

other words, a penalty or other sanction may be ‘criminal’ for the purposes of the ICCPR even though it is considered to be ‘civil’ under Australian domestic law.¹⁵⁷

9.112 For the Human Rights Committee, matters to consider in assessing whether a civil penalty is ‘criminal in nature’ include: the classification of the penalty; the nature of the penalty, including whether it is intended to be punitive or deterrent in nature, and whether the proceedings are instituted by a public authority with statutory powers of enforcement; and the severity of the penalty.¹⁵⁸

Proceeds of crime

9.113 Some aspects of proceeds of crime laws may be considered to involve civil penalties that are criminal in nature. The *Proceeds of Crime Act 2002* (Cth) (*Proceeds of Crime Act*) establishes a scheme to confiscate the proceeds of crime.¹⁵⁹

9.114 The Act provides for the making of an ‘unexplained wealth order’: an order requiring the person to pay an amount equal to so much of the person’s total wealth as the person cannot satisfy the court is not derived from certain offences.¹⁶⁰ A court may make an unexplained wealth order if a preliminary unexplained wealth order¹⁶¹ has been made, and the court is not satisfied that the person’s wealth was not derived from an offence.¹⁶²

9.115 The burden of proving that the person’s wealth is not derived from an offence lies on that person.¹⁶³ The person need not have been charged or convicted of any offence.

9.116 Gray has argued that civil forfeiture regimes are criminal in nature:¹⁶⁴

Such provisions typically allow forfeiture of the asset although the person who owns the asset has not been proven at the criminal standard to have committed a crime by which the asset was directly or indirectly obtained.¹⁶⁵

9.117 Section 179E was added to the *Proceeds of Crime Act* in 2010,¹⁶⁶ with the rationale that,

[w]hile the Act contains existing confiscation mechanisms, these are not always effective in relation to those who remain at arm’s length from the commission of offences, as most of the other confiscation mechanisms require a link to the

157 Parliamentary Joint Committee on Human Rights, ‘Offence Provisions, Civil Penalties and Human Rights’ (Guidance Note No 2, Parliament of Australia, 2014).

158 Ibid.

159 *Proceeds of Crime Act 2002* (Cth) s 6. See also Ch 19.

160 Ibid s 179A.

161 An order requiring a person to appear before the court for the purpose of enabling the court to decide whether or not to make an unexplained wealth order: Ibid s 179B(1).

162 Ibid s 179E(1).

163 Ibid s 179E(3).

164 Gray, above n 156, 32.

165 Gray, above n 33, 135–36.

166 *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth). Further amendments were made by the *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Act 2015* (Cth) to ‘strengthen the Commonwealth’s unexplained wealth regime’: Explanatory Memorandum, Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014.

commission of an offence. Senior organised crime figures who fund and support organised crime, but seldom carry out the physical elements of crimes, are not always able to be directly linked to specific offences.¹⁶⁷

9.118 The reversal of the onus of proof in unexplained wealth orders has been said to be appropriate because '[d]etails of the source of a person's wealth will be peculiarly within his or her knowledge'.¹⁶⁸ However, the Scrutiny of Bills Committee was concerned about the 'potential impact of such an onerous provision on a person's civil liberties'.¹⁶⁹

9.119 The operation of the unexplained wealth provisions is subject to the oversight of the Parliamentary Joint Committee on Law Enforcement.¹⁷⁰ That Committee may require law enforcement bodies to appear before it to give evidence.¹⁷¹ Additionally, the Commissioner of the Australian Federal Police must report to the Committee each financial year.¹⁷²

9.120 In an independent review of the *Proceeds of Crime Act* in 2006 Tom Sherman found that, while there was consensus among international law enforcement bodies about the appropriateness of a reversal of the burden of proof in unexplained wealth provisions,

it falls short of the wider consensus I believe is necessary to support the introduction of unexplained wealth provisions. Unexplained wealth provisions are no doubt effective but the question is, are they appropriate considering the current tension between the rights of the individual and the interests of the community? ... On balance I believe it would be inappropriate at this stage to recommend the introduction of these provisions.¹⁷³

9.121 In contrast, in 2012, a Parliamentary Joint Committee on Law Enforcement Inquiry into unexplained wealth legislation concluded that,

in practice, it is difficult to conceive of scenarios by which an individual had significant amounts of unexplained wealth with no way of accounting for their legitimate accumulation, if that was in fact what had occurred ... The committee is therefore of the view that, with appropriate safeguards, unexplained wealth laws represent a reasonable, and proportionate response to the threat of serious and organised crime in Australia.¹⁷⁴

167 Revised Explanatory Memorandum, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009.
168 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *10th Report of 2009* (September 2009).
169 Ibid.
170 *Proceeds of Crime Act 2002* (Cth) s 179U(1).
171 Ibid s 179U(2).
172 Ibid s 179U(3).
173 Tom Sherman, 'Report on the Independent Review of the Operation of the *Proceeds of Crime Act 2002* (Cth)' (Attorney-General's Department, 2006) 37.
174 Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements* (March 2012) 10.

9.122 The Law Council submitted to this Inquiry that traditional criminal court processes should apply in civil confiscation proceedings, ‘whereby the onus remains with the prosecution to establish that the property was unlawfully acquired’.¹⁷⁵

Conclusion

9.123 Reversal of the legal burden of proof on an issue essential to culpability in an offence arguably provides the greatest interference with the presumption of innocence, and its necessity requires the strongest justification.

9.124 The ALRC concludes that further review of the reversals of the legal burden of proof in these laws may be warranted, to determine whether they unjustifiably interfere with the presumption of innocence. Laws that may merit further review include deeming provisions in relation to the requisite intention or belief for serious drug offences, and to directors’ liability for taxation offences committed by a corporation. Any such review should consider whether placing an evidential rather than legal burden on the defendant would be sufficient to balance the presumption of innocence with the legitimate objectives pursued by these laws.

9.125 The ALRC notes that there can be a blurring of distinctions between criminal and civil penalties, such that some civil laws may effectively be criminal in nature. Reversals of the burden of proof in such laws merit careful scrutiny.

175 Law Council of Australia, *Submission 75*.

10. Strict and Absolute Liability

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Summary

10.1 It is an important principle of the common law that a person generally should not be criminalised for committing a physical act (*actus reus*) without an accompanying ‘guilty mind’ (*mens rea*). However, some statutes impose strict or absolute liability on one or more physical acts, meaning that proof of *mens rea* is not required.

10.2 This chapter considers examples of offences where strict or absolute liability is imposed on any physical element of an offence. It discusses the source and rationale of the common law principle; how it is protected from statutory encroachment; and when Commonwealth laws that impose strict or absolute liability may be justified.

10.3 Strict liability offences do not require proof of fault, and provide for a defence of an honest and reasonable mistake of fact. It is generally considered justified to impose strict liability to protect public health, safety and the environment. It may also be imposed for regulatory offences. The general principle is that strict liability may be imposed where a person is placed on notice to guard against the possibility of inadvertent contravention.

10.4 A defence of an honest and reasonable mistake of fact is not available for absolute liability offences. Such offences usually arise when an element is essentially a pre-condition of the offence, and the state of mind of the defendant is not relevant.

10.5 There are strict and absolute liability offences across many areas of law, including corporate and commercial regulation, environmental regulation, work health and safety, customs and border protection, counter-terrorism and national security, and copyright.

10.6 Some areas of particular concern have been identified. These include:

- various counter-terrorism offences provided under sch 1 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*) and ss 20 and 21 of the *Charter of the United Nations Act 1945* (Cth);
- reporting requirements under customs legislation; and
- the imposition of strict liability in relation to commercial scale infringement offences in copyright law.

10.7 Counter-terrorism and national security laws, including those mentioned above, should be subject to further review to ensure that the laws do not unjustifiably impose strict or absolute liability, or encroach upon other rights and freedoms. Further review on this basis could be conducted by the Independent National Security Legislation Monitor (INSLM) and the Parliamentary Joint Committee on Intelligence and Security.

10.8 The Productivity Commission may wish to consider the imposition of strict liability in relation to commercial scale copyright infringement offences as part of its review of Intellectual Property arrangements.

10.9 Finally, strict and absolute liability provisions should be reviewed to ensure they provide a consistent and uniform standard of safeguards.

A common law principle

10.10 There is a common law principle that presumes ‘*mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence’.¹ The general requirement of *mens rea* is said to be ‘one of the most fundamental protections in criminal law’,² and it reflects the idea that

it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (ie recklessness).³

1 *Sherras v De Rutzo* [1895] 1 QB 918, 921.

2 Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) [2.26].

3 *Ibid.*

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10.11 Professors Andrew Ashworth and Jeremy Horder commented that:

The essence of the principle of *mens rea* is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and consequences.⁴

10.12 In *He Kaw Teh v The Queen*, Brennan J explained the operation of *mens rea* as an element in criminal offences:

It is implied as an element of the offence that, at the time when the person who commits the *actus reus* does the physical act involved, he either—

- (a) knows the circumstances which make the doing of that act an offence; or
- (b) does not believe honestly and on reasonable grounds that the circumstances which are attendant on the doing of that act are such as to make the doing of that act innocent.⁵

10.13 Historically, criminal liability at common law necessarily involved proof of *mens rea*.⁶ In *Williamson v Norris*, Lord Russell CJ said the ‘general rule of the English law is, that no crime can be committed unless there is *mens rea*’.⁷

10.14 In his *Commentaries on the Laws of England*, William Blackstone wrote that, to ‘constitute a crime against human laws, there must be first a vitious will, and secondly, an unlawful act consequent upon such vitious will’.⁸

10.15 Criminal offences are generally characterised in one of three ways:

- *mens rea* offences—the prosecution must prove a physical element (*actus reus*) and a mental element (*mens rea*);
- strict liability offences⁹—the prosecution is not required to prove *mens rea*, but there is a defence of reasonable mistake available;¹⁰ and
- absolute liability offences—proof of *mens rea* is not required and the defence of reasonable mistake is not available.¹¹

4 Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013) 155.

5 *He Kaw Teh v The Queen* (1985) 157 CLR 523, 582.

6 Sir William Holdsworth, *A History of English Law* (Methuen, 2nd ed, 1937) vol 8, 432.

7 *Williamson v Norris* [1899] 1 QB 7, 14.

8 William Blackstone, *Commentaries on the Laws of England*, (Clarendon Press reprinted by Legal Classics Library, first published 1765–1769, 1983 ed) vol IV, bk IV, ch 2, 21.

9 At common law, strict liability does not extend to criminal conduct. However, Parliament may impose strict (or absolute) liability on an offence by statute.

10 Generally, an honest and reasonable mistake in a set of facts, which, if they had existed, would make the defendant’s act innocent, affords an excuse for doing what would otherwise be an offence: *Proudman v Dayman* (1941) 67 CLR 536, 541 (Dixon J).

11 *Wamphler v The Queen* (1987) 67 CLR 531. See further, Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2003) [4.4].

10.16 In the mid to late 19th century, strict and absolute liability offences were increasingly created by statute, particularly so-called ‘regulatory offences’.¹² Regulatory offences were designed to protect individuals from the risks that came with greater industrialisation and mass consumerism.

10.17 In Australia, the common law presumes that *mens rea* is an essential ingredient of a criminal offence is reflected in statute. Chapter 2 of the *Criminal Code* codifies the general principles of criminal responsibility which apply to all Commonwealth offences. Offences are made up of physical elements (*actus reus* at common law) and fault elements (*mens rea* at common law).¹³

10.18 A law may expressly provide that there is no fault element for one or more physical elements of an offence. If an offence is designated as a strict or absolute liability offence, no fault elements apply to all of the physical elements of the offence.¹⁴ If strict or absolute liability is designated to apply to a physical element of an offence, no fault elements apply to that physical element.¹⁵ A defence of an honest and reasonable mistake of fact applies only in relation to strict liability offences.¹⁶ Different fault elements may apply to different physical elements of an offence.¹⁷

10.19 Where an offence is silent on the fault element that applies to one or more physical elements of the offence, s 5.6 operates to impose a default fault element. If the physical element relates to conduct, the prosecution must prove intention in relation to that conduct (that is, that the conduct was intended).¹⁸ If the physical element relates to a circumstance or result, the prosecution must prove recklessness in relation to that circumstance or result.¹⁹

10.20 A number of Commonwealth laws expressly impose strict or absolute liability on some physical elements of an offence.²⁰ Most commonly, these relate to technical²¹

12 Before this time, convictions for criminal offences without proof of intent were found ‘only occasionally, chiefly among the nuisance cases’: Francis Bowes Sayre, ‘Public Welfare Offenses’ (1933) 33 *Columbia Law Review* 55, 56. ‘Whereas at common law, it was generally true to say that to convict D, P had to prove *actus reus* and *mens rea*, in modern times a doctrine has grown up that in certain classes of statutory offences, which may be called for convenience ‘regulatory offences’, D can be convicted on proof by P of *actus reus* only’: Colin Howard, *Strict Responsibility* (Sweet & Maxwell, 1963) 1.

13 *Criminal Code* s 3.1(1).

14 *Ibid* ss 6.1(1), 6.2(1).

15 *Ibid* ss 6.1(2), 6.2(2).

16 *Ibid* ss 6.1, 6.2.

17 *Ibid* s 3.1(2).

18 *Ibid* s 5.6(1).

19 *Ibid* s 5.6(2).

20 See, eg, *Corporations Act 2001* (Cth) ss 200B, 791A, 820A, 952J; *Customs Act 1901* (Cth) ss 96A, 99–102A, 102CK, 102DE, 102FA, 105C, 112; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 15A, 15C, 17B, 207B, 229; *Great Barrier Reef Marine Park Act 1975* (Cth) ss 38BC, 38BD, 38EA, 61AAC, 61ACB.

21 For example, strict liability is imposed with respect to the fact that the conduct occurred within a protected zone: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 15A. Another example is, where a provision makes it an offence to give a defective disclosure document or statement, strict liability is imposed in relation to whether the person is a financial services licensee, and whether they gave or made the document available to another person: *Corporations Act 2001* (Cth) s 952E. In relation to a provision that goods should not be transferred between certain vessels, strict liability is imposed on the circumstance that an aircraft is making an international or prescribed flight or voyage:

or jurisdictional²² elements, and as such don't offend the common law principle. However, problems arise when strict or absolute liability applies to physical elements that would normally require fault to render them culpable.²³ Professor Jeremy Gans submitted:

Some physical elements of a criminal offence almost never lack subjective intent in practice (eg most conduct) and many others in Commonwealth legislation are technical/jurisdictional elements with no relevance to responsibility. The relevant question is whether or not absolute/strict liability applies to any element of a Commonwealth offence that may plausibly be committed without subjective intent or knowledge and that is relevant to criminal responsibility.²⁴

10.21 Accordingly, this chapter focuses on laws which impose strict or absolute liability on physical elements that would normally require fault to render them culpable.

Protections from statutory encroachment

Australian Constitution

10.22 The *Australian Constitution* does not expressly require that criminal offences include *mens rea*,²⁵ nor has this been specifically implied into the *Constitution* by the High Court.²⁶

Principle of legality

10.23 The principle of legality provides some protection to the principle of *mens rea*.²⁷ When interpreting a statute, courts will presume that Parliament did not intend to create a strict liability offence, unless this intention was made unambiguously clear.²⁸

Customs Act 1901 (Cth) s 175. Absolute liability is imposed in some corporate offences, in relation to whether an entity was a company at the time of the offence: *Corporations Act 2001* (Cth) s 592. In relation to aggravated people smuggling offences, absolute liability applies to the circumstance that at least five of the persons entering a foreign country are not citizens or permanent residents of that country: *Criminal Code* s 73.3.

22 For example, in relation to theft and other property offences, absolute liability is imposed on the circumstance that the Commonwealth owned or occupied the property: *Customs Act 1901* (Cth) s 33L; *Criminal Code* ss 131.1, 132.4, 134.1. Another example relates to offences relating to fraudulent conduct, where absolute liability is imposed on the circumstance that the person or entity (to whom the fraudulent statements were made) was a Commonwealth public official or Commonwealth entity: *Ibid* ss 134.2, 135.1, 135.2, 136.1, 137. These are referred to as jurisdictional elements, as a connection with the Commonwealth is necessary to demonstrate a connection with the Commonwealth's power to legislate under the *Constitution*.

23 See, eg, *Criminal Code* s 102.5(2)(b).

24 J Gans, *Submission 2*.

25 This section and the section following refer to *mens rea* rather than fault elements, as it relates to the protection of the underlying common law principle, rather than the statutory expression of the principle under the *Criminal Code*.

26 However, where an offence in a Commonwealth law encroaches upon a constitutional right (express or implied), imposing strict or absolute liability on the offence may mean it is more difficult to establish that the offence is a proportionate limitation on the constitutional right.

27 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 2.

28 *He Kaw Teh v The Queen* (1985) 157 CLR 523, 528 (Gibbs CJ); *Sherras v De Rutzen* [1895] 1 QB 918.

10.24 In *CTM v The Queen*, for example, the High Court considered whether the common law defence of honest and reasonable mistake of fact applies to s 66C(3) of the *Crimes Act 1900* (NSW) (*Crimes Act*), which makes it an offence for a person to have sexual intercourse with another person between the ages of 10 and 16. The majority of the High Court stated:

While the strength of the consideration may vary according to the subject matter of the legislation, when an offence created by Parliament carries serious penal consequences, the courts look to Parliament to spell out in clear terms any intention to make a person criminally responsible for conduct which is based on an honest and reasonable mistake.²⁹

10.25 An amendment to the *Crimes Act* in 2003 had removed the express statutory defence under s 77(2)(c) that the person ‘had reasonable cause to believe, and did in fact believe, that the child was of or above the age of 16 years’.³⁰ It was designed to provide equal treatment of sexual offences against males and females.³¹

10.26 A majority of the High Court held that the offence in s 66C was not an absolute liability offence, despite the repeal of s 77(2), because it did not prevent the ongoing operation of the common law principle that an honest and reasonable mistake generally precludes criminal liability. The Court stated:

the New South Wales Parliament regarded the ‘express defence’ in s 77(2) as no longer appropriate. It was a defence that, in its terms, differentiated between homosexual and heterosexual activity, so it at least had to be changed if there were to be the desired equalisation. It could not have been left as it was. Yet the problem to which that provision was addressed did not disappear; and the long-standing and well-understood principle which provided an alternative response to the same problem remained potentially applicable in the absence of ‘the clearest and most indisputable evidence [concerning] the meaning of the Act’.³²

International law

10.27 The imposition of strict or absolute liability is seen to engage and limit the presumption of innocence protected under art 14.2 of the *International Covenant on Civil and Political Rights* (ICCPR),³³ because it allows for the imposition of criminal liability without proof of fault. Article 14.2 therefore provides some protection to the principle of *mens rea*. While international instruments cannot be used to ‘override clear and valid provisions of Australian national law’,³⁴ where a statute is ambiguous, courts

29 *CTM v The Queen* (2008) 236 CLR 440, [7] (Gleeson CJ, Gummow, Crennan and Kiefel JJ). This finding was supported by the other judges: *Ibid* [57], [61] (Kirby J), [139] (Hayne J), [201]–[202] (Heydon J).

30 New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 May 2003, 376 (Bob Debus, Attorney-General).

31 New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 May 2003, 834 (Kristina Keneally).

32 *CTM v The Queen* (2008) 236 CLR 440, [30] (Gleeson CJ, Gummow, Crennan and Kiefel JJ).

33 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

34 *Minister for Immigration v B* (2004) 219 CLR 365, [171] (Kirby J).

will generally favour a construction that accords with Australia's international obligations.³⁵

Justifications for imposing strict and absolute liability

10.28 The imposition of strict or absolute liability is a departure from the common law principle that a criminal offence must include a *mens rea* element. The general principle is that strict liability may be imposed where a person is placed on notice to guard against the possibility of inadvertent contravention.

10.29 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) published a report on the application of strict and absolute liability in 2002 (*Strict and Absolute Liability Report*). It concluded that the imposition of strict liability may be justified:

- where it is difficult to prosecute fault provisions;
- to overcome 'knowledge of law' issues, where a physical element incorporates a reference to a legislative provision;
- where it is necessary to protect the general revenue; or
- to ensure the integrity of a regulatory regime (for example, public health, the environment, financial or corporate regulation).³⁶

10.30 Additionally, the following general principles are relevant to the imposition of strict liability:

- It should only be imposed after careful consideration of all available options, and where there is general public support and acceptance of the measure and the penalty.
- It should not be imposed for mere administrative convenience, or based on a rigid formula. It is insufficient to rely on broad uncertain criteria (such as general public good or community interest), or solely on reduced resource requirements. Strict liability should only be imposed based on specific criteria/rationales.
- It should not be imposed where schemes are so complex and detailed that breaches are virtually guaranteed, or where parties must, by necessity, rely on information from third parties.
- It should not be imposed where it is accompanied by an excessive or unreasonable increase in agency powers of control, search, monitoring and questioning.

35 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 2.

36 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 284.

- It should only apply for offences where the penalty does not include imprisonment, and where there is a cap of 60 penalty units for monetary penalties.
- It should be accompanied by program-specific defences which account for reasonable contraventions. These should be in addition to the defences in the *Criminal Code*.³⁷

10.31 On the question of absolute liability, the *Strict and Absolute Liability Report* stated that the imposition of absolute liability should be ‘rare and limited to jurisdictional or similar elements of offences’.³⁸ Additionally, it stated that it may be acceptable to impose absolute liability ‘where an element is essentially a precondition of an offence and the state of mind of the offender is not relevant’.³⁹

10.32 The Parliamentary Joint Committee on Human Rights (Human Rights Committee) considers strict and absolute liability offences in light of art 14.2 of the ICCPR.⁴⁰

10.33 The Human Rights Committee has noted that the imposition of strict or absolute liability will not violate art 14.2 where it pursues a legitimate aim, and is reasonable and proportionate to that aim.⁴¹ Strict liability offences drafted in accordance with the principles set out in the *Strict and Absolute Liability Report* and the *Guide to Framing Commonwealth Offences*⁴² are likely to satisfy this test.⁴³ In relation to absolute liability, the Human Rights Committee has stated that imposing absolute liability on jurisdictional elements is unlikely to raise human rights concerns.⁴⁴

Laws that impose strict or absolute liability

10.34 There are a range of Commonwealth laws that could be said to impose strict or absolute liability. This chapter examines laws that arise in the following areas:

- corporate and prudential regulation;

37 Ibid 283–6.

38 Ibid 285. For example, in relation to aggravated people smuggling offences, absolute liability applies to the circumstance that at least five of the persons entering a foreign country are not citizens or permanent residents of that country: *Criminal Code* s 73.3.

39 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 285.

40 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Second Report of the 44th Parliament* (February 2014) [1.139], [1.308].

41 See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Bills Introduced 18–29 June 2012, First Report of 2012* (2012) 13.

42 Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011).

43 See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Bills Introduced 18–29 June 2012, First Report of 2012* (2012) 13.

44 See, eg, Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixth Report of 2012* (2012) [1.24].

- environmental protection;
- work health and safety laws;
- customs and border protection legislation;
- national security legislation; and
- copyright legislation.

10.35 The imposition of absolute liability is relatively rare, and is largely confined to technical or jurisdictional elements.⁴⁵ Some notable exceptions arise in relation to customs and border protection and national security.

Corporate and prudential regulation

10.36 Strict liability offences are a common feature of regulatory frameworks underpinning corporate and prudential regulation, and may be appropriate to ensure the integrity of a financial or corporate regulatory regime.⁴⁶

10.37 Strict liability is imposed on elements of a variety of corporate offences, including: the composition of corporate entities and licensing;⁴⁷ the provision of information, both to the general public and the regulator;⁴⁸ compliance with regulator and court/tribunal directions;⁴⁹ directors' duties and remuneration;⁵⁰ corporate governance, including audit requirements;⁵¹ and the holding of monies on behalf of others.⁵²

45 For example, absolute liability is imposed on elements relating to the value of property and cash (in the proceeds of crime context), the time period in which the conduct occurred, or whether the conduct contravenes particular legislation: *Criminal Code* ss 360.2, 360.3, 400.3(4)–400.7(4). Another example relates to extradition. A nominal offence is created to facilitate prosecution in lieu of extradition. It applies where a person is remanded by a magistrate under s 15 of the *Extradition Act 1988* (Cth), and the person engaged in conduct outside Australia which would have constituted an offence if it had occurred in Australia: *Extradition Act 1988* (Cth) s 45. Absolute liability applies to these two elements, on the basis that the prosecution would have to prove all elements of the underlying offence beyond reasonable doubt. These elements are technical elements, and if the prosecution, for instance, could prove all the fault elements relating to the offence of murder, it should not also be required to prove that the defendant knew or was reckless to the fact that murder constitutes an offence under Australian law.

46 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 284.

47 See, eg, *Corporations Act 2001* (Cth) ss 113, 115, 624, 630, 633, 640, 664D, 672B, 723–725, 734, 736, 791A, 820A.

48 See, eg, *Ibid* ss 123, 136, 139, 142–144, 146, 148, 153, 157, 162, 178A, 178C, 205B, 235, 246B, 246D, 246F–G, 249Z, 250BB, 250P, 250S, 250W, 314, 316, 316A, 317, 348D, 349A, 428, 601CW, 601DD–601DE, 601DH, 643–644, 648G, 650B, 650E–650F, 651A, 652C, 661B, 662A, 665A, 666A–666B, 667A, 670C, 912F, 952C, 952E, 952G, 985J, 1020AI, 1021C, 1021E, 1021FA–1021FB, 1021H, 1021M, 1021NA–1021NC, 1041E, 1274, 1299G, 1300, 1308.

49 See, eg, *Ibid* ss 158, 294, 601BJ, 601JA, 657F, 1232. See also *Australian Securities and Investments Commission Act 2001* (Cth) ss 12GN, 66, 72–73, 91, 200, 220.

50 See, eg, *Corporations Act 2001* (Cth) ss 191, 195, 199B, 200B, 201D, 202B, 203D, 205G, 206J–206K, 206M, 588G.

51 See, eg, *Ibid* ss 249K, 250PA, 307A–307C, 308–309, 312, 324B, 601HG, 989CA.

52 See, eg, *Ibid* ss 666B, 722, 993B–993D, 1021O.

10.38 Strict liability offences relating to prudential regulation are primarily found in the *Superannuation Industry (Supervision) Act 1993* (Cth), *Insurance Act 1973* (Cth), and *Life Insurance Act 1995* (Cth).⁵³ Strict liability in prudential regulation aims to ensure the fidelity of the regulatory framework. As a regulatory agency, the Australian Prudential Regulatory Authority (APRA) relies strongly on the deterrence effect of regulatory mechanisms, and incentives to enter into administrative arrangements to prevent contravening conduct. Where prosecutions prove difficult, or provisions are virtually unenforceable, the overall efficacy of the regulatory regime is jeopardised. APRA has contended that, where it becomes known that the regulatory regime is difficult to enforce, it could encourage disreputable practices in the industry, putting the pool of superannuation savings in Australia at risk.⁵⁴

10.39 Based on this reasoning, non-compliance provisions relating to APRA directions,⁵⁵ superannuation payments and related commissions and brokerages,⁵⁶ false, misleading or defective statements and representations are designated strict liability offences. Additionally, as APRA relies on information from industry participants in fulfilling its regulatory responsibilities, failures to provide APRA with information, documents or assistance are also designated strict liability offences.

10.40 Two examples of corporate and prudential regulation were highlighted in submissions to this Inquiry. The Australian Institute of Company Directors (AICD) submitted that s 588G of the *Corporations Act 2001* (Cth) (*Corporations Act*) is the ‘most notable example’ of a suite of provisions imposing strict or absolute liability for a breach of directors’ duties at state, territory and Commonwealth level.

10.41 Section 588G of the *Corporations Act* states:

- (3) A person commits an offence if:
 - (a) a company incurs a debt at a particular time; and
 - (aa) at the time, a person is a director of the company; and
 - (b) the company is insolvent at that time, or becomes insolvent by incurring that debt, or incurring at that time debts including that debt; and
 - (c) the person suspected at the time when the company incurred the debt that the company was insolvent or would become insolvent as a result of incurring that debt or other debts (as in paragraph (1)(b)); and
 - (d) the person’s failure to prevent the company incurring the debt was dishonest.

53 See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth) ss 11B–11C, 18, 29JA–29JB, 29JCA, 29W–29WB, 34M–34Q, 34Z, 35A–35D, 63–64, 71EA, 103–105, 107–108A, 122–124, 126K, 129–130, 130C, 131AA, 131B–131C, 135, 140, 141A, 154, 159–160, 201, 242P, 252A, 254, 260, 262, 265, 299C, 299F–299K, 299M, 299Y, 303, 331; *Insurance Act 1973* (Cth) ss 7A, 9–10, 14, 17, 20, 24, 27, 43A, 49, 49A, 49F, 49L, 62ZD, 62ZQ, 108.

54 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Ninth Report of 2000* (June 2000) 247.

55 See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth) ss 29JB, 34P–34Q, 63, 131AA, 159–160; *Life Insurance Act 1995* (Cth) ss 88B, 98B, 125A, 230F; *Insurance Act 1973* (Cth) ss 7A, 17, 27, 49, 49F, 62ZD, 108.

56 See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth) ss 29WA–29WB, 34M–34N.

- (3A) For the purposes of an offence based on subsection (3), absolute liability applies to paragraph 3(a).
- (3B) For the purposes of an offence based on subsection (3), strict liability applies to paragraphs (3)(aa) and (b).

10.42 The AICD submitted that imposing criminal liability for the acts of the company on any basis other than because the director ‘knowingly authorised or recklessly permitted a contravention fosters an approach to business which is overly risk averse and which stifles economic growth and innovation’.⁵⁷ In determining whether a company is likely to be insolvent, a director is likely to be required to make complex commercial decisions without full information, and with limited time.⁵⁸

10.43 The Australian Securities and Investments Commission (ASIC) suggested that the imposition of strict liability in s 588G reflects a drafting error. According to ASIC, the requirement for a reasonable suspicion set out in s 588G(3)(c) should be the fault element that applies to s 588G(3)(b). It submitted that s 588G should be amended to delete s 588G (3B).⁵⁹

10.44 While the Scrutiny of Bills Committee has accepted the general approach to the imposition of strict liability in prudential regulation,⁶⁰ the Committee drew attention to amendments inserted by the *General Insurance Reform Act 2001* (Cth). This inserted the following strict liability offences:

- breaching a condition of an APRA determination that certain requirements do not apply (authorisation to carry on an insurance business, audit and actuarial investigations, compliance with prudential standards, keeping of accounting records, requirements relating to presence and service in Australia)—s 7A;
- carrying on an insurance business in Australia, unless otherwise authorised—ss 9, 10;
- breaching an authorisation condition—s 14;
- breaching an authorisation condition given to a non-operating holding company—s 20.

10.45 While the Scrutiny of Bills Committee accepted that strict liability sought to ‘ensure the effectiveness of using the prospect of prosecutions as a deterrent to imprudent behaviour or an incentive to negotiate a rectification plan’, it noted that the provisions were modelled on ss 7 and 8 of the *Banking Act 1959* (Cth), which are fault-based provisions. While the Committee left the question for the Senate as a whole to

⁵⁷ Australian Institute of Company Directors, *Submission 42*.

⁵⁸ Australian Institute of Company Directors, *Submission 105*.

⁵⁹ Australian Securities and Investments Commission, *Submission 125*.

⁶⁰ See, eg, Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Ninth Report of 2000* (June 2000) 245–7; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Seventh Report of 2002* (June 2002) 304–5; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *15th Report of 2002* (December 2002) 509–11; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *First Report of 2008* (March 2008) 11–12; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Second Report of 2008* (March 2008) 61–4.

consider, by the time the Scrutiny of Bills Committee had published its report, the Bill had already been passed, and there was no whole of Senate consideration of the issue.⁶¹

Environmental protection

10.46 Strict liability is a key feature of a variety of environmental regulatory frameworks, including in relation to protection of the environment and biodiversity, standards and measures targeted at improving water efficiency, prohibitions on the manufacture and use of ozone depleting substances, fisheries and marine reserves, and areas of particular significance, such as the Great Barrier Reef.

10.47 The ALRC received one submission on such provisions. The Environmental and Planning Law Committee submitted that such offences were justified:

On balance, removing strict liability for offences under Commonwealth environmental legislation would, in the EPLC's view, significantly reduce the efficacy of the EPBC Act and other Commonwealth environmental legislation in deterring environmental crime.⁶²

10.48 However, it is desirable to scrutinise each strict or absolute liability offence individually, to determine whether it is a proportionate response to the underlying needs sought to be addressed.

10.49 The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) is the central plank of environmental regulation at the Commonwealth level.⁶³ It contains a number of strict liability offences. The effect of the majority of these provisions is that the prosecution does not need to prove that the defendant knew that a species is a protected species, or that the conduct occurred in a protected place.⁶⁴ In justifying a number of these provisions to the Scrutiny of Bills Committee in 2006, the Minister stated:

The relevant offence provisions of the EPBC Act form part of a fundamental environmental regulatory regime that is aimed at protecting matters of national environmental significance. The application of strict liability to elements of these offences is considered appropriate for ensuring the maintenance of the integrity of the regulatory regime of the EPBC Act.⁶⁵

10.50 Additionally, the Minister noted that strict liability is appropriate

where it has proved difficult to prosecute fault provisions ... The experience of the [Department], as confirmed by the Commonwealth Director of Public Prosecutions, is that the requirement to prove a mental element (for example that a person knew or

61 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *11th Report of 2001* (August 2001) 483.

62 Law Society of NSW Young Lawyers, *Submission 69*.

63 See also Ch 20.

64 See, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12, 15A–15C, 16, 17B, 18, 18A, 20, 20A, 21, 22A, 23, 24A, 24D–24E, 354A, 355A.

65 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *11th Report of 2006* (November 2006) 214.

was reckless as to the fact that a species is a listed threatened species) is a substantial impediment to proving these offences.⁶⁶

10.51 Strict liability has also been justified on the grounds that it overcomes a knowledge of law problem.⁶⁷

10.52 By contrast, the Scrutiny of Bills Committee did not accept such justifications for similar provisions in the *Fisheries Management Act 1991* (Cth) (*Fisheries Management Act*). For example, s 100B of the *Fisheries Management Act* states:

- (1) A person commits an offence if:
 - (a) the person intentionally uses a boat; and
 - (b) the boat is a foreign boat and the person is reckless as to that fact; and
 - (c) the use of the boat is for commercial fishing and the person is reckless as to that fact; and
 - (d) the boat is at a place that is, at the time of the use, in a part of the territorial sea of Australia that is in the [Australian Fishing Zone].

(1A) Strict liability applies to paragraph (1)(d).⁶⁸

10.53 In its 2007 consideration of the insertion of ss 100B and 101AA of the *Fisheries Management Act*, the Scrutiny of Bills Committee expressed an initial view that these provisions did not appear to comply with the principles set out in the *Strict and Absolute Liability Report*.⁶⁹

10.54 The *Strict and Absolute Liability Report* states that where strict liability is imposed because proving fault is undermining the deterrent effect of the offence, there must be ‘legitimate grounds for penalising persons lacking “fault” in respect of that element’.⁷⁰ The Scrutiny of Bills Committee was concerned

about the fairness of applying strict liability to the element of the location of a foreign fishing boat in the territorial sea of Australia when ‘the territorial sea is not generally depicted on Australian charts or charts issued under other jurisdictions’, thus making it virtually impossible for a foreign fishing boat to know whether or not it has entered the territorial sea.⁷¹

10.55 A number of provisions in the *Great Barrier Reef Marine Park Act 1975* (Cth) are potentially analogous to this. These provisions impose strict liability in relation to

66 Ibid.

67 Ibid. The Scrutiny of Bills Committee’s comments in relation to this Bill reflect its general approach to this issue.

68 See also *Fisheries Management Act 1991* (Cth) ss 99–100, 101–104, 105AA.

69 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Seventh Report of 2007* (June 2007) 233.

70 Ibid.

71 Ibid 235.

whether certain conduct was engaged in within specified zones in the Great Barrier Reef Marine Park.⁷² However, this issue was not raised in submissions to this Inquiry.

Work health and safety

10.56 The *Work Health and Safety Act 2011* (Cth) (*WHS Act*) imposes strict liability on ‘each physical element of each offence under [the *WHS Act*] unless otherwise stated’.⁷³

10.57 The National Farmers Federation submitted that reg 49 of the *Work Health and Safety Regulations 2011* (Cth) ‘appears impossible to comply with’, because it imposes strict liability for accidental exposure despite the presence of safe systems of work.⁷⁴

10.58 Regulation 49 requires that ‘a person conducting a business or undertaking at a workplace must ensure that no person at the workplace is exposed to a substance or mixture in an airborne concentration that exceeds the exposure standard for the substance or mixture’. Section 12F of the *WHS Act* imposes strict liability on all physical elements of offences under the Act (and by extension, regulations under the Act). However, s 17 of the *WHS Act* defines a duty to ensure health and safety imposed under the Act or regulations as requiring that risks are eliminated as far as is reasonably practicable. Where it is not reasonably practicable to eliminate the risk, it should be minimised as far as reasonably practicable. Following this definition, it appears that so long as the safe systems of work eliminate or minimise the risk of exposure, a person carrying on a business or undertaking would not be committing an offence.

Customs and border protection

Strict liability offences

10.59 The customs and border protection regulatory framework is based on risk assessments. These risk assessments rely on information provided to Customs officials.⁷⁵ Inaccurate, false or misleading information can result in inaccurate risk assessments, and may result in the entry of prohibited imports (for example, narcotics or weapons) into the community.⁷⁶ As a result, the *Customs Act 1901* (Cth) (*Customs*

72 See, eg, *Great Barrier Reef Marine Park Act 1975* (Cth) ss 38AA, 38BA(2), (3A), 38BC(2), 38BD(2), 38CA(2), 38DA, 38DD(3), 38GA(4)(c), 38GA(11). However, these provisions may be considered a technical element, thus justified.

73 *Work Health and Safety Act 2011* (Cth) s 12F(2). See also *Industrial Chemicals (Notification and Assessment) Act 1989* (Cth); *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth); *Seafarers Rehabilitation and Compensation Act 1992* (Cth).

74 The National Farmers Federation provided a copy of its submission to the Improving the Model Work Health and Safety Laws Issues Paper and Consultation Regulation Impact Statement Questions as an attachment to its submission to this Inquiry: National Farmers Federation, *Submission 127*.

75 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2002* (May 2002) 149.

76 *Ibid.*

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Act) includes a number of strict liability offences relating to the failure to keep records or provide information, and the provision of false or misleading information.⁷⁷

10.60 The Law Council of Australia (Law Council) submitted that

the failure to report the entry of cargo on time or in an untimely or incorrect fashion (s 64AB(10) of the *Customs Act*) may be an unjustified use of strict liability where the provision of that information has been made in an untimely or incorrect fashion by a contracting party overseas. In that case the imposition of a penalty may be unfair on the Australian party who becomes liable for the offence.⁷⁸

10.61 The Senate Standing Committee on Legal and Constitutional Affairs (Legal and Constitutional Affairs Committee) stated that the imposition of strict and absolute liability was justified in such circumstances.⁷⁹ The strict liability regime was introduced to ‘preserve appropriate border control’⁸⁰ and reflects the view that isolated non-compliance, when viewed in its entirety, ‘can have significant consequences for the community as a whole’.⁸¹ Incorrect information ‘renders ineffective’ Customs’ capacity to regulate using risk management techniques.⁸²

10.62 However, bodies such as the Australian Federation of International Forwarders (AFIF) and Customs Brokers and Forwarders Council of Australia Inc (CBFCA) raised concerns before the Legal and Constitutional Affairs Committee’s Inquiry about the application of strict liability, particularly in relation to false or misleading statements and late reporting.

10.63 AFIF noted that, in some cases, data received from exporters is simply forwarded directly to Customs, and shipping companies are reliant on overseas exporters for the accuracy and timeliness of the reporting.⁸³ CBFCA noted that late reporting is caused by user error, inadequate systems or operating hours and lack of data from overseas sources. It submitted that the first of these could be remedied with training, and contended that it ‘is unreasonable that infringement notices and penalties should apply for late reports caused by the overseas source not supplying data in the time stipulated by the Australian regulatory authorities’.⁸⁴ In relation to false or misleading statements, the Legal and Constitutional Affairs Committee noted that a person is not liable if they make a statement that the person is uncertain about the information provided.⁸⁵

77 See, eg, *Customs Act 1901* (Cth) ss 64–64ABA, 64ACD, 64AE, 64A, 65, 67EI, 71AAAQ, 71G, 74, 90, 101–102A, 102DG, 105C, 113, 114F, 116, 117AA, 117A, 118, 119, 123–124, 213A, 214AI, 240, 243SA–243SB, 243T–243V.

78 Law Council of Australia, *Submission 75*.

79 Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2001, Import Processing Charges Bill 2000, and the Customs Depot Licensing Charges Amendment Bill 2000* (2001).

80 *Ibid* [1.27].

81 *Ibid*.

82 *Ibid*.

83 *Ibid* [1.46].

84 *Ibid* [1.47].

85 *Ibid* [1.50].

10.64 By contrast, in 2002, the Scrutiny of Bills Committee expressed the view that the imposition of strict liability for a failure to provide information in the customs context may trespass on personal rights and liberties. The Scrutiny of Bills Committee said that these provisions did not comply with the principles relating to ‘the protection of people affected by strict liability provisions and for the administration of such provisions’.⁸⁶ For example:

Strict liability should depend as far as possible on the actions or lack of action of those who are actually liable for an offence, rather than be imposed on parties who must by necessity rely on information from third parties in Australia or overseas; offences which do not apply this principle have the potential to operate unfairly.⁸⁷

Absolute liability offences

10.65 In the customs and border protection context, some provisions impose absolute liability on elements other than technical or jurisdictional elements. Examples include ss 233BABAB and 233BABAC of the *Customs Act*, which impose absolute liability in relation to whether importation of a particular good was prohibited under the *Customs Act*. In response to concerns raised by the Scrutiny of Bills Committee about the application of absolute liability for offences that are more traditionally subject to strict liability, the Minister stated that this departure from general policy is justified to ‘ensure consistency across similar offences’.⁸⁸

National security

Strict liability offences

10.66 A number of submissions to this Inquiry have identified strict liability offences relating to counter-terrorism and national security as examples of unjustified impositions of strict or absolute liability.⁸⁹

Associating with a terrorist organisation

10.67 The Law Council and the joint submission by the Councils for Civil Liberties raised concerns about ss 102.5(2) and 102.8 of the *Criminal Code*, which impose strict liability for training with or associating with a terrorist organisation.⁹⁰ These provisions are discussed in greater detail in Chapter 6, dealing with freedom of association. The Law Council of Australia and the UNSW Law Society criticised the provisions for expanding the reach of criminal liability to conduct which does not indicate culpability.

86 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Ninth Report of 2000* (June 2000) 374.

87 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 286.

88 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Eighth Report of 2007* (August 2007) 297.

89 Law Council of Australia, *Submission 75*; Australian Lawyers for Human Rights, *Submission 43*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*.

90 Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 75*.

10.68 The Attorney-General’s Department argued that the fault elements

need to be clarified, first by applying strict liability to the question of whether the organisation is a proscribed or listed organisation and secondly by introducing a new offence that the person was reckless as to the nature of the organisation.⁹¹

10.69 The Security Legislation Review Committee, chaired by Simon Sheller QC, considered this submission, and stated in its report (*Sheller Report*) that, it ‘does not regard it as according with justice and proportionate to apply strict liability to offences under either ss 102.5 or 102.8’.⁹² Further, it concluded that offences that carry custodial penalties of 25 years (s 102.5) and three years (s 102.8) should not be subject to strict liability.⁹³

10.70 The *Sheller Report* also concluded that:

Even if strict liability applies only to make it unnecessary for the prosecution to prove that the organisation is a terrorist organisation as a result of proscription, the defendant is denied by the process of proscription any opportunity to resist the factual conclusion that it is a terrorist organisation, at any time, either by resisting the process of proscription, which results in the executive act of proscription, or at the trial for the offence.⁹⁴

10.71 The Council of Australian Governments, in its 2013 review of counter-terrorism legislation, adopted the Sheller Report’s comments relating to s 102.5,⁹⁵ and recommended the repeal of s 102.8.⁹⁶

Financial transactions

10.72 The *Charter of the United Nations Act 1945* (Cth) includes provisions which prohibit dealings with assets owned or controlled by proscribed persons or entities, and giving assets to proscribed persons or entities.⁹⁷ Under ss 20 and 21 of the *Charter of the United Nations Act 1945* (Cth),⁹⁸ strict liability applies such that a person does not need to know that any use of, dealing with, or making available of an asset is not in accordance with a notice under the Act. The Attorney-General, in response to the Scrutiny of Bills Committee’s initial concerns about these provisions, stated that the imposition of strict liability

91 Attorney-General’s Department (Cth), Submission No 14(a) to Security Legislation Review Committee, *Report of the Security Legislation Review Committee*, 2006, 21.
92 Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006), [10.36].
93 Ibid.
94 Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) [104], quoting Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) [10.32].
95 Ibid [104]–[105].
96 Ibid rec 23.
97 The Minister must proscribe a person or entity if they are satisfied on reasonable grounds of matters prescribed by regulation. These matters must give effect to a decisions related to terrorism and dealings with assets made by the Security Council under ch VII of the Charter of the United Nations, which must be carried out by Australia under art 25: *Charter of the United Nations Act 1945* (Cth) s 15.
98 Inserted into the *Charter of the United Nations Act 1945* (Cth) by the *Suppression of the Financing of Terrorism Act 2002* (Cth).

is necessary to ensure that the offences can be effectively prosecuted ... if the prosecution was required to prove not only that the defendant was aware that the asset was a freezable asset but also that he or she was aware that a particular dealing with the asset was not in accordance with a notice under section 22, defendants would be able to avoid liability by demonstrating that they did not turn their minds to the question of whether there was a notice permitting the dealing ... A person who acts in the mistaken but reasonable belief that a dealing is in accordance with a notice would be able to rely on the defence of mistake of fact under section 9.2 of the Criminal Code.⁹⁹

10.73 Notwithstanding the Attorney-General's response, the Scrutiny of Bills Committee was concerned these provisions may trespass upon personal rights and liberties, and left the question for resolution by the Senate as a whole.

Disclosure of information

10.74 Section 34ZS of the *Australian Security Intelligence Organisation Act 1979* (Cth) imposes strict liability in relation to the disclosure of operational information concerning a warrant issued under s 34D by the subject of the warrant or a legal representative. Chapter 4 discusses this provision in greater detail, including the ALRC's recommendations in a previous Inquiry in relation to such secrecy provisions.

Declared area offences

10.75 Several stakeholders raised concerns about s 119.2 of the *Criminal Code*, as inserted by the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).¹⁰⁰

10.76 Section 119.2 criminalises the entry or presence in an area in a foreign country, which is a declared area, unless it is for the purpose of a limited list of approved purposes.

10.77 Under s 119.2, and applying the default fault elements set out in s 5.6 of the *Criminal Code*, the prosecution is required to prove the following fault elements:

- the person intentionally enters, or remains in, an area in a foreign country, knowing that it is an area in a foreign country; and
- the person is reckless as to whether the area is an area declared by the Foreign Affairs Minister under s 119.3.

10.78 A number of stakeholders and parliamentary committees raised concerns about this provision. While these criticisms do not relate to the imposition of strict liability, it highlights that s 119.2 of the *Criminal Code* potentially imposes criminal liability in the absence of culpable conduct.

99 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2002* (May 2002) 180.
100 Councils for Civil Liberties, *Submission 142*; Australian Lawyers for Human Rights, *Submission 43*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*. The extent to which this provision encroaches on freedom of movement is discussed in Chapter 7.

10.79 The Gilbert and Tobin Centre of Public Law submitted that, while not expressed as an offence of strict liability, s 119.2 operates such that, in effect, it is an offence of strict liability. Criminal liability is established, *prima facie*, when a person enters or remains in a declared area. The Gilbert and Tobin Centre of Public Law noted that ‘the prosecution need not establish, for example, that the person travelled to the area for the purpose of engaging in terrorism’.¹⁰¹ It contended that the provision is problematic because it is the malicious purpose of engaging in terrorism, rather than the mere fact of travel, ‘which should render the conduct an appropriate subject for criminalisation’.¹⁰² Australian Lawyers for Human Rights echoed the concerns raised by the Gilbert and Tobin Centre of Public Law.¹⁰³

10.80 The Scrutiny of Bills Committee raised concerns about the breadth of this provision, noting that ‘it appears that the offence is made out simply for being in a declared area’.¹⁰⁴ Following consideration of the legitimate purposes set out in s 119.2(3) of the *Criminal Code*, the Scrutiny of Bills Committee stated:

The potential difficulty with this provision, however, is that the legitimate purposes are listed and it is not clear that the listed purposes cover the field of purposes which would demonstrate that there was no intent to support terrorist groups or engage in terrorist activities overseas.¹⁰⁵

10.81 The Attorney-General, in his response to the committee, noted the following passage from the Parliamentary Joint Committee on Intelligence and Security:

The areas targeted by the ‘declared area’ provisions are extremely dangerous locations in which terrorist organisations are actively engaging in hostile activities. The Committee notes the declared area provisions are designed to act as a deterrent to prevent people from travelling to declared areas. The Committee considers it is a legitimate policy intent for the Government to do this and to require persons who choose to travel to such places despite the warnings to provide evidence of a legitimate purpose for their travel. This is particularly the case given the risk individuals returning to Australia who have fought for or been involved with terrorist organisations present to the community.¹⁰⁶

10.82 The Human Rights Committee also noted that a person could commit the offence without intending to engage in or support terrorist activity.¹⁰⁷

10.83 The UNSW Law Society conducted a proportionality analysis of the provision, and noted that a provision which includes an intent to engage in hostile or terrorist activity as an element of the offence would be a less rights-encroaching alternative.¹⁰⁸

101 Gilbert and Tobin Centre of Public Law, *Submission 22*.

102 Ibid.

103 Australian Lawyers for Human Rights, *Submission 43*.

104 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *14th Report of 2014* (October 2014) 58.

105 Ibid.

106 Ibid 59.

107 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011*, *14th Report of the 44th Parliament* (2014) [1.170].

108 UNSW Law Society, *Submission 19*.

Other laws

Copyright

10.84 The Australian Digital Alliance identified a number of strict liability offences in the *Copyright Act 1968* (Cth) (*Copyright Act*), and submitted that ‘to date there has been no evidence that these provisions have led to a reduction in commercial scale copyright infringement ... [and] by removing the *mens rea* element from the offences, strict liability provisions could easily see people innocently committing an offence’.¹⁰⁹

The Australian Digital Alliance also raised concerns about the broad discretion given to prosecutors and police arising from a strict liability regime coupled with an infringement notice scheme.¹¹⁰

10.85 In its consideration of the provisions of the *Copyright Amendment Act 2006*, the Legal and Constitutional Affairs Committee noted that a number of submissions found the imposition of strict liability for copyright infringement ‘unprecedented and troubling, to the extent that [the provisions imposing such liability] should not be passed in [their] current form’.¹¹¹

10.86 Associate Professor Kimberlee Weatherall stated:

The key to understanding the regulatory potential of [the strict liability] provisions lies in appreciating their breadth. Historically, there is no quantitative threshold for criminal liability for copyright infringement: almost all offences under the *Copyright Act 1968* (Cth) apply to the making of, or dealing with, a single infringing article, provided it is made for the purposes of trade or commercial advantage. As a result, behaviour extending all the way from the obviously ‘pirate’ through to quite commonplace commercial acts falls within the scope of the criminal offences ... The provisions confer considerable discretion on the executive branch, in the form of enforcement agencies and prosecution agencies, without parliamentary oversight.¹¹²

10.87 Other jurisdictions such as the United Kingdom, Canada and the United States have not imposed strict liability for copyright infringements.¹¹³ Similar offences do not exist in the regulatory framework for patents and trademarks.¹¹⁴

10.88 A number of submissions to the inquiry by the Legal and Constitutional Affairs Committee stated that strict liability for copyright infringement ‘should be rejected as a matter of principle’.¹¹⁵ Additionally, concerns were raised that the provisions were overly broad, and most problematically, could be applied to non-commercial acts, acts undertaken by the public in general, and conduct undertaken in the course of ordinary, legitimate business.¹¹⁶

109 Australian Digital Alliance and Australian Libraries Copyright Committee, *Submission 61*.

110 Ibid.

111 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Copyright Amendment Bill 2006 [Provisions]* (2006) [3.16].

112 Australian Digital Alliance and Australian Libraries Copyright Committee, *Submission 61*.

113 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Copyright Amendment Bill 2006 [Provisions]* (2006) [3.16], [3.36].

114 Ibid rec 2.

115 Ibid [3.17].

116 Ibid [3.18].

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10.89 The Legal and Constitutional Affairs Committee agreed that ‘there is merit in attempting to limit the scope of these provisions to the actual activities that the committee understands they are intended to target’.¹¹⁷ It was of the view that ‘strict liability provisions could be narrowed in a way that would significantly reduce the risk of their application to ordinary Australians and legitimate businesses’,¹¹⁸ and recommended that

the Federal Government re-examine with a view to amending the strict liability provisions in Schedule 1 of the Bill to reduce the possible widespread impact of their application on the activities of ordinary Australians and legitimate businesses.¹¹⁹

10.90 Following this recommendation, the Government removed 11 proposed strict liability offences and amended one to ‘address the perception of possible overreach’.¹²⁰

10.91 However, the Australian Digital Alliance, in its submission to this ALRC Inquiry, noted that the remaining strict liability offences could still ‘easily see people innocently committing an offence’.¹²¹ It cited s 132AO(5) of the *Copyright Act* as an example. The relevant provision states:

- (5) A person commits an offence if:
 - (a) the person causes:
 - (ii) images from a cinematograph film to be seen; or
 - (iii) sound from a cinematograph film to be heard; and
 - (b) the hearing or seeing occurs in public at a place of public entertainment; and
 - (c) causing the hearing or seeing infringes copyright in the recording or film.

10.92 The Australian Digital Alliance submitted that

the absence of any *mens rea* or necessity to have caused financial harm means that any person who plays a short burst of footage from their phone or laptop in a public place faces potential criminal liability.¹²²

10.93 The phrase ‘in public’ is not defined in the *Copyright Act*. A place of public entertainment is also not exhaustively defined.¹²³ Divisions 3 and 4 of pt III outline relevant acts which do not constitute infringements of copyright.

117 Ibid [3.128].

118 Ibid.

119 Ibid rec 2.

120 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *First Report of 2007* (February 2007) 12.

121 Australian Digital Alliance and Australian Libraries Copyright Committee, *Submission 61*.

122 Ibid.

123 Under s 132AA of the *Copyright Act 1968* (Cth), a place of public entertainment includes ‘premises that are occupied principally for purposes other than public entertainment but are from time to time made available for hire for purposes of public entertainment’.

10.94 In *Australasian Performing Right Association Ltd v Commonwealth Bank*, Gummow J held that, in determining whether the relevant conduct is in public, the question is whether:

in coming together to form the audience ... were the persons concerned bound together by a domestic or private tie or by an aspect of their public life?¹²⁴

10.95 Based on the reasoning in *Australasian Performing Right Association Ltd v Commonwealth Bank*,¹²⁵ it appears that the scenario described by the Australian Digital Alliance may breach s 132AO of the *Copyright Act*.

10.96 Such issues might be considered by the Productivity Commission as part of its current inquiry into intellectual property arrangements.¹²⁶

Family law

10.97 The Law Council stated that a number of provisions in the *Child Support (Assessment) Act 1989* (Cth) and *Child Support (Registration and Collection) Act 1988* (Cth) may unjustifiably impose strict liability.¹²⁷ These provisions relate to providing the Registrar with information about payments, changes in circumstances, or other information sought by written notice.

10.98 It submitted that

[p]roceedings under the family law legislation govern the property of litigants and their family relationships. The imposition of penalties in that context is serious. Further, an offence in a family law context usually will occur whilst other litigation is pending and can impact upon it.¹²⁸

10.99 The specific instances of strict liability identified by the Law Council reflect a broader trend in statutes across the body of Commonwealth laws to impose strict liability in relation to the provision of information to regulatory or governing bodies. The Scrutiny of Bills Committee has accepted difficulties in proving intent as a possible rationale for imposing strict liability.¹²⁹ For example, in considering the Financial Sector Legislation Amendment Bill (No 1) 2000 (Cth), the relevant Minister argued

it would be difficult to successfully prosecute alleged breaches of regulatory offences which involve an act of omission [such as a failure to advise of a significant event] ... as evidence of mental elements such as intention or recklessness is almost impossible to obtain in the absence of admissions or independent evidence ... the [Director of Public Prosecutions] has advised that for regulatory offences relating to the lodgement

124 *Australasian Performing Right Association Ltd v Commonwealth Bank of Australia* (1992) 40 FCR 549, [55].
125 *Australasian Performing Right Association Ltd v Commonwealth Bank of Australia* (1992) 40 FCR 549.
126 The terms of reference for the Productivity Commission's inquiry are available on its website: <www.pc.gov.au>
127 These include: *Child Support (Registration and Collection) Act 1988* (Cth) ss 23(7), 33(2), 34(2), 72W(2), 111(3), 113A(3), 120(3); *Child Support (Assessment) Act 1989* (Cth) ss 160(3), 161(3).
128 Law Council of Australia, *Submission 75*.
129 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 285.

of documents or the provision of documentary information, it would be more appropriate if the legislation imposed a strict liability.¹³⁰

General review

10.100 In 2004, the Scrutiny of Bills Committee recommended that the ‘Attorney-General’s Department should coordinate a new project to ensure that existing strict and absolute liability provisions are amended where appropriate to provide a consistent and uniform standard of safeguards’.¹³¹

10.101 The Government did not accept this recommendation for a number of reasons, including that the *Criminal Code* harmonisation project has achieved a significant degree of certainty and consistency in the application of strict and absolute liability.¹³²

10.102 However, the trend in legislation brought before the Parliament to harmonise provisions with the *Criminal Code* is that it does not consider the policy merits of imposing strict or absolute liability. The amendments simply seek to ensure that existing strict or absolute liability offences are not interpreted as fault-based offences, as a result of the operation of s 5.6 of the *Criminal Code*, by expressly stating that the relevant offences are strict or absolute liability offences.¹³³ This suggests that there may be a continuing need to undertake a project of the kind suggested by the Scrutiny of Bills Committee, including the examination of issues such as the drafting of s 588G of the *Corporations Act* and provisions in prudential and environmental regulation discussed in this chapter.

Conclusion

10.103 The ALRC concludes that the following Commonwealth laws should be further reviewed to determine whether they unjustifiably impose strict liability:

- various counter-terrorism and national security offences provided under the *Criminal Code 1995* (Cth) and ss 20 and 21 of the *Charter of the United Nations Act 1945* (Cth);
- reporting requirements under customs legislation; and

130 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Ninth Report of 2000* (June 2000) 246.

131 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 289.

132 Australian Government, *Government Response to the Senate Standing Committee for the Scrutiny of Bills, Sixth Report of 2002—Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2004) 6.

133 See, eg, *Communications and the Arts Legislation Amendment (Application of Criminal Code) Act 2000* (Cth); *Treasury Legislation Amendment (Application of Criminal Code) Act (No 1) 2001* (Cth); *Treasury Legislation Amendment (Application of Criminal Code) Act (No. 2) 2001* (Cth); *Treasury Legislation Amendment (Application of Criminal Code) Act (No 3) 2001* (Cth); *Environment and Heritage Legislation Amendment (Application of Criminal Code) Act 2000* (Cth); *Employment, Workplace Relations and Small Business Legislation Amendment (Application of Criminal Code) Act 2001* (Cth).

- the imposition of strict liability in relation to commercial scale infringement offences in copyright law.

10.104 Counter-terrorism and national security laws, including those mentioned above, should be subject to further review to ensure that the laws do not unjustifiably impose strict or absolute liability, or encroach upon other rights and freedoms. Further review on this basis could be conducted by the Independent National Security Legislation Monitor (INSLM) and the Parliamentary Joint Committee on Intelligence and Security.

10.105 The Productivity Commission may wish to consider the imposition of strict liability in relation to commercial scale copyright infringement offences as part of its review of intellectual property arrangements.

10.106 Finally, strict and absolute liability provisions should be reviewed to ensure they provide a consistent and uniform standard of safeguards.

11. Privilege Against Self-incrimination

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Summary

11.1 The privilege against self-incrimination allows a person to refuse to answer any question, or produce any document or thing, if doing so would tend to expose the person to conviction for a crime.

11.2 A statutory form of the privilege is available in the Uniform Evidence Acts. The statutory protection is only available to resist disclosure of information in a court proceeding. The common law privilege is available to persons subject to questioning in both judicial and other proceedings.

11.3 A number of rationales have been said to underpin the privilege. In recent judgments, it has been said to be necessary to preserve the proper balance between the powers of the state and the rights and interests of citizens, to preserve the presumption of innocence and to ensure that the burden of proof remains on the prosecution. At other times, the courts have described the privilege as a human right, necessary to protect the privacy, freedom and dignity of the individual.

11.4 The privilege places barriers in the way of investigations and prosecutions, particularly where information is peculiarly within the knowledge of certain persons who cannot be expected to share that information voluntarily. Parliament has, at times, considered that the public interest in the full investigation of matters of public concern outweighs the public interest in the maintenance of the privilege. Many Commonwealth statutes give government agencies—including the Australian Crime Commission (ACC), the Australian Competition and Consumer Commission (ACCC), the Australian Security Intelligence Organisation (ASIO), and the Australian Securities and Investments Commission (ASIC)—the power to compel a person to answer questions, and provide that the privilege against self-incrimination does not excuse a person from answering questions. These powers are intended to facilitate the timely exposure of wrongdoing and prevent further harm.

11.5 Laws abrogating the privilege usually provide use immunity regarding the answers given—that is, they provide that the answers given are not admissible against the person in a subsequent proceeding. Some laws also provide derivative use immunity—that is, they provide that evidence obtained as a result of a person having made a statement is not admissible against the person in a subsequent proceeding. Other statutory safeguards against incrimination may also be provided, including restrictions on sharing the information obtained with law enforcement agencies. The courts also have inherent powers to exclude evidence that would render a trial unfair.

11.6 There have been several reviews of the privilege against self-incrimination and the availability of use immunities to protect witnesses who are compelled to answer questions or produce documents. These reviews largely concluded that use immunities are an appropriate safeguard of individual rights and may, therefore, appropriately justify laws that exclude the privilege against self-incrimination. However, there have been recent developments in the area, including the use of compulsory powers to question a person subject to charge. The High Court has said that such questioning has the potential to ‘fundamentally alter the accusatorial judicial process’.¹ The Court has also expressed concern about the publication of transcripts of examinations to prosecutors.²

1 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [124] per Hayne and Bell JJ, Kiefel J agreeing.

2 *Lee v The Queen* [2014] HCA 20 (21 May 2014).

11.7 The ALRC considers further review of the abrogation of self-incrimination in Commonwealth laws is warranted. Such a review could consider whether the abrogation in more than 40 Commonwealth laws has been sufficiently justified, and if so, what type of immunity is appropriate. It could also consider whether, and in what circumstances, the compulsory examination of persons subject to charge, about the subject matter of the charge, and the publication of transcripts of examinations to prosecutors, is justified.

11.8 The *Taxation Administration Act 1953* (Cth) Sch 1 s 353-10 is unusual, in that it abrogates the privilege against self-incrimination,³ and no use immunity is available. The Commissioner of Taxation may disclose the information provided to a law enforcement agency.⁴ Further review should consider whether these laws are appropriately justified, or whether statutory protections should be made available.

A common law right

11.9 The privilege against self-incrimination is ‘a basic and substantive common law right, and not just a rule of evidence’.⁵ It reflects ‘the long-standing antipathy of the common law to compulsory interrogations about criminal conduct’.⁶

11.10 In 1983 the High Court described the privilege as follows:

A person may refuse to answer any question, or to produce any document or thing, if to do so ‘may tend to bring him into the peril and possibility of being convicted as a criminal’.⁷

11.11 Similarly, in 2004 the Full Federal Court said:

The privilege is that a person (not company) is not bound to answer any question or produce any document if the answer or the document would expose, or would have a tendency to expose, the person to conviction for a crime.⁸

11.12 The common law privilege is available not only to persons questioned in criminal proceedings, but to persons suspected of a crime,⁹ to persons questioned in civil proceedings¹⁰ and in non-curial contexts.¹¹

3 *Taxation Administration Act 1953* (Cth) sch 1 s 353–10; *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564.

4 *Taxation Administration Act 1953* (Cth) s 355–190.

5 *Reid v Howard* (1995) 184 CLR 1, [8].

6 *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, [1] (French CJ).

7 *Sorby v Commonwealth* (1983) 152 CLR 281, 288. The Court cited *Lamb v Munster* (1882) 10 QBD 110, 111.

8 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, [27]; *Sorby v Commonwealth* (1983) 152 CLR 281, [44].

9 *Petty & Maiden v R* (1991) 173 CLR 95.

10 *Reid v Howard* (1995) 184 CLR 1, [15].

11 *Griffin v Pantzer* (2004) 137 FCR 209, [44].

11.13 The privilege is one aspect of the right to silence.¹² The right to silence protects the right not to be made to testify against oneself (whether or not that testimony is incriminating).¹³ The privilege against self-incrimination is narrower, in that it protects the right not to be made to incriminate oneself. A statute might require a person to answer questions, thus breaching the right to silence, but allow the person to refuse to give incriminating answers, thus preserving the privilege against self-incrimination.¹⁴

11.14 There are two closely related privileges that arose in equity: the privileges against exposure to a civil penalty and exposure to a forfeiture.¹⁵ This Inquiry focuses on the common law privilege against self-incrimination.

Testimony and documents

11.15 The privilege is testimonial in nature, protecting a witness from being convicted 'out of his own mouth'.¹⁶

11.16 The privilege does not prevent persons from being compelled to incriminate themselves through the provision of evidence that is non-testimonial in nature.¹⁷ Non-testimonial evidence may include, for instance, fingerprints or DNA samples.¹⁸ In *Sorby v Commonwealth*, Gibbs CJ explained that the privilege

prohibits the compulsion of the witness to give testimony, but it does not prohibit the giving of evidence, against the will of a witness, as to the condition of his body. For example, the witness may be required to provide a fingerprint, or to show his face or some other part of his body so that he was identified.¹⁹

11.17 While recent Australian decisions have indicated that the privilege extends to documents,²⁰ questions have been raised as to whether that continues to be the case. The Australian Securities and Investments Commission (ASIC) noted that in the United States and the United Kingdom, the privilege against self-incrimination no longer extends to the production of documents, but only protects testimonial communications.²¹

12 Queensland Law Reform Commission, *The Abrogation of the Principle against Self-Incrimination* Report No 59 (2004) 54; *R v Director of Serious Fraud Office; Ex parte Smith* [1993] AC 1. See also Anthony Gray, 'Constitutionally Heeding the Right to Silence in Australia' (2013) 39 *Monash University Law Review* 156, 158.

13 Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 204.

14 See, eg, *Broadcasting Services Act 1992* (Cth) s 202.

15 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [45]. See also Dyson Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2013) [25070]; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, [24], [50]. The privilege against exposure to a civil penalty is now recognised by the common law: *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [13].

16 *Hamilton v Oades* (1989) 166 CLR 486, 496.

17 See, eg, Australian Securities and Investments Commission, *Submission 74*.

18 Heydon, above n 15, [25095].

19 *Sorby v Commonwealth* (1983) 152 CLR 281, 292.

20 *Ibid* 288; *Griffin v Pantzer* (2004) 137 FCR 209, 37.

21 Australian Securities and Investments Commission, *Submission 74*; ASIC relied upon the following authorities: *Attorney General's Reference (No 7 of 2000)* (2001) 2 Cr App R 19; *R v Kearns* (2001) 1 WLR 2815; *Fisher v United States* (1976) 425 US 391.

11.18 ASIC also noted that doubts have been expressed by Australian courts about the extension of the privilege to documents. In three judgments of the High Court, documents have been referred to as being ‘in the nature of real evidence which speak for themselves’, in contrast to testimonial evidence, with the inference that the privilege may be unnecessary with regard to documents.²² However, in those cases it was not necessary for the Court to definitively confirm the existence—or otherwise—of the common law privilege regarding documents.

11.19 If the privilege continues to extend to documents, it only excuses the person from producing them. If the documents are, for example, seized under a warrant, they are not protected by the privilege.²³

Corporations may not claim the privilege

11.20 The privilege against self-incrimination extends to natural persons, but not corporations.²⁴ In *Environment Protection Authority v Caltex*, the High Court reviewed the historical and modern rationales for the privilege and held that these did not support the extension of the privilege to corporations. In particular, the Court noted that

a corporation is usually in a stronger position vis-a-vis the state than is an individual; the resources which companies possess and the advantages which they tend to enjoy, many stemming from incorporation, are much greater than those possessed and enjoyed by natural persons ... Accordingly, in maintaining a ‘fair’ or ‘correct’ balance between state and corporation, the operation of the privilege should be confined to natural persons.²⁵

11.21 The privilege is also not available to other entities such as political parties, sporting clubs, advocacy groups, small businesses and unions.²⁶

The origins of the privilege

11.22 There is some debate among legal historians about the origins of the privilege.²⁷ Some have suggested it is of ancient origin, arising from the common law maxim *nemo tenetur prodere seipsum*, meaning that people should not be compelled to betray

22 *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, 392; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 326; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 502. In the context of discovery of documents by a corporation subject to contempt proceedings, see *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* [2015] HCA 21 (17 June 2015) [38], [79].

23 Heydon, above n 15, [25090].

24 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477. While companies are not entitled to claim the privilege against self-incrimination, company directors can claim the privilege where a disclosure would tend to make them personally liable: *Upperedge v Bailey* (1994) 13 ACSR 541. See also Uniform Evidence Acts s 187 which abolished the privilege regarding bodies corporate.

25 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 500.

26 Jeremy Gans, *Prove Your Own Contempt: CFMEU v Boral* (20 July 2015) Opinions on High <<http://blogs.unimelb.edu.au/opinionsonhigh/2015/07/20/gans-boral/>>.

27 McHugh J details some of the arguments in *Azzopardi v R* (2001) 205 CLR 50, [119]–[152]. See also Cosmas Moisisdis, *Criminal Discovery. From Truth to Proof and Back Again* (Institute of Criminology Press, 2008); *X7 v Australian Crime Commission* (2013) 248 CLR 92, 135 [100] (Hayne and Bell JJ).

themselves.²⁸ Professor Richard Helmholz said that the *ius commune* or common law of the 12th and 13th centuries, a combination of the Roman and canon laws, included an early privilege against self-incrimination that influenced the modern iteration of the privilege at common law.²⁹

11.23 In his *Commentaries on the Laws of England*, William Blackstone explained that the maxim was enlivened where a defendant’s fault ‘was not to be wrung out of himself, but rather to be discovered by other means and other men’.³⁰

11.24 Others point to the development of the privilege in the 17th century as a response to the unpopularity of the Star Chamber in England whose practices included requiring suspects on trial for treason to answer questions without protection from self-incrimination.³¹

11.25 On the other hand, Professor John Langbein suggested the privilege did not arise until much later. He pointed to the development of the privilege as part of the rise of the adversarial criminal justice system, where the prosecution is charged with proving the guilt of a defendant beyond a reasonable doubt and subject to protections surrounding the manner of criminal discovery.³²

11.26 In a vigorous dissent in *Azzopardi v R*, McHugh J endorsed Langbein’s approach, observing that:

these lawyers and historians have convincingly demonstrated that the self-incrimination principle originated from the European inquisitorial procedure and that it did not become firmly established as a principle of the criminal law until the mid-19th century or later.³³

The rationale for the privilege

11.27 A number of rationales have been offered for the privilege. Most recently, the High Court has emphasised the functional role of the privilege. In *X7 v Australian Crime Commission*, it was said to be essential to the accusatorial system:

The accusatorial process of criminal justice and the privilege against self-incrimination both reflect and assume the proposition that an accused person need never make any answer to any allegation of wrong-doing.³⁴

28 Richard Helmholz, ‘Introduction’ in Richard Helmholz (ed), *The Privilege Against Self-incrimination: Its Origins and Development* (University of Chicago Press, 1997).
29 Ibid 7.
30 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol IV, bk IV, ch 22, 293.
31 Leonard Levy, *Origins of the Fifth Amendment* (Macmillan, 1986); John Wigmore, *Evidence in Trials at Common Law* (Little Brown, 1961) vol 1. See also *Sorby v Commonwealth* (1983) 152 CLR 281, 317; *Griffin v Pantzer* (2004) 137 FCR 209, [40]. For further background, see, David Dolinko, ‘Is There a Rationale for the Privilege against Self-Incrimination?’ (1986) 3 *UCLA Law Review* 1063, 1079.
32 John Langbein, ‘The Historical Origins of the Privilege against Self-Incrimination at Common Law’ (1994) 92 *Michigan Law Review* 1047, 1047.
33 *Azzopardi v R* (2001) 205 CLR 50; see also Moisisdis, above n 27; *X7 v Australian Crime Commission* (2013) 248 CLR 92, 135 [100].
34 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [104].

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11.28 The High Court returned to this theme in *Lee v The Queen*, when considering the compulsory examination powers of the NSW Crime Commission:

Our 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. This was accepted as fundamental in *X7*. The principle is so fundamental that ‘no attempt to whittle it down can be entertained’ albeit its application may be affected by a statute expressed clearly or in words of necessary intendment. The privilege against self-incrimination may be lost, but the principle remains. The principle is an aspect of the accusatorial nature of a criminal trial in our system of criminal justice.

The companion rule to the fundamental principle is that an accused person cannot be required to testify. The prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof.³⁵

11.29 The privilege has been said to be necessary to preserve the presumption of innocence, and to ensure that the burden of proof remains on the prosecution. In *Cornwell v The Queen*, Kirby J said:

Such self-incrimination has been treated in the jurisprudence as objectionable, not only because the methods used to extract it are commonly unacceptable but because the practice is ordinarily incompatible with the presumption of innocence. This presumption normally obliges proof of criminal wrong-doing from the evidence of others, not from the mouth of the person accused, given otherwise than by his or her own free will.³⁶

11.30 Another functional role of the privilege is to reduce the power imbalance between the prosecution and a defendant,³⁷ or as Gleeson CJ put it, to hold ‘a proper balance between the powers of the State and the rights and interests of citizens’.³⁸

11.31 Rights based rationales are also important. The privilege is said to protect the right to dignity, privacy and freedom. In *Pyneboard Pty Ltd v Trade Practices Commission*, Murphy J explained that the privilege is

part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigation. It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination; it is society’s acceptance of the inviolability of the human personality.³⁹

11.32 Also in *Pyneboard*, the privilege was described as a ‘fundamental bulwark of liberty’.⁴⁰

35 *Lee v The Queen* [2014] HCA 20 (21 May 2014) [32]–[33]. See also *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 [146].
36 *Cornwell v R* (2007) 231 CLR 260, [176]; see also *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 527; *X7 v Australian Crime Commission* (2013) 248 CLR 92, [55].
37 *Moisisdis*, above n 27, 136.
38 *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118, 127. See also Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) [857].
39 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346.
40 *Ibid* 340 (Mason CJ, Wilson and Dawson JJ).

11.33 In more utilitarian terms, the privilege may offer the following benefits.

- It may encourage witnesses to cooperate with investigators and prosecutors, as they are able to do so without giving answers to questions that may incriminate them.⁴¹
- It may protect individuals from unlawful coercive methods used to obtain confessions,⁴² and in this sense protects personal liberty.
- It may reduce the incidence of false confessions. The stressful environment of police interviews may be ‘conducive to false confessions on account of the authority of police, the isolation, uncertainty and anxiety of the suspect and the expectations of the interrogation officer’.⁴³ Being compelled to give a statement in this environment could exacerbate the problem.
- It may reduce the incidence of untruthful evidence in court proceedings, on the basis that a person who is compelled to give evidence is more likely to lie.⁴⁴

Protections from statutory encroachment

Australian Constitution

11.34 The privilege is not expressly protected by the *Australian Constitution*, nor has protection been implied by the courts. The High Court has on numerous occasions ‘discarded any link between the privilege and the requirements of Ch III of the *Australian Constitution*’.⁴⁵ For instance, in *Sorby v Commonwealth*, a majority of the High Court held that the privilege against self-incrimination is not an integral element in the exercise of judicial power reposed in the courts by Ch III of the *Constitution*.⁴⁶

Principle of legality

11.35 The principle of legality provides some protection to the privilege against self-incrimination.⁴⁷ When interpreting a statute, courts will presume that Parliament did not intend to interfere with the privilege, unless a legislative intent to do so ‘clearly emerges, whether by express words or necessary implication’.⁴⁸

11.36 In *Pyneboard Pty Ltd v Trade Practices Commission*, the High Court held that the right to claim the privilege against self-incrimination could be revoked where a

41 Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) [852], [861]; Heydon, above n 15, [25140].

42 Moisisdis, above n 27, 133.

43 Ibid 129.

44 Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) [855].

45 See discussion in Anthony Gray, ‘Constitutionally Protecting the Presumption of Innocence’ (2012) 31 *University of Tasmania Law Review* 132, 162.

46 *Sorby v Commonwealth* (1983) 152 CLR 281, 308 (Mason, Wilson and Dawson JJ). See also *X7 v Australian Crime Commission* (2013) 248 CLR 92, [63]–[65] (French CJ and Crennan J).

47 The principle of statutory interpretation now known as the ‘principle of legality’ is discussed more generally in Ch 2.

48 *Sorby v Commonwealth* (1983) 152 CLR 281, [14] (Gibbs CJ); Gibbs CJ relied on DC Pearce, *Statutory Interpretation in Australia* (Butterworths, 2nd ed, 1981).

statutory body, like the Trade Practices Commission, was authorised to compel individuals to produce information which may incriminate that individual. In that case, s 155(1) of the *Trade Practices Act 1974* (Cth) required a person to provide information or documents to the Commission. The High Court held that the privilege

will be impliedly excluded if the obligation to answer, provide information or produce documents is expressed in general terms and it appears from the character and purpose of the provision that the obligation was not intended to be subject to any qualification. That is so when the object of imposing the obligation is to ensure the full investigation on the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation.⁴⁹

International law

11.37 The right to claim the privilege against self-incrimination is contained in art 14.3(g) of the *International Covenant on Civil and Political Rights* (ICCPR)⁵⁰ which provides that, in the determination of any criminal charge, everyone shall be entitled not to be compelled to testify against himself or to confess guilt.

11.38 International instruments cannot be used to ‘override clear and valid provisions of Australian national law’.⁵¹ However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.⁵² The High Court has confirmed the influence of art 14 of the ICCPR on the common law.⁵³

Bills of rights

11.39 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. Article 6 of the *European Convention on Human Rights* protects the right to a fair trial and the presumption of innocence.⁵⁴ While the privilege against self-incrimination is not specifically mentioned, the European Court has held that

the right to silence and the right not to incriminate oneself, are generally recognised international standards, which lie at the heart of the notion of a fair procedure under article 6.⁵⁵

49 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 618 (Mason ACJ, Wilson and Dawson JJ).

50 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

51 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

52 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 2.

53 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 499 (Mason CJ and Toohey J).

54 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 6. Ibid.Ibid.Ibid.The European Court of Human Rights has upheld the centrality of the presumption of innocence as part of the inquisitorial systems of European nations’ criminal justice systems: *Funke v France* [1993] 16 EHRR 297 (1993).

55 *Heaney and McGuinness v Ireland* (2001) 33 Eur Court HR 12, [40].

11.40 In the UK case of *R v Lambert*, Lord Hope explained that art 6.2 is

not absolute and unqualified, the test to be applied is whether the modification or limitation of that right pursues a legitimate aim and whether it satisfies the principle of proportionality.⁵⁶

11.41 The privilege is protected in bills of rights and human rights statutes in the United States,⁵⁷ the United Kingdom,⁵⁸ Canada,⁵⁹ South Africa⁶⁰ and New Zealand.⁶¹ For example, the *Canadian Charter of Rights and Freedoms* provides:

Any person charged with an offence has the right ...

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence.⁶²

11.42 The right or privilege against self-incrimination is also protected in the Victorian *Charter of Human Rights and Responsibilities* and the ACT's *Human Rights Act*.⁶³

Justifications for excluding the privilege against self-incrimination

11.43 The right to claim the privilege against self-incrimination is not absolute and may be removed or diminished by statute.⁶⁴ In *Hamilton v Oades*, the High Court held that

it is well established that Parliament is able to interfere with established common law protections, including the right to refuse to answer questions, the answers to which may tend to incriminate the person asked.⁶⁵

11.44 The High Court has observed that legislatures may choose to exclude the privilege 'based on perceptions of public interest, to elevate that interest over the interests of the individual in order to enable the true facts to be ascertained'.⁶⁶

11.45 Removing the right to claim the privilege, while providing immunities regarding the use of the information, may serve the public interest in having information revealed to agencies responsible for investigating crime or misconduct. Gathering information for the purpose of investigating serious crime or maintaining regulatory schemes is an important function of the executive branch of government.

56 *R v Lambert* [2002] 2 AC 545, [88].
57 *United States Constitution* amend V.
58 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 6.
59 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 13.
60 *Constitution of the Republic of South Africa Act 1996* (South Africa) s 35.
61 *New Zealand Bill of Rights Act 1990* (NZ) s 25(d).
62 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 11(c).
63 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2)(k); *Human Rights Act 2004* (ACT) s 22(2)(i).
64 See, for example, *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503 (Mason CJ and Toohey J).
65 *Hamilton v Oades* (1989) 166 CLR 486, 494.
66 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503 (Mason CJ and Toohey J). See also *Sorby v Commonwealth* (1983) 152 CLR 281, 298 (Gibbs CJ); *Rees v Kratzman* (1965) 116 CLR 63, 80 (Windeyer J).

11.46 Again, the High Court said in *X7 v Australian Crime Commission*:

Legislatures have, in different settings, abrogated or modified the privilege when public interest considerations have been elevated over, or balanced against, the interests of the individual so as to enable true facts to be ascertained. Longstanding examples such as the compulsory public examination of a bankrupt, or of a company officer (when fraud is suspected), serve a public interest in disclosure of the facts on behalf of creditors and shareholders which overcome some of the common law's traditional consideration for the individual.⁶⁷

11.47 The High Court, in the passages above, described the public interest being balanced against the individual's interest in avoiding self-incrimination. A slightly different approach was taken by the Queensland Law Reform Commission in its 2004 report, *The Abrogation of the Privilege Against Self-incrimination*, where two public interests were described:

In relation to the privilege against self-incrimination there is, on the one hand, the public interest in upholding the policies that underlie what has come to be judicially recognised as an important individual human right. On the other hand, there is a public interest in ensuring that relevant authorities have adequate powers to inquire into and monitor activities that give rise to issues of significant public concern.⁶⁸

11.48 Stakeholders and commentators have proposed a range of factors that should be considered in the balancing exercise.

Public benefit and avoiding serious risks

11.49 The Law Council of Australia said that to justify abrogating the privilege, there should be an 'assessment that the public benefit which will derive from negation of the privilege must decisively outweigh the resultant harm to the maintenance of civil rights'.⁶⁹ The Law Council suggested that an investigation into 'major criminal activity, organised crime or official corruption' might justify an abrogation of the privilege, as would risks such as 'danger to human life, serious personal injury or damage to human health, serious damage to property or the environment or significant economic detriment'.⁷⁰

11.50 The Australian Council of Trade Unions (ACTU) agreed that only the intention to avoid serious risks would justify abrogating the privilege.⁷¹ The ACTU approved of the abrogation of the privilege in the *Model Work Health and Safety Act*, noting that nearly 200 workers were killed in 2013, and arguing that the clear public interest in healthy and safe workplaces justified the abrogation. However, the ACTU was critical of the abrogation of the privilege in workplace relations laws, arguing that no such pressing public interest was at stake.⁷²

67 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [28].

68 Queensland Law Reform Commission, *The Abrogation of the Principle against Self-Incrimination* Report No 59 (2004) [6.3].

69 Law Council of Australia, *Submission 75*.

70 *Ibid.*

71 Australian Council of Trade Unions, *Submission 44*.

72 *Ibid.*

11.51 In 2000, the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) expressed concern at the loss of the privilege, and (citing its own 1993 report) commented that

it was ‘reluctant to see the use of provisions abrogating the privilege—even with a use/derivative use indemnity—being used as a matter of course.’ The Committee preferred to see the use of such provisions ‘limited to “serious” offences and to situations where they are absolutely necessary’.⁷³

11.52 ASIC also considered that ‘the importance of the public interest sought to be advanced by the exclusion’ is relevant to the assessment of whether a law that excludes the privilege against self-incrimination is appropriately justified.⁷⁴

Proportionality

11.53 Justifications that refer to public benefit and the investigation of serious offences implicitly incorporate a proportionality approach, which asks whether the law limiting the right pursues an objective of sufficient importance to warrant limiting the right. Such an approach was explicitly proposed by two stakeholders. The Law Council said:

Other considerations include whether the information could not reasonably be obtained by any other lawful means; whether the abrogation is no more than is necessary to achieve the identified purpose; and the consequences of abrogation.⁷⁵

11.54 Professor Gans et al also endorsed a proportionality approach. He explained the balancing exercise which must be conducted in any coercive information-gathering exercise and said:

These processes may limit the privacy of citizens, but, assuming that the material gathered is sufficiently narrow and the government’s purposes are proportionate to the infringement, they will be compatible with the right.⁷⁶

11.55 It cannot be assumed that limiting the privilege against self-incrimination will necessarily result in better investigation, detection, prevention and prosecution of crime.⁷⁷ Evidence regarding the effect of changing legal processes is not easy to come by, but there is some evidence that curtailing the right to silence does not produce increased conviction rates.⁷⁸ Justifications for encroachments on fundamental common law rights should include some assessment of whether the encroachment will actually achieve the identified purpose.

73 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest* No 4 of 2000 12, 20.
74 Australian Securities and Investments Commission, *Submission 74*.
75 Law Council of Australia, *Submission 75*.
76 Gans et al, above n 13, 235.
77 Justice Mark Weinberg, ‘The Impact of Special Commissions of Inquiry/Crime Commissions on Criminal Trials’ (Paper, Supreme Court of NSW Annual Conference, Wollongong, 1 August 2014) 204; Mark Findlay, Stephen Odgers and Stanley Yeo, ‘Expanding Crime Investigation’ in *Australian Criminal Justice* (Oxford University Press, 2014).
78 See the studies of Professors Jackson and Leng referred to in Barbara Hocking and Laura Manville, ‘What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Fiction?’ (2001) 1 *Macquarie Law Journal* 63, 71.

11.56 The Parliamentary Joint Committee on Human Rights (Human Rights Committee) has noted that, while art 14.3(g) of the ICCPR protects the right not to incriminate oneself, the right is ‘subject to permissible limitations, provided that the limitations are for a legitimate objective, and are reasonable, necessary and proportionate to that objective’.⁷⁹

11.57 Under the *European Convention on Human Rights*, the right to a fair trial is absolute, but the implied right against self-incrimination may be restricted to achieve a legitimate aim, if there is ‘a reasonable relationship of proportionality between the means employed and the aim sought to be realised’.⁸⁰ In *Procurator Fiscal v Brown* the Privy Council considered whether road traffic legislation—which required a person to identify the driver of a car—was compatible with the implied right against self-incrimination. It was relevant to the proportionality test that the legislation in question was road traffic legislation, with the important and legitimate aim of protecting public safety. The Court noted that there were 37,770 fatal and serious accidents in 1998 in Great Britain, and that it can be difficult for the police to identify drivers of vehicles. The restriction on the privilege was held to be compatible with the European Convention.⁸¹

Voluntary participation in regulatory scheme

11.58 Infringements on the privilege may be justified when the person required to provide information is a voluntary participant in a regulatory scheme.⁸² Professor Gans suggested that in such a case, ‘there is a good argument that the decision to participate renders any subsequent self-incrimination voluntary, rather than compelled’ and gave the example of a regulatory scheme requiring company officers to supply information about a company.⁸³

11.59 The Queensland Law Reform Commission has also suggested that ‘society is entitled to insist on the provision of certain information from those who voluntarily submit themselves to such a regulatory scheme’.⁸⁴ ASIC cited this suggestion with approval, and argued that:

Persons operating in the corporate, markets, financial services or consumer credit sectors generally enjoy significant privileges as a consequence of being licensed, authorised or registered with ASIC and submitting to the relevant regulatory regime.⁸⁵

79 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fifth Report of 2012* (October 2012) [1.58]. See also United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984), discussed in Ch 2.

80 *Procurator Fiscal v Brown (Scotland)* (Unreported, UKPC D3, 5 December 2000) (Lord Hope).

81 *Ibid.*

82 J Gans, *Submission 2*; Australian Securities and Investments Commission, *Submission 74*. See further Cole J’s comments in *Spedley Securities Ltd v Bond Brewing Investments Pty Ltd* (1991) 4 ACSR 229.

83 J Gans, *Submission 2*.

84 Queensland Law Reform Commission, *The Abrogation of the Principle against Self-Incrimination Report No 59* (2004) [6.54].

85 Australian Securities and Investments Commission, *Submission 74*.

11.60 The *Guide to Framing Commonwealth Offences* provides that ‘it may be appropriate to override the privilege when its use could seriously undermine the effectiveness of a regulatory scheme and prevent the collection of evidence’.⁸⁶

Immunities

11.61 Nearly all laws that abrogate the privilege provide a safeguard in the form of use immunity regarding the answers given—that is, they provide that the answers given are not admissible against the person in a subsequent proceeding.⁸⁷ Some laws also provide derivative use immunity—that is, they provide that evidence obtained as a direct or indirect result of a person having made a statement is not admissible against the person. The *Guide to Framing Commonwealth Offences* indicates that where a law excludes the privilege, it is ‘usual to include a use immunity or a derivative use immunity provision’. The Guide explains that the rationale for this protection is that ‘removing the privilege against self-incrimination represents a significant loss of personal liberty for an individual who is forced to give evidence that would tend to incriminate him or herself’.⁸⁸

11.62 The Human Rights Committee and the Scrutiny of Bills Committee have both indicated that noted that an abrogation of the privilege is more likely to be considered justified if it is accompanied by both use and derivative use immunity.⁸⁹

Inherent powers

11.63 The courts have inherent power to exclude evidence where admitting such evidence would render the trial unfair.⁹⁰ This may be used to justify a statutory encroachment on the privilege against self-incrimination, because it reduces or eliminates the risk that the encroachment will result in an unfair trial.⁹¹

11.64 If a statutory abrogation of the privilege results in the prosecution obtaining an unfair forensic advantage, there is a question over the admissibility of that evidence:

the trial judge has a discretion in relation to the admissibility of such [derivative] evidence, and the court has a power to control any use of derivative evidence which amounts to an abuse of process.⁹²

86 Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 95.

87 Some statutes provide that the answers are inadmissible in all proceedings, others refer only to criminal proceedings, and still others to criminal proceedings and proceedings for a civil penalty.

88 Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 96.

89 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fifth Report of 2012* (October 2012) [1.58]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2006* (June 2006) 81.

90 *Dietrich v R* (1992) 177 CLR 292, [4]. See further Ch 8.

91 See, eg, Australian Securities and Investments Commission, *Submission 125*.

92 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [58].

11.65 A court may prevent the examination of a person if such an examination would prejudice the person in their criminal trial.⁹³ It may quash a conviction if compelled questioning results in a trial that is fundamentally flawed. The High Court exercised this power in *Lee v The Queen* when the transcripts of the defendants for questioning before the NSW Crime Commission were published to the prosecution:

It is a breach of the principle of the common law, and a departure in a fundamental respect from a criminal trial which the system of criminal justice requires an accused person to have, for the prosecution to be armed with the evidence of an accused person obtained under compulsion concerning matters the subject of the charges.⁹⁴

11.66 The common law regarding contempt of court also restrains the use of coercive information-gathering powers. In *Deputy Commissioner of Taxation v De Vonk*, the Full Federal Court held that the questioning of a person charged with a criminal offence about matters relevant to that charge will be contempt of court if there is a real risk of interference with the course of justice. The Court relied on Gibbs CJ in *Hammond v Commonwealth*:

Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with. It is clear that the questions will be put and pressed. It is true that the examination will take place in private, and that the answers may not be used at the criminal trial. Nevertheless, the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence.⁹⁵

11.67 ASIC emphasised the existence of

wide and flexible judicial discretion to exclude the admission of derivative evidence, and further restrict the use of both information compelled from a person and derivative evidence, in order to prevent unfair prejudice to an accused or fundamental departures from ordinary criminal trial processes.⁹⁶

11.68 However Warren CJ of the Victorian Supreme Court, considering the compatibility of certain coercive questioning powers with the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* has cast some doubt on whether the discretions available to the trial judge sufficiently protect the privilege against self-incrimination, particularly with regard to derivative evidence.⁹⁷

Other statutory safeguards

11.69 Statutes that abrogate the privilege may be more justifiable if they include safeguards such as a requirement for reasonable suspicion of wrongdoing before a

93 *Hammond v Commonwealth* (1982) 152 CLR 188.

94 *Lee v The Queen* [2014] HCA 20 (21 May 2014) [46].

95 *Hammond v Commonwealth* (1982) 152 CLR 188 cited in *Deputy Commission of Taxation v de Vonk* (1995) 61 FCR 564.

96 Australian Securities and Investments Commission, *Submission 125*.

97 *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 [57]–[78]. ASIC submitted that it is now clear that courts have sufficient discretion: Australian Securities and Investments Commission, *Submission 125*.

person can be subject to compulsory questioning, as is the case in s 39A of the *Proceeds of Crime Act (2002)* (Cth). Examples of other statutory safeguards in relation to the powers of the Australian Crime Commission, ASIC and Australian Security Intelligence Organisation are noted below.⁹⁸

11.70 Abrogation of the privilege may be more justifiable where the examination is to be conducted with judicial supervision. In this case, an officer of the court can ‘control the course of questioning and to make suppression or non-publication orders limiting the timing and scope of any use or dissemination by the Commission of answers given or documents produced’.⁹⁹

Laws that exclude the right to claim the privilege

11.71 A range of Commonwealth laws empower federal agencies to conduct coercive information-gathering investigations. For the purpose of performing their investigatory functions, these agencies have the power to require a person to produce documents and answer questions. Most of these laws provide that those answers or documents are not admissible against the person in criminal proceedings or proceedings for a penalty. It is possible to characterise these laws as preserving the privilege against self-incrimination, because of inadmissibility of the material.¹⁰⁰ For the purpose of this Inquiry, these laws will be characterised as excluding the privilege, because at common law there is a right *not to speak*, rather than a right not to have one’s answers used against one.¹⁰¹ If this broader approach to the right is taken, there are many provisions in Commonwealth laws that exclude the right to claim the privilege against self-incrimination. Most include use or derivative use immunity. However, as Professor Ben Saul and Michelle McCabe reported, ‘there is no consistent approach to the individual rights and protections available’.¹⁰²

11.72 This chapter will focus particularly on laws that abrogate the privilege and offer either no immunity, or use immunity only. Such laws give federal government agencies, including the Australian Tax Office (ATO), ASIC, ASIO, the ACC, and the Australian Competition and Consumer Commission (ACCC), powers to require persons to answer questions or produce documents.

Taxation

11.73 Section 353–10 of sch 1 of the *Taxation Administration Act 1953* (Cth) provides that the Australian Tax Commissioner may require a person to give the Commissioner any information that the Commission requires, attend and give evidence before the Commissioner, or produce any document in the person’s custody or control. The

98 See further the safeguards recommended in Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, Report No 48 (May 2008) Principle 17.

99 *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, [340]; *X7 v Australian Crime Commission* (2013) 248 CLR 92, [50].

100 See, eg, J Gans, *Submission 2*.

101 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [104]; *Sorby v Commonwealth* (1983) 152 CLR 281, 290–292.

102 Ben Saul and Michelle McCabe, ‘The Privilege against Self-Incrimination in Federal Regulation’ (2001) 78 *Australian Law Reform Commission Reform Journal* 54.

Commissioner may also enter premises and inspect and make copies of any documents.¹⁰³

11.74 This provision does not expressly abrogate the privilege against self-incrimination, but in *Deputy Commissioner of Taxation v De Vonk* the Federal Court said:

If the argument were to prevail that the privilege against self-incrimination was intended to be retained in tax matters, it would be impossible for the Commissioner to interrogate a taxpayer about sources of income since any question put on that subject might tend to incriminate the taxpayer by showing that the taxpayer had not complied with the initial obligation to return all sources of income. Such an argument would totally stultify the collection of income tax.¹⁰⁴

11.75 However, the Court also held that the coercive questioning of a taxpayer about matters that are before the court could amount to contempt.¹⁰⁵

11.76 The Tax Institute raised concerns about these powers. It submitted that the laws should be subject to the privilege against self-incrimination. It also noted that there are provisions in the *Taxation Administration Act* which allow the disclosure of information by taxation officers to the court for the purpose of criminal proceedings, and was concerned that the encroachment on the privilege is not ‘balanced by statutory limitations on derivative use of the information in criminal proceedings’.¹⁰⁶

11.77 The ATO has indicated that its notice powers, which include the power to require a person to attend and give evidence, are

wide and flexible, but they are not unlimited. We endeavour to exercise our powers:

- in good faith
- in strict compliance with the law under which the notice has been issued
- for the proper purposes of that law.¹⁰⁷

11.78 On its face, s 353–10 is a significant encroachment on the common law privilege against self-incrimination. It is not balanced by any statutory immunity, although the court’s inherent power to ensure a fair trial provides some protection. It may be that this encroachment is necessary for the protection of public revenue. Further review should consider whether this provision is appropriately justified, or whether statutory protections should be made available.

Corporate and commercial regulation

11.79 ASIC is the Commonwealth’s corporate, markets and financial services regulator. It is empowered to compel persons to produce books and attend

103 *Taxation Administration Act 1953* (Cth) s 353–15.

104 *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564, 583; *Binetter v Deputy Commissioner of Taxation* (2012) 206 FCR 37.

105 *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564, [60].

106 The Tax Institute, *Submission 68*.

107 Australian Taxation Office, *Our Approach to Information Gathering* <<https://www.ato.gov.au/About-ATO/Access,-accountability-and-reporting>>.

examinations and answer questions.¹⁰⁸ The privilege against self-incrimination is not available, but use immunity is available regarding statements and the signing of a record.¹⁰⁹ ASIC may only begin an investigation if it has reason to suspect wrongdoing,¹¹⁰ and may only question a person if it has reasonable grounds for believing that the person can provide relevant information.¹¹¹ However, there is no requirement that ASIC suspect that the person questioned was involved in the wrongdoing. ASIC may release the transcripts to private litigants and government agencies in certain circumstances.¹¹²

11.80 ASIC may also apply to a court for an officer or a provisional liquidator of a corporation to be summoned for a public examination about the corporation’s affairs. The privilege against self-incrimination is not an excuse for not answering a question, and use immunity is available.¹¹³

11.81 ASIC submitted that because company officers occupy positions of trust, and have extensive opportunities to commit wrongdoing and cause immense harm, the need to regulate them justifies excluding the privilege. ASIC also suggested that company officers should be considered to be voluntary participants in a regulatory scheme, which would justify the abrogation of the privilege.¹¹⁴

11.82 ASIC’s powers, particularly regarding the use to which compelled disclosures may be put, have been the subject of several reviews since 1989. In 1989, derivative use immunity became available in the Corporations Law. In 1991, the Joint Statutory Committee on Corporations and Securities—now the Parliamentary Joint Committee on Corporations and Financial Services—conducted an inquiry into use immunity provisions in the Corporations Law. It reported on the concerns raised by the Australian Securities Commission (now ASIC) that ‘the danger of imperilling future criminal prosecutions has led the Commission to decide not to formally interview witnesses’, meaning that the power of compulsory examination was not used.¹¹⁵ One outcome was that ‘investigations which could be discharged within a period of months are taking periods of years’.¹¹⁶ The Director of Public Prosecutions raised concerns that a prosecutor might have to prove that each piece of evidence tendered was not acquired as a result of information disclosed in a compelled examination.¹¹⁷ Other stakeholders challenged these claims.¹¹⁸

108 *Australian Securities and Investments Commission Act 2001* (Cth) ss 19, 21, 30, 31, 33.

109 *Ibid* s 68.

110 *Australian Securities and Investments Commission Act 2001* (Cth) s 13.

111 *Ibid* s 19(1).

112 *Ibid* ss 25, 37 and 127; see further Australian Securities and Investments Commission, *Confidentiality and Release of Information* Regulatory Guide 103, 27 November 1995.

113 *Corporations Act 2001* (Cth) s 597(12).

114 Australian Securities and Investments Commission, *Submission 74*.

115 Joint Statutory Committee on Corporations and Securities, ‘Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law’ (1991) [3.1.5].

116 *Ibid* [3.2.1].

117 *Ibid* [3.5.1].

118 *Ibid* [3.5.3]–[3.10.3].

11.83 The Committee recommended removal of the derivative use immunity provisions and they were in fact removed in 1992. A 1997 review of that legislative change by John Kluver found that the amendments ‘greatly assisted the ASC in its enforcement of the national scheme laws, primarily by increasing the Commission’s ability to more fully and expeditiously utilise its power to conduct compulsory oral examinations’ but had not led to examinees being unjustifiably prejudiced.¹¹⁹

11.84 Professor Gans criticised the quality of both the Joint Statutory Committee’s review and the Kluver review. He argued that the concerns about derivative use immunity have been overstated,¹²⁰ while ASIC restated its concerns about such an immunity impeding the regulation of corporations and the prosecution of criminal activities.¹²¹ In particular, ASIC expressed concern that derivative use immunity would exclude evidence discovered as a result of the disclosure, ‘even if it would or could have been discovered without the particular information disclosed by the person’.¹²² ASIC offered examples of situations where a suspect would be effectively rendered ‘conviction-proof’ for an unforeseeable range of offences by such an immunity.¹²³

11.85 In later submissions, both ASIC and Professor Gans pointed to a possible model approach to immunity—a flexible approach that would exclude some, but not all, derivative evidence.¹²⁴ This model is discussed further in the conclusion to this chapter.

Serious and organised crime

11.86 The ACC is a criminal intelligence agency, responsible for investigating serious and organised crime. The ACC Board may declare that an investigation is a ‘special investigation’, in which case the coercive information-gathering powers in pt II div 2 of the *Australian Crime Commission Act 2002* (Cth) (*ACC Act*) are available.¹²⁵

11.87 The ACC may summon a person for questioning.¹²⁶ Failing to attend or answer questions, as required by a summons, is an offence.¹²⁷ Self-incrimination is not an excuse for such failure, but if the person claims that answering the question or producing a document might incriminate the person, the answer or document is not admissible in a criminal proceeding.¹²⁸

11.88 There are safeguards in the Act, including a requirement that an examination must be held in private. Transcripts and derivative material may be disclosed to the

119 John Kluver, *Report on the Review of the Derivative Use Immunity Reforms* (Australian Government Press, 1997).

120 J Gans, *Submission 77*; J Gans, *Submission 2*.

121 Australian Securities and Investments Commission, *Submission 74*.

122 Australian Securities and Investments Commission, *Submission 125*; Australian Securities and Investments Commission, *Submission 74*.

123 Australian Securities and Investments Commission, *Submission 125*.

124 *Ibid*; J Gans, *Submission 77*.

125 *Australian Crime Commission Act 2002* (Cth) s 7C(3).

126 *Ibid* s 28.

127 *Ibid* s 30(6).

128 *Ibid* s 30.

prosecutor of the examinee,¹²⁹ but the examiner must direct that a transcript must not be published if to do so would prejudice the person's safety or their fair trial.¹³⁰

11.89 The predecessor to the ACC Act was the *National Crime Authority Act 1984* (Cth), which, for a time, provided derivative use immunity to witnesses. When the legislation was changed to allow use immunity only, the Explanatory Memorandum said:

The Authority is unique in nature and has a critical role in the fight against serious and organised crime. This means that the public interest in the Authority having full and effective investigatory powers, and to enable, in any subsequent court proceedings, the use against the person of incriminating material derived from the evidence given to the Authority, outweigh the merits of affording full protection to self-incriminatory material.¹³¹

11.90 Part II div 2 was recently the subject of High Court consideration in *X7 v Australian Crime Commission (X7 v ACC)*.¹³² The plaintiff was charged with drug trafficking offences, and while in custody, was served with a summons to appear before an ACC examiner. When he declined to answer questions concerning the subject matter of the charges, he was informed that he would be charged with failing to answer questions.

11.91 The Court held (by majority) that the *ACC Act* did not authorise the examination of an accused person about the subject matter of the pending charge. Hayne and Bell JJ said that if the provisions did this, 'they would effect a fundamental alteration to the process of criminal justice', and that such an alteration could only be made 'clearly by express words or necessary intendment'.¹³³ Kiefel J agreed, and added that 'the conduct of any inquiry parallel to a person's criminal prosecution would ordinarily constitute a contempt because the inquiry presents a real risk to the administration of justice'.¹³⁴

11.92 Since *X7 v ACC*, the *ACC Act* has been amended to clarify that an ACC examiner may question a person who has been charged with an offence about matters that are the subject matter of the charge.¹³⁵ The Explanatory Memorandum for the amending act indicated that these amendments were necessary to ensure that the ACC has 'appropriate powers to understand, disrupt and prevent ... serious and organised criminal activity'. It also noted that requiring the ACC to wait until the conclusion of criminal proceedings to examine the person 'would diminish the value of any intelligence gained out of the examination or hearing about the contemporary activities, operations and practices of the organised criminal group'.¹³⁶

129 Ibid ss 25B, 25C.

130 Ibid s 25A.

131 Explanatory Memorandum, National Crime Authority Legislation Amendment Bill 2000.

132 *X7 v Australian Crime Commission* (2013) 248 CLR 92.

133 Ibid [118]–[119].

134 Ibid [161].

135 *Law Enforcement Legislation Amendment (Powers) Act 2015* (Cth); *Australian Crime Commission Act 2002* (Cth) ss 25A–25E.

136 Explanatory Memorandum, Law Enforcement Legislation Amendment (Powers) Bill 2015 15.

11.93 The Law Council has expressed concern that the amendments to the *ACC Act* ‘would allow derivative use to be made of post-charge examination material, which could then be made available to the prosecutor of the person being examined, which may affect the right to a fair trial’. The Law Council suggested that ACC examiners should be required to seek judicial authorisation before conducting a post-charge examination of a witness, providing a further safeguard to the right to a fair trial.¹³⁷

Proceeds of crime

11.94 The ACC has joint responsibility, with the Australian Federal Police and the Commonwealth Director of Public Prosecutions, for the administration of the *Proceeds of Crime Act 2002* (Cth). This Act enables the seizure of property used in, or derived from, terrorism offences, and the confiscation of profits from drug trafficking, people smuggling, money laundering and large-scale fraud.¹³⁸ Several provisions exclude the privilege against self-incrimination:

- s 39A excludes the use of the privilege as a reason to refuse to provide a sworn statement to the Australian Federal Police under s 39(1)(d) where authorities harbour a suspicion that a person may have information about, or assets derived from, the suspected criminal activities of others. Use immunity is available.
- s 206 is a similar provision that states that the privilege does not excuse a person from providing information with regard to a production order. Use immunity is available.
- s 271 provides that a person is not excused from providing information to the Official Trustee if the information may tend to incriminate them. Derivative use immunity is available.

Competition and consumer law

11.95 The *Competition and Consumer Act 2010* (Cth) includes several provisions that encroach on the privilege against self-incrimination. The most important of these is s 155, which allows a member of the ACCC to issue a notice requiring a person to provide information, documents, or evidence, if the ACCC has reason to believe that the person has information about a contravention of the Act. Self-incrimination is not an excuse not to answer, and use immunity is available. The Act also includes other coercive information-gathering powers that exclude the privilege against self-incrimination, all of which provide use or derivative use immunity.¹³⁹

11.96 The ACCC has noted that there are implied limits on the use of s 155 powers, and in particular, that

issuing s 155 notices to respondents in proceedings instituted by the ACCC may interfere with rights and protections against self-incrimination ... which apply in court proceedings, and may interfere with the court’s inherent power to conduct its own

137 Law Council of Australia, *Submission 140*.

138 Explanatory Memorandum, *Proceeds of Crime Bill* (Cth) 2002.

139 *Competition and Consumer Act 2010* (Cth) ss 133D, 135B, 151BUF, 155B.

proceedings ... Accordingly, the ACCC is unlikely to issue a notice addressed to a respondent or non-party to ACCC proceedings where the notice relates to the subject matter of those proceedings.¹⁴⁰

National security

11.97 ASIO's main role is 'to gather information ... that will enable it to warn the government about activities or situations that might endanger Australia's national security'.¹⁴¹

11.98 The Director-General may request a warrant authorising a person to be taken into custody and questioned.¹⁴² Section 34L(8) provides that a person cannot fail to provide information to ASIO officers even if that information may incriminate them.¹⁴³ Use immunity is available in s 34L(9).

11.99 According to the Explanatory Memorandum,

[T]he normal privilege against self-incrimination does not apply in relation to proposed new subsection 34G(8) to maximise the likelihood that information will be given or records or things produced that may assist to avert terrorism offences. The protection of the community from such violence is, in this special case, considered to be more important than the privilege against self-incrimination.¹⁴⁴

11.100 Several stakeholders raised concerns about this provision.¹⁴⁵ Lisa Burton, Nicola McGarrity and Professor George Williams considered that

the problem with these justifications is that they are not reflected in the criteria for issuing a questioning warrant. That is, the legislation does not require any proof of imminent danger or that the intelligence sought is capable of preventing a terrorism offence before coercive questioning is permitted.¹⁴⁶

11.101 Statutory safeguards are contained within the legislation, including the requirement for a warrant, an explanation to the person about what the warrant authorises ASIO to do, provision for interpreters, permission from a judge if questioning continues for more than eight hours, and a requirement for humane treatment.¹⁴⁷

140 Australian Competition and Consumer Commission, *Section 155 of the Trade Practices Act* (2008) 12.

141 Home (2015) ASIO <www.asio.gov.au>.

142 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34D.

143 This provision was raised by several stakeholders: Law Council of Australia, *Submission 75*; Gilbert and Tobin Centre of Public Law, *Submission 22*.

144 Explanatory Memorandum, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.

145 Law Council of Australia, *Submission 75*; Institute of Public Affairs, *Submission 49*; Gilbert and Tobin Centre of Public Law, *Submission 22*.

146 Lisa Burton, Nicola McGarrity and George Williams, 'The Extraordinary Questioning and Detention Powers of the Australian Security Intelligence Organisation' (2012) 36 *Melbourne University Law Review* 415, 446.

147 *Australian Security Intelligence Organisation Act 1979* (Cth) ss 30E, 34J, 34M, 34N, 34R, 34T.

11.102 The Law Council considered that this law may unjustifiably exclude the privilege, noting that a person

may be required to give information regardless of whether doing so might tend to incriminate the person or make them liable to a penalty. The mandatory presence of a police officer throughout questioning, required by ASIO's Statement of Procedures, ensures law enforcement agencies have ready access to information and material provided to ASIO by the detained person, and thus may increase the likelihood of derivative use of information in a subsequent prosecution brought against the person who has been compelled to divulge it.¹⁴⁸

11.103 When considering s 34L(8), the Independent National Security Legislation Monitor (INSLM) noted that it is 'not at all unusual for laws to abrogate the privilege against self-incrimination albeit with protection against the use of such answers in criminal proceedings'. Given this, the INSLM concluded:

[o]n balance and provisionally, the view of the INSLM is that there are so many such provisions given effect every day in Australia that the issue cannot be given top priority. It does seem as if the pass has been sold on statutory abrogations of this privilege.¹⁴⁹

11.104 The Australian Human Rights Commission also raised concerns about this provision, particularly the lack of protection against derivative use.¹⁵⁰

Workplace relations laws

11.105 The Terms of Reference for this Inquiry ask the ALRC to include particular consideration of Commonwealth laws in the areas of commercial and corporate regulation, environmental regulation and workplace relations.

11.106 Several provisions in workplace relations legislation exclude the privilege against self-incrimination, primarily for the purpose of empowering Commonwealth officials to examine individuals in relation to workplace offences. The following provisions include use and derivative use immunities:

- *Fair Work Act 2009* (Cth) s 713 provides that a person is not excused from producing a record or document under ss 709(d) and 712 on the grounds that it may tend to incriminate that person;
- *Fair Work (Registered Organisations) Act 2009* (Cth) ss 337 and 337A provide that a person may not refuse to give information, produce documents or answer questions on the ground that the information may incriminate that person; and
- *Fair Work (Building Industry) Act 2012* (Cth) s 53 provides that a person may not refuse to give information, produce documents, or answer questions if required to do so by an examination notice relating to a building industry workplace investigation on the grounds that it may incriminate the person.

148 Law Council of Australia, *Submission 75*.

149 Independent National Security Legislation Monitor, Australian Government, *Annual Report* (2011) 28.

150 Australian Human Rights Commission, *Submission to the Independent National Security Legislation Monitor* (2012).