

# Black Economy Report - Reverse Onus of Proof

## Reverse onus of proof and Human Rights Law

This was suggested in the Black Economy Final Report, and in the Bill. However it **contravenes a human rights covenant** which Australia has signed. The Black Economy Final Report suggests that "...even though 'reverse onus of proof' adversely affects individual rights and liberties, they are considered appropriate in serious offences related to terrorism, drugs and child sex offenders..." (And now apparently making a payment in cash is considered as serious as terrorism!) Interestingly, they **do not** recommend reverse onus of proof to apply to those found to be depositing large amounts of cash to financial institutions. Even though later in the report they describe money laundering to involve "...large quantities of cash are deposited into Australian bank accounts and transferred offshore or used to purchase investments."

## Human Rights

Reverse onus of proof **contravenes** the International Covenant on Civil and Political Rights, which Australia has signed  
<http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>

## **Article 14**

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

## Reverse onus of proof in the Cash Restrictions Bill:

1.48 A defendant bears an evidential burden to establish the possibility that their use of cash of an amount equal to or above the cash payment limit relates to a transaction of a kind specified by the Treasurer. The defendant, as one of the parties to the transaction, is readily able to assess the nature of the transaction because the details of the transaction are peculiarly within the knowledge of the parties. This is in contrast to the position of enforcement agencies, which would find it difficult or impossible to prove the nature of the transaction and enforce the offences should the parties to the transaction choose to withhold information.

## Reverse Onus of Proof in the Black Economy Final Report

P189 Proving the origin of unexplained wealth: The *Proceeds of Crime Act 2002* (PoCa) governs the majority of confiscation processes at the Commonwealth level. These civil provisions **target high level criminal bosses** who obtain the proceeds of criminal operations they have directed, but not participated in. When a link is demonstrated between a person and a criminal offence, or a link between the wealth and a criminal offence, that person can be ordered to attend court and prove that their wealth was legitimately acquired.

**Due to constitutional limitations**, the Commonwealth unexplained wealth provisions **can only apply if there is a link to a Commonwealth offence, a foreign offence, or a state offence with a federal aspect**. Unexplained wealth that is purely derived from a state

offence is unlikely to fall under the purview of the Commonwealth rules, they would fall under the relevant states' unexplained wealth provisions.

P189 Gathering proof to the criminal standard is difficult and resource intensive. Proof may be hard to obtain because such knowledge is only privy to the defendant.

In criminal proceedings, the prosecution **bears the legal onus of proof** to prove the elements of an offence **beyond reasonable doubt**. The defendant then bears the evidential onus of proof for any defences or excuses that they raise in response. This general principle is a core principle of common law where a party is **presumed to be innocent until proven guilty**.

Laws that expressly reverse this general principle are considered to 'reverse the onus of proof'. Because such laws **adversely affect individual rights and liberties**, they are considered appropriate **in serious offences relating to terrorism, drugs and child sex offences**. A key justification for the reversal of the onus of proof in these cases is the formidable difficulty faced by the prosecution to secure proof.

The legal onus of proof need not be reversed for all elements of an offence. Reversing the legal onus of proof for even a few elements of an offence may be a good compromise between the competing objectives of **protecting individual rights** and reducing the prosecution's burden of proof.

**Reducing excessive burdens on the prosecution** will improve the likelihood of aggressive black economy offences being successfully prosecuted, which can act as an effective deterrent. **Reversing the onus of proof** can lead to cost effective high-volume enforcement

P193 Law enforcement agencies face challenges when prosecuting black economy offenders using criminal offence provisions. **Criminal offence provisions usually require the prosecutor to prove beyond reasonable doubt that the defendant intended to commit the offence**. Given the serious consequences of being convicted of a criminal offence, it is only fair to place a high burden of proof. **The requirement of proof of fault is one of the most fundamental protections of criminal law**, but it can mean that **regulators are unable to obtain and demonstrate sufficient proof to the criminal standard**. In contrast to criminal provisions, the burden of proof for civil penalties is lower, as are the sanctions. Regulators often resort to civil proceedings where lower evidentiary standards are sufficient.

**Black Economy Report does not recommend reverse onus of proof to apply to banks**

P190 We considered reversing the onus of proof onto those found depositing large sums of cash in financial institutions. We decided not to proceed further as the existing AML/CTF legislation already covers such scenarios. Financial institutions should already be reporting cash deposits greater than \$10,000 and suspicious matter reports with AUSTRAC if they form suspicion of an offence against a range of laws, including Commonwealth laws.

P293 Money laundering enables organised criminals to extract their profits from Australia or to convert illegally obtained funds into legitimate wealth. Dirty money is also brought in from offshore — Australia's good governance and relative stability makes it an attractive location for people to purchase assets as a store of value.

Money laundering takes various forms. At its most crude, large quantities of cash are deposited into Australian bank accounts and transferred offshore or used to purchase investments. Money laundering may also occur through the use of cryptocurrencies