



Law Council
OF AUSTRALIA

Office of the President

4 January 2019

Mr Philip Gaetjens
Secretary
The Treasury
Langton Crescent
PARKES ACT 2600

By email: sumiti.teo@treasury.com.au

Dear Mr Gaetjens

Improving Black Economy Enforcement and Offences

The Law Council welcomes the opportunity to provide comment to the Treasury regarding the Black Economy Taskforce (**the Taskforce's**) recommendation to introduce a modern offences regime to tackle the black economy as set out in the Improving Black Economy Enforcement and Offences Consultation Paper dated 22 November 2018 (**the Consultation Paper**).

In this brief submission, the Law Council seeks to draw the Treasury's attention to a particular recommendation of the Taskforce that is of concern. Recommendation 8.3 provides that the onus of proof should be reversed for some black economy offences to reduce barriers to prosecuting such offences. Accordingly, the Law Council provides comments on the feasibility and implications of reversing the legal onus of proof for some element of black economy offences.

The problem noted by the Taskforce is as follows:

The prosecution bears the legal onus of proof in criminal proceedings for certain black economy offences. The Taskforce found that gathering proof to the criminal standard can be difficult and resource intensive for prosecutors, leading to lower rate of successful prosecution against aggressive black economy offences.¹

Further, the Consultation Paper notes:

The Taskforce's Report identified that gathering proof for black economy offences to the criminal standard can be difficult and resource intensive for prosecution, as this knowledge is only privy to the defendant.²

¹ The Treasury, Parliament of Australia, *Improving the Black Economy Enforcement and Offences – Consultation Paper* (2018) 2.

² *Ibid* 10.

The following questions in the Consultation Paper relate to a reversal of the onus of proof:

Questions:

5. Which elements of serious black economy offences should reversing the onus of proof apply to?

6. Should the onus of proof for some elements of black economy offences be reversed and borne by the defendant instead of prosecution as recommended by the Taskforce?

7. What are the issues in reversing the onus of proof for some black economy offences?³

A cardinal principle of our system of justice is that the prosecution bears the burden of proof in criminal matters.⁴ In 2014 the High Court of Australia observed that:

[o]ur system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law is that the prosecution is to prove the guilt of an accused person.⁵

The principle that the prosecution bears the burden of proof and that guilt must be proved beyond reasonable doubt are essential to the presumption of innocence.⁶

The Law Council considers that the following considerations are relevant in determining whether a law that reverses or shifts the burden of proof is justified:

- a) whether there is a matter peculiarly within the defendant's knowledge and such knowledge is not available to the prosecution, which suggests that the defendant bear the onus of establishing that matter (noting that, even then, the defendant should ordinarily bear an evidential, as opposed to a legal burden);⁷ and
- b) general principles of proof of criminal responsibility arising under Australian law and prosecutorial policy, including the centrality of the matter in question to proof of culpability, the gravity of the alleged offence, any potential impact on public health

³ Ibid 11.

⁴ *Sorby v Commonwealth* (1983) 152 CLR 281, 294 (Gibbs CJ). See also *Momcilovic v The Queen* (2011) 245 CLR 1, [44] (French CJ).

⁵ *Lee v The Queen* [2014] HCA 20 (21 May 2014) [32]. See also *X7 v Australian Crime Commission* (2013) 248 CLR 92, [46] (French CJ and Crennan J), [100]–[102] (Hayne and Bell JJ), [159] (Kiefel J); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

⁶ In *Momcilovic v The Queen* (2011), French CJ stated: 'The presumption of innocence has not generally been regarded in Australia as logically distinct from the requirement that the prosecution must prove the guilt of an accused person beyond reasonable doubt': *Momcilovic v The Queen* (2011) 245 CLR 1, [54].

⁷ Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011, Principle 3. This principle provides that all people are entitled to the presumption of innocence and to a fair and public trial. The state should be required to prove, beyond reasonable doubt, every element of a criminal offence, particularly any element of the offence which is central to the question of culpability for the offence.

or safety,⁸ and the extent of the burden imposed (e.g. whether the defendant is required to satisfy a legal or evidential burden).⁹

It is unclear whether the Taskforce's recommendation relates to a reversal of the evidential or legal onus of proof. The Law Council would not support a reversal of the legal onus of proof for any of the black economy offences (or elements thereof) as this runs counter to common law principles. Any consideration of an evidential burden being placed on the defendant must be carefully considered in light of the above principles.

The fact that gathering proof for black economy offences to the criminal standard "*can be difficult*" does not provide sufficient grounds for reversing what is a fundamental principle of our criminal justice system. That something is difficult does not mean it should not be done. If successfully prosecuting a case is perceived as 'resource intensive', whatever that means, then the government should look at allocating greater resources to serious black economy cases.

The Consultation Paper notes the situation where a defendant faces a legal onus of proof under the unexplained wealth provision in subsection 179E(3) of the *Proceeds of Crime Act 2002* (Cth). Under this provision, there is a presumption that the property is unlawfully acquired unless the respondent can establish the contrary. The Law Council holds the view that this reverse onus is contrary to established common law principles and is counter to the presumption of innocence. The reverse onus means that the respondent may lose legitimately obtained assets if he or she cannot show that they have been lawfully obtained, which may be difficult for particular defendants, for example, due to age, language ability or poor record-keeping skills. As civil confiscation proceedings are often criminal in nature,¹⁰ traditional criminal court processes should apply, whereby the onus remains with the prosecution to establish that the property was unlawfully acquired.

In relation to Question 7 of the Consultation Paper, one of the implications of reverse onus provisions, when they require an accused person to satisfy a jury or judicial officer of a fact on the balance of probabilities, is that they create the possibility that a person can be found guilty of an offence even though there is a reasonable doubt in the mind of the fact-finder as to whether the person had a defence at law. Accordingly, reverse onus provisions challenge the golden thread of the criminal law that it is the duty of the prosecution to prove a person's guilt beyond reasonable doubt.¹¹

The Law Council would be pleased to discuss this matter further with the Treasury, should it be of assistance.

⁸ For example, *Criminal Code Act 1995* (Cth) s 13.1 – 13.6. These sections set out that the prosecution bears a legal burden of proving every element of an offence and disproving any matter in relation to which the defendant has discharged an evidential burden of proof. A legal burden of proof on the prosecution must be discharged beyond reasonable doubt whereas a legal burden of proof on the defendant must be discharged on the balance of probabilities. See also Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 50.

⁹ Where a defendant is required to discharge a legal burden of proof, the explanatory material should justify why a legal burden of proof has been imposed instead of an evidential burden. Provisions that place a legal burden of proof on a defendant should be kept to a minimum. See also Senate Standing Committee for the Scrutiny of Bills, *Report No 5 of 2010*, 191-192; Senate Standing Committee for the Scrutiny of Bills, *Report No 3 of 2010*, 71.

¹⁰ When laws are considered to be 'criminal' in nature they engage the criminal process rights under articles 14 and 15 of the *International Covenant on Civil and Political Rights* – Parliamentary Joint Committee on Human Rights, Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills Introduced 27 May – 6 June 2013 – Human Rights and Civil Penalties, (2013) 73.

¹¹ *Woolmington v DPP* [1935] AC 462.

In the first instance, please contact Dr Natasha Molt, Director of Policy at natasha.molt@lawcouncil.asn.au or on 02 6246 3754 if you would like any further information.

Yours sincerely

A handwritten signature in black ink, appearing to read 'A. Moses'.

Arthur Moses SC
President