

Senate Economics Committee – Public hearing Sydney, Wednesday 7 April 2021
Inquiry into Treasury Laws Amendment (Your Future, Your Super) Bill 2021 [Provisions]
Answers to questions on notice – Law Council of Australia

Received via email 13 April 2021

Dear Senate Economics Committee Secretariat

I refer to our prior email correspondence in connection with my appearance before the Committee on Wednesday, 8 April 2021 on behalf of the Law Council of Australia's Superannuation Committee.

I took a question on notice as to whether there are other Commonwealth laws in which there has been a reversal of the traditional onus of proof (i.e. such that the defendant in a civil or criminal matter bears the burden of proving certain matters) and the rationale for that reversal of the onus of proof.

In endeavouring to provide some sort of response to that query, I stress that the Superannuation Committee of the Law Council of Australia is a committee of superannuation lawyers. Our area of specialisation is superannuation law and there would be other specialists in other areas of the law who would be better placed to comment on the technical evidentiary aspects of legislation in fields outside of superannuation. That said, our understanding is that, while typically uncommon, there are some other examples in Commonwealth laws of the traditional onus of proof being reversed. We are aware of a report published by the Institute of Public Affairs in December 2014 titled 'The state of fundamental legal rights in Australia' which, in Appendix 1, identifies some 48 provisions across 13 Commonwealth statutes where there has been some reversal of the onus of proof such that a defendant in a civil or criminal matter must prove certain matters.

For example, under the Fair Work Act, there can be a presumption that an employer took adverse action for a prohibited reason, unless shown otherwise. Similarly, under the Work Health & Safety Act, there can be a presumption that a prohibited reason was the substantial reason why discriminatory conduct occurred, unless shown otherwise. Under the Commonwealth Electoral Act, a person who is not enrolled on the electoral role bears a burden of proving that this was not due to their failure. Under the Copyright Act, someone who engages in parallel importation of copyrighted material bears a burden of proving that they were importing legitimate copies, and under the Australian Consumer Law someone who is alleged to have breached the legislation by demanding payment for unsolicited goods or advertising bears the burden of proving that they believed they were entitled to receive payment. Under the Taxation Administration Act, certain individuals are deemed to be involved in a corporation's taxation offences unless they can prove that they did not aid, abet or procure the offence and so forth. Similarly, we understand that there can be technical examples under environmental and native title law where parties bear the burden of displacing a presumption about some matter. Examples exist under the anti-money laundering and counter terrorist-financing legislation as well.

In some cases, the rationale for the reversal of the onus of proof seems to be that, in the given context, the relevant information is exclusively within the knowledge of the putative defendant and that other parties would be particularly unable to prove the relevant matter (more so than in the ordinary case, for example, because it is a situation where the issues concern motivations or intentions which are considered unlikely to be evidenced in documentation which would be accessible in the ordinary course of discovery of evidence in a legal proceeding). In other cases, the rationale seems to be that the relevant legislation creates a benefit or right for a certain category of person that would not otherwise exist, and imposing an onus of proof is seen as a reasonable quid pro quo for the new benefit or right which is being created. In other cases, the rationale is less clear.

Regards

Luke Barrett – In my capacity as a member of the Superannuation Committee of the Legal Practice
Section of the Law Council of Australia