24 December 2020

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| To | Manager  Retirement Income Policy Division  Treasury  Langton Cres  Parkes ACT 2600  [superannuation@treasury.gov.au](mailto:superannuation@treasury.gov.au) |  |

Dear Sirs and Mesdames

**Submissions in relation to the “Your Super, Your Future” package**

King & Wood Mallesons is pleased to provide a submission to Treasury in relation to the “Your Super, Your Future” package (“**Package**”). We do not intend to comment on all of the matters contained in the Package. Instead, we confine our comments in this submission to the issue which is of most concern to us, the proposed reversal of the onus of proof contained in new sections 220A(1), (2) and (3) (“**Sections**”) of the exposure draft of the Treasury Law Amendment (Measures for a later sitting) Bill 2020: Best Financial Interests Duty (“**Bill**”).

# Summary of submissions

### As a matter of principle, the onus of proof should never be reversed in any matter where the entity bringing the proceedings is the State; and

### Whilst the Exposure Draft Explanatory Materials for the Bill (“**Explanatory Materials**”) state that the reverse onus of proof would not apply where a criminal penalty is pursued, we submit that although the Sections are described as applying to civil proceedings only, the civil penalty which attaches to this section is criminal in nature and so, in accordance with the Parliament’s own policy, the same principles should apply, including the presumption of innocence.

# Background

Proposed s220A(2) and s220A(3) suffice to illustrate the issue. They provide that:

“*In civil proceedings for a contravention of subsection 54B(2) in relation to a covenant set out in paragraph 52A(2)(c), it is presumed that a director of a corporate trustee of a registrable superannuation entity did not perform the director’s duties and exercise the director’s powers as director of the corporate trustee in the best financial interests of beneficiaries, unless the director of the corporate trustee adduces evidence to the contrary.*

*If, in such proceedings a … director of a corporate trustee wishes to adduce evidence to the contrary—the … director of the corporate trustee bears an evidential burden in relation to the matter*.”

The Explanatory Materials state that:

“*The reversal of the evidential burden should emphasise to trustees and directors of corporate trustees that they need to have strong systems and processes in place to ensure that all actions they take can be demonstrated to be in the best financial interests of beneficiaries. It should also highlight the need for trustees to keep clear records of the decision-making process… This reversal of the evidential burden of proof is proportional, necessary, reasonable and in pursuit of a legitimate objective. Given that the facts of whether a trustee has acted in the best financial interests of beneficiaries is peculiarly within the knowledge of the trustee; proof of this could be readily provided by the trustee; and the reverse onus is confined to situations where the consequences of a breach are civil penalties sought by the regulator, and will not be applied to situations where a criminal penalty is pursued*.[[1]](#footnote-1)

*The reversal of evidential burden is reasonable as a trustee should be readily able to point to evidence that they considered the likely financial impact on beneficiaries of a decision to make a payment to a third party and how such payment was in the best financial interests of beneficiaries*….*Whereas it is difficult for the regulator to prove that the trustee failed to take certain matters into account in determining whether a decision or payment was in the best financial interests of beneficiaries…Reversal of the evidential burden is also justified given the potentially serious and widespread impact of a trustee’s failure to act in the best financial interests of beneficiaries*.”[[2]](#footnote-2)

# Submissions

## The onus of proof should never be reversed in any matter where the entity bringing the proceedings is the State

### Reversing the onus of proof is sometimes justified by stating that it is particularly difficult for the prosecution to meet the required evidentiary burden. However, we submit that the fact that it is difficult to meet the required evidentiary burden is not itself a sound basis for placing the burden of proof on the defendant. If it is difficult for the prosecution to prove a particular fact, the defendant may also be in that same position – regardless of this, it is inherently unjust to require a person being prosecuted by the State to prove they are innocent. “[t]he common law legal system is ideal not for the ease with which it allows for prosecutions, but for the protections it offers against an overbearing state”.[[3]](#footnote-3) Whilst we agree that there may be matters which are “peculiarly within the knowledge of the accused”, we respectfully agree with Professor Hamer that extraordinary proof imbalances are more likely to exist in the case of regulatory offences, and that reverse persuasive burdens “provide a practical way for the regulator to manage the cost of prosecutions”[[4]](#footnote-4), rather than being based on any real difficulty with meeting a particular burden of proof.

### We submit that in all cases where the State is proceeding against an individual, the State should be required to meet the applicable onus of proof. Whilst we are aware that there are other pieces of legislation which place the burden of proof on an individual where the State is the prosecutor (eg anti-terrorism legislation) we submit that the nature of those offences is significantly different from the nature of the offence detailed in the Bill. As a matter of principle, there is no justification for the onus of proof to be reversed in the circumstances contemplated by the Bill and for trustees and directors not to have available to them one of the most fundamental protections afforded by the common law.

### We further submit that the reasoning provided in the Explanatory Memorandum for reversing the onus of proof is not persuasive. Merely stating that the reversal of the evidential burden of proof is proportional, necessary reasonable and in pursuit of a legitimate objective does not make those claims factually correct. Far more considered analysis is required before such a fundamental right is removed. We also note that the legislation will not be subject to the Parliamentary Joint Committee on Law Enforcement (or similar body) as is the case for other legislation which reverses the onus of proof (eg the Proceeds of Crime Act) and which would provide additional oversight.

### We also submit that the statement that these matters will be peculiarly within the knowledge of the relevant director is not supported. The regulator has extensive powers of investigation well and truly sufficient to determine whether enough evidence exists to commence proceedings against a trustee or director for a breach of the best financial interests’ duty. When compared to other legislation where the onus of proof is reversed, the nature of the issue being considered is quite different to the matters contemplated by section 220A(2). The nature of the issue being considered under those other pieces of legislation usually turn on intention. This would be clearly within the defendant’s specific knowledge. Whether a trustee or director has acted in the best financial interests of a beneficiary is an objective matter that does not require proof of knowledge or intent and should be proven by the entity bringing the claim.

### Finally, the Courts have long been reluctant to intervene in a trustee’s exercise of a discretionary power provided that the trustee has:

### acted honestly and in good faith;

### given the matter real and genuine consideration that includes acting within the scope of the power, generally considering whether or to exercise the power and taking in account all relevant considerations and not taking into account any irrelevant considerations; and

### acted consistently with the purpose for which the power was given (and not for some ulterior purpose.

### The proposed reversal of onus of proof as it applies to superannuation trustees is contradictory to a long line of established case law.

## The civil penalty which attaches to this section is criminal in nature

### If a trustee or director is unable to disprove the presumption of guilt in section 220A(1) or (2), the penalty to be applied will be a maximum of 2,400 penalty units which on the current value of a penalty unit ($222) equates to a fine of over half a million dollars.

### The ALRC has noted that “the traditional dichotomy between criminal and non-criminal procedures no longer accurately describes the modern position … the functions and purposes of civil … and criminal penalties overlap in several respects. Even some procedural aspects, such as the different standards of proof for civil and criminal sanctions, are not always clearly distinguishable”.[[5]](#footnote-5)

### The Human Rights Committee has noted that some civil penalty provisions may engage criminal process rights under articles 14 and 15 of the ICCPR where the penalty may be regarded as criminal for the purposes of international human rights law – in other words, the sanction may be considered criminal for the purposes of the ICCPR even though it is considered to be civil under Australian domestic law.[[6]](#footnote-6)

### The Guidance Note on this matter issued by the Parliamentary Joint Committee on Human Rights states that the following matters are to be considered in assessing whether a civil penalty is criminal in nature:

* The classification of the penalty;
* The nature of the penalty including whether it is meant to be punitive or deterrent in nature;
* Whether the proceedings are instituted by a public authority with statutory powers of enforcement; and
* The severity of the penalty (both the amount and the impact of a finding of culpability).

We submit that the civil penalty attaching to section 220A(1) and (2) is criminal in nature given that it is supposed to be deterrent in nature, a finding of culpability precedes the imposition of the penalty (the culpability is essentially “baked in”), the proceedings would be instituted by a public authority and the penalty is very severe – not just the monetary value but also the reputational damage this could cause a trustee or director who is unable to essentially prove a negative. The proposal may also lead to an increase in the costs of directors’ and officers’ insurance which will ultimately need to be met by members of the relevant superannuation fund.

As the proposed civil penalty is criminal in nature, the normal principles of justice and fairness that apply in a proceeding where the outcome is criminal must be applied – fundamentally, that a person is innocent until proven guilty. We further submit that public confidence is unlikely to be harmed by requiring adherence to commonly accepted and recognised principles of fairness and justice and that public confidence may in fact be enhanced by this.

Yours sincerely

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1. Treasury Law Amendment (Measures for a later sitting) Bill 2020: Best Financial Interests Duty - Exposure Draft Explanatory Materials at 1.46 and 1.48 [↑](#footnote-ref-1)
2. Ibid at 1.53 and 1.54 [↑](#footnote-ref-2)
3. Institute of Public Affairs, Submission 49 [↑](#footnote-ref-3)
4. David Harmer, ‘The Presumption of Innocence and Reverse Burdens: A Balancing Act (2007) 66 *The Cambridge Law Journal* 142, 151-155” [↑](#footnote-ref-4)
5. Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia,* ALRC Report 95 (2003) 84. [↑](#footnote-ref-5)
6. Parliamentary Joint Committee on Human Rights “Offence Provisions, Civil Penalties and Human Rights (Guidance Note No 2, Parliament of Australia 2014). [↑](#footnote-ref-6)