before Australia creates its own rCBDC.<sup>57</sup> Therefore, cash will remain the only publicly funded payment method and sole form of legal tender available to the public for many years to come.

Implementing an M-Pesa-style payment system that allows its users to transfer money by sending an SMS<sup>58</sup> utilizing the existing telephone network in Australia holds the potential for numerous benefits. One of the primary advantages lies in the accessibility it offers to a broader segment of the population, irrespective of smartphone ownership. By leveraging the ubiquitous nature of mobile phones, even those without smartphones could seamlessly participate in digital transactions. This inclusivity promotes financial access for a wider demographic, reducing the digital divide. Moreover, such a system could enhance financial inclusion in remote or underserved areas where access to traditional banking infrastructure might be limited. The estimated high mobile phone ownership rate in Australia, recorded at 89.9 per cent in 2019<sup>59</sup> and anticipated to be higher in 2024, underscores the feasibility and potential reach of an M-Pesa-style platform.

However, there are potential downsides that must be considered. One significant challenge is the vulnerability to network outages and electricity failures, which could disrupt the seamless functioning of the payment system. Dependence on the existing telecommunications infrastructure makes the system susceptible to technical glitches and power outages caused by natural disasters, potentially hindering users’ ability to make transactions in real-time.

Another notable drawback is the exclusion of individuals who fall within the approximately 10 per cent of the population that do not own mobile phones or lack consistent access to connectivity or electricity. This demographic, often marginalized or residing in remote areas, may face difficulties participating in the digital payment ecosystem. The system’s success hinges on widespread mobile phone ownership and reliable network connectivity, potentially leaving a portion of the population underserved and reliant on traditional cash transactions. Additionally, concerns related to data security and privacy may arise, as digital transactions involve the exchange of personal and financial information.

Another option is for the Commonwealth to install or subsidize ‘reverse ATMs’ at retailers refusing to accept cash. ‘Reverse ATMs’ are machines that convert cash into a token or SVC. ‘Smart cards with a stored value function have been developed as electronic payment devices which can be used as a substitute for cash in everyday retail transactions’.<sup>60</sup> This type of technology already exists for public transport in Australia, as this is an industry where it is extremely burdensome to handle

57. ‘Central Bank Digital Currency’ *Reserve Bank of Australia* (Web Page) <<https://www.rba.gov.au/payments-and-infrastructure/central-bank-digital-currency/>>. A CBDC is a digital form of a national currency issued by a country’s central bank. Unlike physical banknotes and coins, CBDCs exist exclusively in digital format, often stored in electronic wallets or accounts. The RBA has recently published a report concluding that: ‘There is no clear public interest case to issue retail CBDC in Australia as yet...’, and they will revisit the issue of creating a rCBDC in 2025. Reserve Bank of Australia and Department of the Treasury, *Central Bank Digital Currency and the Future of Digital Money in Australia* (Report, September 2024), 3. A discussion of CBDCs is outside of the scope of this article.

58. SMS stands for ‘Short Message Service’. It is a text messaging service that allows short messages, typically up to 160 characters, to be sent between mobile devices. SMS has been a widely used communication method for sending brief messages quickly and efficiently.

59. Roy Morgan, ‘Australians are bringing their own phone to new mobile plans’, (Press Release 8032, 1 July 2019) <<https://www.roymorgan.com/findings/australians-are-bringing-their-own-phone-to-new-mobile-plans>>.

60. Andrew Galvin, ‘The Legal Nature of Stored Value Card Transactions’ (1999) 10(1) *Journal of Banking and Finance Law and Practice* 54, 54–55.



cash. However, these machines are costly to install and require constant maintenance. Deloitte has estimated that each new ATM costs between \$15,000 and \$65,000, with a monthly cost of \$165 to maintain.<sup>61</sup> Therefore, it is much cheaper for the government to implement a policy to ban ‘no cash’ policies and require retailers to cover the cost of purchasing and installing reverse ATMs if they would like to go cashless.

The government must also provide an option for making ‘offline’ payments in the event that the electronic payments system goes down at a national level due to a cyber-attack, a power outage or a software issue. For example, a major outage occurred in October 2022 when the Osko inter-bank payment system that connects 85 major banks in Australia and permits near-instantaneous electronic fund transfers went offline for four hours due to a software issue.<sup>62</sup> The government must also ensure the availability of sufficient offline payment options at the regional level in the event of disruptions, such as power outages or damage to the telecommunications network caused by natural disasters. At the moment, cash and cheques are the only form of offline payment that exist in Australia.

In conclusion, the Commonwealth should institute a policy mandating the acceptance of cash by retailers in Australia due to the absence of any publicly funded payment alternatives currently available to the public, particularly one that operates seamlessly in offline environments.

## V Options for Prohibiting ‘No Cash’ Policies

There are three different ways to prohibit ‘no cash’ policies in Australia. First, a ‘no cash’ sign may be considered an unfair contract term under consumer laws. Second, placing restrictions on the use of cash may negatively affect certain groups of people in Australia, and hence it may be a form of discrimination. Third, the government could pass legislation that bans ‘no cash’ policies and requires retailers to accept cash up to a certain amount for the payment of essential goods and services.

### A Consumer Laws

‘No cash’ policies could be prohibited under existing consumer protection laws in Australia. This is the approach followed in Norway and Denmark, where ‘there exists consumer legislation restricting the possibility of waiving the obligation to accept cash’<sup>63</sup> for retailers. Schedule 2 of the *Competition and Consumer Act 2010* (Cth),<sup>64</sup> which contains the main provisions of the *Australian Consumer Law* (ACL), provides protection against misleading or deceptive conduct, unconscionable conduct, unfair contractual terms, false representations and other unfair practices in connection with the supply of goods, services and land. The ACL is designed to protect vulnerable and unsophisticated consumers from sophisticated retailers who often have superior bargaining power for setting the contractual terms in the form of standard form contracts. In the context of banning ‘no cash’ policies, two specific provisions of the ACL are particularly relevant.

61. Dan Freed and Olivia Oran, ‘Hauling cash, replacing cards, fixing ATMs: the stubborn costs banks can’t erase’ *Reuters* (Web Page, 19 July 2019) <<https://www.reuters.com/article/us-usa-banks-expenses-idUSKCN0ZZ0AO>>.

62. Josh Taylor, ‘Australian banks hit with payment transfer outage as RBA blames technical error’, *The Guardian* (online, 13 October 2022) <<https://www.theguardian.com/australia-news/2022/oct/13/australia-banks-osko-fast-payment-transfer-outage-reserve-bank-rba-technical-error>>.

63. Sveriges Riksbank (Central Bank of Sweden), Petition to the Riksdag, The State’s Role on the Payment Market 2018/19: RB3 (16 April 2019) 11.

64. *Competition and Consumer Act 2010* (Cth) sch 2 (‘*Australian Consumer Law*’ or ‘ACL’).

First, section 20 of the ACL states that '[a] person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time'. A court or tribunal could find that a 'no cash' policy amounts to unconscionable conduct if there is a power imbalance between a particular retailer and a retail consumer. A refusal to accept cash in a retail situation could be found to be 'clearly unfair or unreasonable'<sup>65</sup> because a consumer is usually at a disadvantage when it is time to negotiate and set the terms of the contract for essential goods and services. It is also unreasonable for a retailer to refuse cash, given that accepting cash does not pose any significant disadvantages for most retailers, as highlighted earlier.

Second, section 23(1)(b) of the ACL prohibits unfair terms in 'consumer contracts'<sup>66</sup> that are 'standard form contracts'. According to the Australian Competition & Consumer Commission (ACCC), a 'standard form contract is one that has been prepared by one party to the contract and where the other party has little or no opportunity to negotiate the terms — that is, it is offered on a 'take it or leave it' basis'.<sup>67</sup> Standard form contracts are used by businesses for the uniformity, efficiency and administrative ease that they provide in deal-making. The inherent efficiency of these contracts results in their being unilaterally drafted by the retailer without any input from consumers. Consequently, they could be classified as 'contracts of adhesion' if they include unfair terms that have not been negotiated with the consumer.

Under the ACL, a term that is considered unfair in a standard form contract will be void.<sup>68</sup> The ACCC and the courts have regarded a term to be 'unfair' where: (1) it causes a significant *imbalance* in the parties' rights and obligations under the contract; (2) it is *not reasonably necessary to protect the legitimate interests* of the party who would be advantaged by the term and (3) it *causes detriment* (financial or otherwise) to a party if it were to be relied on.<sup>69</sup> Retailers with 'no cash' policies are generally offering their goods and services on a 'take it or leave it' basis, as the retailer is notifying prospective customers — generally with a sign on the door — that they refuse to transact with a customer who wants to pay with cash.

A 'no cash' policy could be an unfair term in a standard form contract for the following reasons: (1) a retail customer is at a significant power *imbalance* compared to the retailer because they are typically not provided with an opportunity to negotiate the payment term; (2) a 'no cash' policy is *not reasonably necessary to protect the legitimate interests* of the retailer, as most businesses will not be placed at a disadvantage for accepting cash and (3) a 'no cash' policy *causes detriment* to cash-dependent consumers.

If it were held that a 'no cash' policy is an unfair or unconscionable term, the term would be void, but the rest of the contract would remain enforceable.<sup>70</sup> Furthermore, the ACCC can protect consumers from 'no cash' policies under the ACL because the court is able to impose a pecuniary penalty on a retailer if it determines that such a policy amounts to unconscionable conduct.<sup>71</sup>

In sum, it is possible that the ACL could be used to invalidate 'no cash' policies, and fines could be imposed on retailers to deter them from having these policies. However, it is unclear whether this avenue can be used to protect retail consumers, as a court may find that the protections of the ACL do not apply until the parties have actually entered into a contract. A retailer displaying a 'no cash'

65. *ACCC v Radio Rentals Ltd* (2005) 146 FCR 292 at [24].

66. ACL (n 64) s 23(3): 'A consumer contract is a contract for: (a) a supply of goods or services...'.

67. Commonwealth of Australia, 'Unfair Contract Terms: A Guide for Businesses and Legal Practitioners' (2016) 8.

68. ACL (n 64) s 23(2).

69. See, eg, Undertaking to the Australian Competition and Consumer Commission from Fowler Homes Pty Ltd to ACCC, 13 December 2022.

70. ACL (n 64) ss 23(1)–(2).

71. *Ibid* s 224(1)(a)(i).

sign is notifying prospective consumers that they do not want to form a contract with a consumer who wants to pay for the goods or services with cash. A contract is not created unless there is mutual agreement and all the terms are agreed to by both parties, including an express or implied term with respect to the method of payment. Hence, the ordinary rules of contract formation may be an obstacle in requiring retailers to accept cash, and specific legislation may be necessary to overcome these rules.

## B Anti-Discrimination Laws

The existing anti-discrimination legislation in Australia makes it unlawful to discriminate based on several protected attributes, including age, disability, race, intersex status, gender identity and sexual orientation in certain areas of public life, including education and employment.<sup>72</sup> It is unlawful to subject a class of people with one of these attributes to less favourable treatment as a result of possession of a protected attribute.

The Canadian Civil Liberties Association has reported that ‘no cash’ policies may violate provincial human rights codes in Canada for being discriminatory against certain groups of people.<sup>73</sup> This argument can also be made under Australian anti-discrimination laws. It is evident that ‘no cash’ policies have a disproportionate negative impact on unbanked and underbanked people in Australia, which usually includes children, seniors, low-income individuals, racial minorities, First Nations peoples,<sup>74</sup> people with a disability and people who live in remote communities. Therefore, ‘no cash’ policies disproportionately affect these groups of people and may have a discriminatory impact.

However, the effectiveness of anti-discrimination laws in safeguarding all groups affected by ‘no cash’ policies may be limited. In Australia, the anti-discrimination legislation does not explicitly recognize ‘poverty’ as a protected attribute of individuals. Consequently, the extent to which existing anti-discrimination laws would provide protection for low-income individuals against ‘no cash’ policies remains uncertain.

## C Legislation Prohibiting ‘No Cash’ Policies

As it is unclear whether ‘no cash’ policies can be successfully challenged under the existing consumer protection laws and anti-discrimination laws in Australia, it may be necessary for the Commonwealth to introduce legislation that specifically outlaws ‘no cash’ policies in retail scenarios for purchasing essential goods and services where the retailer is physically present. This has

72. Australia’s anti-discrimination laws are contained in the following legislation: Australian Human Rights Commission Act 1986 (Cth); Age Discrimination Act 2004 (Cth); Disability Discrimination Act 1992 (Cth); Racial Discrimination Act 1975 (Cth); Sex Discrimination Act 1984 (Cth). See ‘Australia’s anti-discrimination law’, *Attorney-General’s Department* (Web Page) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/australias-anti-discrimination-law>>.

73. ‘However, in certain circumstances, refusing to take cash in a store may actually violate provincial human rights codes. Michael Bryant, executive director of the Canadian Civil Liberties Association (CCLA), warns that a store’s no cash policy could inadvertently discriminate against seniors, people who are disabled, impoverished or people who just don’t have credit or debit cards’: Lisa Mayor, Andrew Culbert and Saman Malik, ‘Can stores refuse my money? Your COVID-19 questions answered’ *CBC* (online, 13 June 2020) <<https://www.cbc.ca/news/health/cash-coronavirus-questions-answered-1.5609691>>.

74. Dean Foley, ‘The Reserve Bank of Australia has no real solutions to solve First Nations access to capital’, *National Indigenous Times* (online, 13 June 2022) <<https://nit.com.au/13-06-2022/3258/the-reserve-bank-of-australia-has-no-real-solutions-to-solve-first-nations-access-to-capital>>.

already been done in multiple jurisdictions in the US. Unlike Australia, there is no specific provision in the US Constitution for the federal government to make laws with respect to legal tender, and the power to make laws vests with the States and local municipalities. ‘Congress cannot create rules concerning legal tender unless it can find some textual authority in the Constitution for doing so’.<sup>75</sup> ‘There is no Federal statute mandating that a private business, a person or an organization must accept currency or coins as payment for goods or services’.<sup>76</sup> As the majority of US States have taken a freedom of contract approach for retail scenarios, most businesses are free to develop their own policies on whether to accept cash. Nevertheless, some States such as Massachusetts<sup>77</sup> and New Jersey,<sup>78</sup> and cities such as New York City (NYC), Philadelphia<sup>79</sup> and San Francisco<sup>80</sup> have passed specific legislation banning ‘no cash’ policies in the retail context.

In 2020, NYC enacted legislation<sup>81</sup> prohibiting food and retail establishments from refusing cash from consumers. The legislation was passed in response to a surge in the number of retailers going cashless during the pandemic. This alarmed policymakers because it was estimated in 2017 that approximately 354,100 households in NYC were unbanked and another 689,000 households were underbanked. ‘In NYC, 11.2 per cent of households have no bank account (unbanked) and another

75. Clayton P. Gillette, ‘American Legal Tender Rules and Risk Allocation’ in Robert Freitag & Sebastian Omlor (eds), *The Euro as Legal Tender* (De Gruyter, 2020) 105.

76. ‘FAQs: Is It Legal for a Business in the United States to Refuse Cash as a Form of Payment?’, *Board of Governors of the Federal Reserve System* (Web Page, 21 July 2020) <[https://www.federalreserve.gov/faqs/currency\\_12772.htm](https://www.federalreserve.gov/faqs/currency_12772.htm)>.

77. In 1978, Massachusetts enacted a statute providing that: ‘No retail establishment offering goods and services for sale shall discriminate against a cash buyer by requiring the use of credit by a buyer in order to purchase such goods and services. All such retail establishments must accept legal tender when offered as payment by the buyer’. Mass Gen Laws ch 255D § 10A (West 2017). Although the goal of this legislative provision is well-intentioned, it remains vague: (1) it does not define the term ‘retail establishment’; (2) it does not place any restrictions on the amounts that can be paid in coins and notes, thereby permitting revenge payments and increasing the risk of money laundering and (3) it does not provide an exemption for online businesses.

78. In 2019, New Jersey enacted a statute providing that: ‘A person selling or offering for sale goods or services at retail shall not require a buyer to pay using credit or to prohibit cash as payment in order to purchase the goods or services. A person selling or offering for sale goods or services at retail shall accept legal tender when offered by the buyer as payment’: NJ Stat Ann § 56:8-2.33 (2021), amending NJ Law Pub L 2019, ch 50, § 1(a). Discrimination against cash-paying customers prohibited; violations, penalties; exceptions. It defines ‘at retail’ to include any retail transaction conducted in person and exclude any telephone, mail or internet-based transaction: § 1(d). The legislation imposes a fine of \$2500 for the first violation, a fine of \$5000 for the second violation and climbing fines for each violation thereafter: § 1(b). The legislation also exempts some retailers from its requirements, such as those in airports, certain parking facilities, certain sports venues and car rental businesses: § 1(c).

79. ‘A person selling or offering for sale consumer goods or services at retail is prohibited from refusing to accept cash as a form of payment to purchase goods or services. A person selling or offering for sale goods or services at retail shall not: (a) Refuse to accept cash as a form of payment; (b) Post signs on the premises that cash payment is not accepted [and] (c) Charge a higher price to customers who pay cash than they would pay using any other form of payment’: Philadelphia, PA., Code, § 9-1132, s 1.

80. In May 2019, San Francisco banned brick-and-mortar retail businesses from rejecting cash, with some exception. San Francisco, Cal., Police Code, art 55, § 5500–5506 (2019), added by Ord 100-19, File No 190164, App 5/24/2019, Eff 6/24/2019, Oper 8/23/2019 (*San Francisco Ordinance*’).

81. New York City, NY, Admin Code § 20-840 (2020) (*NY City Council Bill*’).

21.8 per cent have a bank account but use alternative financial products for some banking needs (underbanked)<sup>82</sup>. There was also a concern that ‘no cash’ policies discriminate against young people and low-income earners.<sup>83</sup>

As with Australia, many people in the US still use cash. For example, ‘[a] majority of consumers, 70 per cent of those surveyed, say that COVID-19 concerns have not caused them to avoid carrying or storing cash, according to a recent survey conducted by the Federal Reserve System’s Cash Product Office (CPO) and the Federal Reserve Bank of Atlanta’.<sup>84</sup> In 2020, the Diary of Consumer Payment Choice reported that cash was used for 26 per cent of transactions. Cash use is highest among individuals aged 18 to 24 and those 55 and older.<sup>85</sup>

The NYC legislation prohibits establishments from charging cash-paying consumers a higher price than consumers paying with cash alternatives. There are penalties of up to USD \$1,000 for a first violation of this law and up to \$1,500 for each succeeding violation. There are some exceptions included in the legislation: (1) retailers are not required to accept bills in denominations of greater than \$20; (2) transactions taking place completely online, by phone or mail are excluded and (3) retailers may provide a cash alternative to consumers on their premises by installing devices that convert cash into SVCs. There are rules that retailers must follow if they provide customers with an SVC option. Relevantly, the legislation states:

Such devices cannot charge a fee or require a minimum deposit over one dollar. There can be no limit on the number of transactions on such cards. The funds on the card cannot expire. Where a device malfunctions, an establishment must accept cash and shall have a sign stating such on or immediately adjacent to the cash-conversion device.<sup>86</sup>

There has also been support for passing similar legislation at the national level in the US. In 2019, two bills were introduced in Congress to prevent retailers from going cashless: the *Cash Always Should be Honored (CASH) Act*<sup>87</sup> and the *Payment Choice Act*.<sup>88</sup> Although the US Constitution does not specifically empower the federal government to pass laws with respect to legal tender, attorney Samuel Erlanger has convincingly argued that Congress can use the Commerce Clause<sup>89</sup> power of the US Constitution to enact a national cash discrimination statute that requires all retailers

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82. New York City, ‘Where Are the Unbanked and Underbanked in NYC? Updated Findings (2017 Data)’ (Web Page, August 2021) <<https://www1.nyc.gov/assets/dca/downloads/pdf/partners/Research-UnAndUnderbankedNewYorkers.pdf>>. This figure fell slightly in July 2021. However, it is still estimated that ‘301,700 NYC households (9.4 per cent) have no bank account, which is slightly lower than previous years but still considerably higher than the national average of 5.4 percent’. Department of Consumer and Worker Protection Research Finds 301,700 NYC Households Are Unbanked, 9 July 2021, <<https://www.nyc.gov/site/dca/media/pr070921-DCWP-Research-Finds-301700-NYC-Households-Are-Unbanked.page>>.

83. Dean Balsamini and Conor Skelding, ‘NYC businesses told to pay up after not accepting cash’, *New York Post* (online, 4 December 2021) <<https://nypost.com/2021/12/04/nyc-businesses-told-to-pay-up-after-not-accepting-cash/>>.

84. Federal Reserve Bank of San Francisco, ‘Fed report shows consumers are keeping more cash during the COVID-19 pandemic’ (Press release, 4 August 2020) <<https://www.frbsf.org/our-district/press/news-releases/2020/fed-report-shows-consumers-are-keeping-more-cash-on-hand-during-the-covid-19-pandemic/>> (4 August 2020).

85. *Ibid.*

86. *NY City Council Bill* (n 81).

87. *Cash Should Always be Honored (CASH) Act*, HR 2630, 116<sup>th</sup> Congress (2019).

88. *Payment Choice Act* of 2019, HR 2650, 116<sup>th</sup> Congress (2019).

89. The Commerce Clause gives Congress the power ‘to regulate commerce with foreign nations, and among the several states, and with the Indian tribes’: United States Constitution art 1 § 8 cl 3. (‘Commerce Clause’).

to accept USD notes and coins.<sup>90</sup> Such a law would protect unbanked Americans, which in 2017 the Federal Deposit Insurance Corporation estimated was around 6.5 per cent of American households, roughly 20.5 million people.<sup>91</sup> A national statute is desirable to provide consistency, as there is currently a patchwork quilt of laws that have developed at the regional level.

Furthermore, in the European Union (EU), the Court of Justice of the European Union (CJEU) held in 2021 in two joined cases<sup>92</sup> that '[t]he concept of legal tender as interpreted by the Court of Justice for euro banknotes implies: (i) mandatory acceptance, (ii) at full face value and (iii) with the effect of discharging payment obligations'.<sup>93</sup> Thus, the CJEU confirmed that there is a rule for the 'mandatory acceptance' of cash by creditors who are owed a debt. Additionally, the European Commission has proposed a Regulation that would prohibit retailers operating in the eurozone<sup>94</sup> from implementing 'no cash' policies (ie, 'ex ante' unilateral exclusions of cash).<sup>95</sup>

In sum, there is persuasive precedent in other jurisdictions for implementing legislation that adopts a cash mandate for retailers. Given the power in the Australian Constitution with respect to legal tender, it should be possible for the Commonwealth to pass national legislation.

**I Reporting Requirements on Cash Payments to Combat Illicit Activities.** In an era of evolving financial landscapes and growing concerns surrounding financial crimes such as money laundering, terrorist financing and tax evasion, there is a pressing need to re-evaluate Australia's cash transactions policies. The introduction of legislation mandating retailers to accept cash is a crucial step in fostering inclusivity and ensuring financial accessibility for all citizens. However, to strike a balance between convenience and security, it is recommended that the law could be amended to implement reporting requirements for retailers akin to those that are already imposed on financial institutions and designated non-financial businesses and professions (DNFBP) under Australia's AML laws.<sup>96</sup>

90. Erlanger (n 25) 204–205.

91. Federal Deposit Insurance Corporation, *FDIC National Survey of Unbanked and Underbanked Households* (Report, 2017), 1 <<https://www.fdic.gov/householdsurvey/2017/2017report.pdf>> 1.

92. Judgement of 26 January 2021 in Joined Cases C-422/19 and C-423/19, *Dietrich and Haring* (EU:C:2021:63).

93. *Proposal For A Regulation Of The European Parliament And Of The Council On The Legal Tender Of Euro Banknotes And Coins* (European Union) COM/2023/364, 1.

94. The eurozone is an area of 20 countries in the European Union that have officially adopted the euro as the official currency: Trading Economics, *Euro Area Population* (Webpage) <<https://tradingeconomics.com/euro-area/population>>. This mandate would impact a market with an estimated population of 342.9 million people.

95. *Proposal For A Regulation Of The European Parliament And Of The Council On The Legal Tender Of Euro Banknotes And Coins* (n 93) 1. The relevant provisions of the legislation are Article 2(1): To ensure the effectiveness of the legal tender of cash, this Regulation applies also to ex ante unilateral exclusion of payments in cash and to the access to cash, Article 3(4): 'ex ante unilateral exclusions of cash' means a situation when a retailer or service provider unilaterally excludes cash as a payment method for example by introducing a 'no cash' sign. In this case, the payer and payee do not freely agree to a means of payment for a purchase, Article 4(1): The legal tender status of euro banknotes and coins shall entail their mandatory acceptance, at full face value, with the power to discharge from a payment obligation, Article 4(2): In accordance with the mandatory acceptance of cash, the payee shall not refuse euro banknotes and/or coins tendered in payment to comply with that obligation. Furthermore, there are already some EU Member States that have implemented domestic legislation to ban 'no cash' policies at retailers; for example, Spain: see Artículo 47 (ñ). *Infracciones en materia de defensa de los consumidores y usuarios*, Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias. Publicado en: «BOE» núm. 287, de 30/11/2007.

96. Currently, Australia's list of DNFBPs does not include retailers; it is limited to casinos, real estate agents, dealers in precious metals and stones, lawyers, notaries, other independent legal professionals, accountants and trust and company service providers. *AML/CTF Act* (n 3). Financial Action Task Force (FATF), *Glossary of the FATF Recommendations*, 2022.

The proposed reporting obligation would classify retailers as ‘obliged entities’, subjecting them to customer due diligence requirements in line with existing AML laws.

The proposed legislation would introduce a new reporting requirement for retailers to complete a simplified version of a Threshold Transaction Report (TTR)<sup>97</sup> for any single cash transaction exceeding \$10,000 by a specific customer. A retailer would be required to file a TTR because anything above this sum is regarded as a ‘significant cash transaction’<sup>98</sup> that increases the risk of financial crimes.

Drawing inspiration from current AML laws in Australia, this reporting mechanism serves as a proactive measure to curb potential money laundering activities. By obliging retailers to file a TTR within 10 business days of the transaction with the Australian Transaction Reports and Analysis Centre (AUSTRAC), there will be enhanced oversight to mitigate risks associated with large cash transactions.

Moreover, the legislation suggests that retailers should be equipped to file simplified Suspicious Matter Reports (SMR)<sup>99</sup> when they encounter transactions that raise concerns. This could include instances of structuring, where customers deliberately make multiple cash purchases just below the \$10,000 threshold to evade detection. It could also include filing a SMR if the retailer suspects that small sums of cash are being used for terrorist financing purposes. By empowering retailers with the ability to identify and report suspicious activities promptly, the proposed legislation aims to deter money laundering and terrorist financing. A failure by a retailer to file a TTR or SMR could lead to a civil penalty of 20,000 penalty units for individuals (equating to a fine of \$6,260,000), or up to 100,000 penalty units for a body corporate (amounting to \$31,300,000) under section 175 (4) and (5) of the *AML/CTF Act*.<sup>100</sup>

To facilitate a seamless reporting process for retailers, AUSTRAC is urged to provide simplified versions of TTRs and SMRs on its website, specifically tailored for retail establishments. This approach ensures that compliance with reporting requirements is both accessible and efficient, fostering cooperation between retailers and regulatory authorities. In terms of practical implementation, the legislation proposes that retailers collect customer details by asking for ID cards, driver’s licenses or passports, for transactions surpassing the \$10,000 threshold. This additional step adds a layer of accountability, aiding in the traceability of cash transactions.

The motivation behind this legislative initiative is clear — to address the substantial size of the ‘shadow economy’, estimated to be as much as 3 per cent of Australia’s GDP, equivalent to approximately \$50 billion annually, according to the Australian Taxation Office.<sup>101</sup> By fostering transparency and collaboration between retailers and regulatory bodies, the proposed legislation strives to strike a delicate balance between ensuring financial inclusion and safeguarding the nation’s economic integrity.

**2 Limitations of Mandatory Acceptance.** In addition to mandating the acceptance of cash by retailers, it is crucial to establish a reasonable ceiling on the amount of cash a retailer is *obligated* to accept from a consumer per transaction. Setting this ceiling at \$10,000 serves as a pragmatic safeguard, preventing retailers from being burdened with the obligation to accept potentially unlimited amounts of

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97. *AML/CTF Act* (n 3) s 43.

98. *Financial Transaction Reports Act 1988* (Cth) s 3(1).

99. *AML/CTF Act* (n 3) s 41.

100. *Ibid.*

101. Australian Taxation Office, *Whole-of-government shadow economy action plan* (Webpage) <<https://www.ato.gov.au/General/Shadow-economy/The-whole-of-government-shadow-economy-action-plan/>>.

cash. This measure not only protects businesses, especially small enterprises, from undue operational challenges but also ensures that the legislation remains balanced and fair. The \$10,000 cap is rooted in practicality and takes into consideration the spending habits of Australian households, where the average weekly expenditure on goods and services was estimated at \$2,546 in 2024.<sup>102</sup> This figure significantly exceeds the poverty line,<sup>103</sup> providing assurance that cash-dependent low-income families can still access essential goods and services without placing an undue burden on retailers.

Moreover, international precedents, such as San Francisco's legislation<sup>104</sup> mandating retailers to accept cash payments up to USD \$5,000 per transaction while granting discretion on amounts exceeding this limit, highlight the effectiveness of such measures in combating illicit activities and ensuring a practical cash-handling framework for retailers. By instituting a \$10,000 ceiling in Australia, the proposed legislation not only aligns with successful practices from other jurisdictions, but also empowers retailers with the discretion to refuse exceptionally large cash payments. This approach strikes a delicate balance, acknowledging the realities of modern economic transactions, and ensures that reporting requirements remain necessary only when a retailer willingly accepts cash payments exceeding the established threshold, compelling them to file a TTR with AUSTRAC.

## VI New Legislation

The power to enact legislation regarding 'currency, coinage and legal tender' exclusively rests with the Commonwealth Parliament, as outlined in section 51(xii) of the Constitution.<sup>105</sup> Thus, since AUD cash is presently the only recognized form of legal tender in the country, the Commonwealth has the sole authority to create federal laws that can effectively ban 'no cash' policies nationwide.

This section offers several suggestions for the content of potential new legislation aimed at prohibiting 'no cash' policies.

1. *Scope of Application*: The 'no cash' policy ban should apply to retailers who sell 'essential' goods and services to retail consumers on a face-to-face basis. 'Essential' goods and services should be defined in the legislation to include most 'necessities'. The legislation should encompass a non-exhaustive list of essential goods and services, covering necessities like food, clothing, shelter, healthcare products, personal care items and utilities, healthcare, education, transportation, utilities services, communication services and financial services. Additionally, the ACCC, which specializes in consumer protection, could serve as the pertinent authority to adjudicate on the classification of items as 'essential' in instances of dispute.

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102. Saranga Sudarshan and Sophie Wallis, 'Australian Household Spending Statistics' (28 August 2024) *Finder.com* <<https://www.finder.com.au/australian-household-spending-statistics>>. The Australian Bureau of Statistics reported in the 'Household Expenditure Survey, Australia' that '[o]n average, Australian households spent \$1,425 per week on goods and services in the 12 months to June 2016'. Since then, average spending has increased with inflation. <<https://www.abs.gov.au/statistics/economy/finance/household-expenditure-survey-australia-summary-results/latest-release>>.

103. Davidson, Bradbury and Wong note 'The poverty line (based on 50 per cent of median household after-tax income) is \$489 a week for a single adult and \$1,027 a week for a couple with two children, based on the latest data from the ABS'. *ACOSS/UNSW Report* (n 47) 9.

104. *San Francisco Ordinance* (n 80) s 5504(c).

105. *Australian Constitution* (n 4).



2. *The Rule for Notes*: In both debt and non-debt scenarios, the rules governing cash payments would differ significantly depending on whether the transaction involved individuals or retailers. These distinctions address the practicalities of using cash in everyday transactions while ensuring compliance with legal and regulatory frameworks.

### A Debt Scenarios for Individuals

For individuals acting in non-business contexts, there should not be a ceiling on the amount of cash a debtor can tender to a creditor to settle a debt, unless the parties have mutually agreed to an alternative method of payment. In general, a debtor's tender of cash for any amount discharges the debt unless the creditor can provide a valid 'good faith' justification for refusing the payment. For instance, a creditor may reasonably refuse cash if the tender occurs in an unsafe location, such as a scenario where a debtor offers \$10,000 in notes on a poorly lit street in a dangerous neighbourhood at night. In such cases, the creditor's refusal would not discharge the debt, and the debtor would need to offer payment in a more appropriate setting. This principle ensures fairness while balancing the rights and safety of both parties.

### B Debt Scenarios for Retailers

In transactions where a consumer owes a debt to a retailer for goods or services already provided, the retailer is *obligated* to accept cash payments up to an amount of \$10,000 unless the parties have previously agreed to another payment method, or the retailer has a good faith justification for refusing the cash. For cash payments exceeding \$10,000, the retailer *must* still accept the tender to discharge the debt but is legally required to file a TTR with AUSTRAC within 10 business days after the transaction occurs. This reporting obligation ensures compliance with AML laws, maintaining transparency and accountability in high-value transactions.

### C Non-debt Scenarios for Retailers

In non-debt scenarios, such as point-of-sale transactions where no prior obligation exists between the consumer and retailer, the rules would differ. Retailers would be *required* to accept cash payments up to \$10,000. However, they would not be obligated to accept amounts exceeding this limit. If a retailer *chose* to accept cash payments above \$10,000 in a non-debt scenario, they would be subject to the same TTR filing requirement as in debt scenarios.

This framework ensures that consumers would have the right to use cash for transactions up to \$10,000, specifically for essential goods and services. The established limit considers the practicality of purchasing most essential items within this threshold. Furthermore, it serves to safeguard retailers by avoiding the need to store large sums of cash on their premises. This ceiling could be adjusted in the future by the RBA to account for inflation. Furthermore, a failure by a retailer to file a TTR or SMR could lead to a civil penalty of 20,000 penalty units for individuals or up to 100,000 penalty units for a body corporate under section 175 (4) and (5) or a criminal penalty under section 182 of the *AML/CTF Act*.<sup>106</sup>

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106. *AML/CTF Act* (n 3).

3. *The Rule for Coins*: According to the limitations set out in section 16 of the *Currency Act 1965*, a retailer *must* accept a tender of coins from a consumer up to an amount of \$20 — depending on the denomination of coins that are used — to discharge a debt or for the payment of essential goods and services. The purpose of this restriction is to avoid revenge payments and to burden a retailer with too many coins. It is sensible to have a restriction on the amount that can be paid in coins because, unlike notes, coins are heavy and burdensome to transport. It does not further the interests of commerce or the public to permit large payments made with coins. Moreover, a retailer *may* accept a tender of coins over an amount of \$10,000, with an *obligation* on the retailer to file a TTR, and subject to a civil penalty for failure to do so.
4. *The Conforming Tender Rule*: ‘Tender’ is an offer by the debtor to perform some act to discharge the payment obligation. If the act is one specified by the contract, the tender is called a ‘conforming tender’. The offer may be to perform an act other than that specified by the contract, called a ‘non-conforming tender’.<sup>107</sup> The conforming tender rule, which is followed in Australia, applies when there is an outstanding debt between a debtor (such as a consumer) and a creditor (such as a retailer). It is important to note that this rule does not come into play when a debt has not yet been incurred, a circumstance often encountered in many retail transactions. The rule requires a debtor paying in legal tender to provide the precise sum to the creditor to discharge the debt, with no legal obligation on the part of the creditor to offer change in return.<sup>108</sup> Hence, a retailer is not legally obligated to provide change to a customer who does not tender the exact sum to pay for goods or services, although it is generally expected that many retailers will be able to provide cash-paying customers with the appropriate change. In practice, a customer who would like to pay in cash must provide the exact sum (conforming tender) or allow the retailer to retain the excess amount.

This article advocates for the elimination of this rule in the context of cash payments made at retailers for the purchase of essential goods and services and where a debt is owed. The primary argument against maintaining this rule lies in the potential inequity of shifting the responsibility for providing exact change onto vulnerable consumers and allowing retailers to retain any excess cash. However, it is also important to recognize that requiring businesses to constantly maintain an inventory of exact change for every cash transaction may not be equitable either. To strike a fair balance between the interests of consumers and retailers, a new rule should be introduced mandating that retailers offer customers a store credit if they are unable to provide the correct change at the time of payment. This approach acknowledges the challenges faced by both parties and seeks a practical compromise to ensure fairness in cash transactions.

5. *Fines for Refusing Cash*: A refusal by the retailer to accept a cash tender under \$10,000 from a consumer for the payment of goods or services should be classified as a criminal offence,

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107. Thomson Reuters, *Law Relating to Banker and Customer* (31 May 2022) [4.110], Payment, Credit and Exchange Mechanisms, The Australian Currency: Notes and Coin, Legal tender, Last Review: 31/05/2022 (online, Westlaw AU).

108. *Saunders v Graham* (1819) 171 ER 858; *Dean v James* (1833) 110 ER 561; *Polglass v Oliver* (1831) 149 ER 7; *Bevans v Rees* (1839) 151 ER 130 [131–132] (Maule B): ‘No doubt, a tender must be of a specific sum, on a specific account’.

and the retailer should be subject to a fine of \$1,000 for each violation, unless the retailer has a good faith justification for refusing the cash. The onus should be on the retailer to demonstrate that they were unable to accept the cash payment. This amount would be a proper deterrent.<sup>109</sup> Any instances in which a retailer declines to accept a cash tender of up to \$10,000 can be reported to the ACCC, prompting them to conduct a thorough investigation. Furthermore, the refusal to accept cash in payment of debt should result in the debt being fully discharged, thereby encouraging retailers to accept cash.

6. *Appropriate Signage*: A retailer should not be permitted to display a ‘no cash’ sign or its equivalent (eg, ‘card only’) anywhere on the premises.
7. *Exemption for Online Retailers*: Any new legislation should only apply to retailers who deal with customers in person at a physical location. Retailers who sell their products and services using an electronic agent, such as vending machines, toll booths, online businesses and e-commerce platforms,<sup>110</sup> should be exempted from accepting cash.<sup>111</sup> This exemption is necessary because it is not practical for a retailer to accept cash from a consumer where there is no physical interaction with a human being during contract formation. Moreover, it would be unsafe for a consumer to send cash in the mail to a distance vendor.
8. *Cash Substitute Provided*: A retailer should be allowed to reject a cash tender if they provide the customer with a free-of-charge alternative to cash on their premises, such as a machine that dispenses tokens or SVCs. The machine that dispenses the SVC or token should not charge a fee to the customer or require a minimum deposit over one dollar, and there should be no limit on the number of transactions on such cards. Furthermore, the funds on the card should not expire. Where a device malfunctions, a retailer should accept cash and should have a sign stating such on or immediately adjacent to the cash-conversion device. In order to avoid the risk of money laundering and other financial crimes, the SVCs should be able to store a maximum of \$1,000 per card.

## VII Concluding Remarks

Cash remains an important asset for the Australian public, particularly for unbanked and under-banked individuals. Prohibiting ‘no cash’ policies by retailers is essential to ensure financial inclusivity and protect the rights of cash-dependent consumers. As long as the Commonwealth continues to use taxpayer money to print and mint cash, recognizes cash as the sole type of legal tender, and until it provides a publicly funded alternative to cash with offline capabilities, it has a constitutional obligation to ensure that the Australian public is able to purchase essential goods and services with cash.

While existing anti-discrimination and consumer protection laws may offer some avenues for addressing ‘no cash’ policies, implementing federal legislation may emerge as a more effective approach in achieving this objective. By enacting appropriate legislation, policymakers can ensure

109. Other countries that impose fines include Nigeria and China. The *Central Bank of Nigeria Act* punishes criminally a ‘person who refuses to accept the Naira as a means of payment’: at s 19 (5). China’s central bank issued a circular stating that cash payments must not be refused in regular transactions: The People’s Bank of China, *Announcement No.10 [2018] of the People’s Bank of China-Announcement on Cracking down on the Act of Refusing to Accept Cash Payments* (Regulations) <<https://www.pbc.gov.cn/english/130733/3779837/index.html>>.

110. See, eg, Amazon and Uber.

111. There is a carve-out in the *San Francisco Ordinance* (n 80) s 5502 for retailers using an electronic agent via the internet, who do not have a physical presence or who operate from a vehicle or mobile space. There is also a carve-out for online businesses in the *NY City Council Bill* (n 81).

that the needs of cash-dependent individuals are met, fostering an inclusive society where essential goods and services remain accessible to all, regardless of their preferred payment method. Such a policy would ultimately foster financial inclusivity, empower consumers and safeguard the interests of cash-dependent individuals in Australia.

In sum, legislation to ban 'no cash' policies in Australia should include a cash mandate for retailers selling essential goods and services, with an exemption for electronic agents and online retailers. The legislation should include rules for notes and coins, requiring retailers to accept a tender of notes of any denomination up to \$10,000 per transaction for essential goods and services, while a tender of coins would be limited to \$20 in accordance with existing legislation. Retailers would retain the flexibility to accept cash tenders over \$10,000 per transaction, subject to the condition of filing a TTR with AUSTRAC to combat financial crimes. Furthermore, concerning outstanding debts, retailers would be mandated to accept cash tenders in the form of notes, regardless of the amount, with the requisite filing of a TTR for tenders over \$10,000. The conforming tender rule should be eliminated in the context of cash payments to settle debts at retailers and replaced with a mandate to offer a store credit if the retailer is unable to provide exact change. Fines should be introduced for retailers refusing cash payments under \$10,000.

Australia will not be the first country in the world to implement a cash mandate, but it could be the first to impose a reporting requirement on retailers that accept large sums of cash. These measures aim to strike a balance between ensuring access to cash for consumers and considering practicality, safety and regulatory compliance. The proposed legislation serves to protect the interests of cash-dependent individuals, promote financial inclusivity, prevent discrimination against those relying on cash as their preferred payment method and combat financial crimes.

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