11.107 The ACTU criticised the encroachment on the privilege in workplace relations laws. It suggested that abrogating the privilege is justifiable when the intention is to avoid 'serious damage to property or the environment, danger to human life or significant economic detriment'. It commented that

> [n]o satisfactory explanation has been offered as to the abrogation of the privilege in the industrial arena. The enforcement of industrial law … simply does not go to these issues of vital public importance'.[151]

Environmental regulation

11.108 A number of Commonwealth laws with the objective of environmental protection encroach upon the privilege against self-incrimination, and all provide both use and derivative use immunities. For example:

- *Quarantine Act 1908* (Cth) s 79A;
- *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 189, 202;
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 112, 486J;
- *Great Barrier Reef Marine Park Act 1975* (Cth) s 39P(4);
- *Protection of the Sea (Oil Pollution Compensation Funds) Act 1993* (Cth) ss 44(4), 46S(4).

Uniform Evidence Acts

11.109 The common law privilege against self-incrimination is replaced by s 128 of the Uniform Evidence Acts in federal courts, New South Wales, Victoria, Tasmania, the ACT and the Northern Territory. These provisions encroach on the common law privilege to the extent that a court may require the witness to give evidence 'if the interests of justice require'.[152] If a witness is required to give incriminating evidence, the court must give the witness a certificate which provides that the evidence cannot be directly or indirectly used against the witness in any proceeding in an Australian court.[153]

11.110 The Uniform Evidence Acts are only relevant to court proceedings, and do not apply to compulsory questioning by other government agencies.

Other laws

11.111 A large number of other laws exclude the right to claim the privilege, some expressly, and some by necessary intendment. The ALRC has identified 26 laws that provide use immunity only and 46 that provide derivative use immunity.[154] These laws

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151 Australian Council of Trade Unions, *Submission 44*.
152 Uniform Evidence Acts s 128(4).
153 Ibid s 128(6), (7).
154 Some of these provisions were highlighted by stakeholders: J Gans, *Submission 77*; The Tax Institute, *Submission 68*; Institute of Public Affairs, *Submission 49*; J Gans, *Submission 2*.

cover a wide range of areas, including the regulation of transport, charities, sports doping, crime and the proceeds of crime, superannuation and many other matters.

Approaches to immunities

11.112 The privilege against self-incrimination is abrogated in a wide range of Commonwealth laws. Some of these laws provide use immunity and some derivative use immunity, and there is no consistent approach.[155] The laws administered by four of the Commonwealth's most active and powerful agencies—ACC, ACCC, ASIC and ASIO—contain use immunity only, while tax laws contain no immunity. In the Interim Report, the ALRC proposed that there should be further review of use and derivative use immunities.

11.113 Two regulators responded to this proposal, and their responses have been discussed above. ASIC considered that use immunity was appropriate in the context of corporations law, and both ASIC and the ATO emphasised that the inherent power of the court to ensure a fair trial provides important safeguards.[156]

11.114 The Law Council considered that a law that excludes the privilege and provides use, but not derivative use, immunity may, for that reason, be unjustifiable.[157] It suggested that the 'exercise of coercive information gathering powers should be regarded as exceptional … because of the intrusive impact on individual rights'.[158]

11.115 The National Association of Community Legal Centres (NACLC) considers the privilege against self-incrimination to be a key protection 'for vulnerable individuals facing the weight of state resources and prosecution' and was concerned about 'a general trend towards limiting the privilege'. NACLC supported a review of immunities but preferred protections to ensure that privilege could not be overridden.[159]

11.116 The Councils for Civil Liberties (CCL) were also concerned about the 'significant loss of personal liberty for persons who are forced to answer questions'. The CCL supported both a review of immunities and a broader review of justification for abrogation.[160]

11.117 Professor Gans pointed out that at least 40 Commonwealth laws encroach upon this important common law right, and submitted that previous reviews of use and derivative use immunities have not all been of high quality, and have been limited in scope. He argued that further consideration of the issue is necessary.[161]

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155 Saul and McCabe, above n 102.
156 Australian Taxation Office, *Submission 137*; Australian Securities and Investments Commission, *Submission 125*.
157 Law Council of Australia, *Submission 75*.
158 Law Council of Australia, *Submission 140*.
159 National Association of Community Legal Centres, *Submission 143*.
160 Councils for Civil Liberties, *Submission 142*.
161 J Gans, *Submission 77*.

11.118 Professor Gans also suggested that the conversation has, to date, been based on a false dichotomy between US style derivative use immunity, and bare use immunity.

11.119 The US approach is usefully described in the submission from ASIC. It imposes a positive obligation on the prosecution to prove that the evidence it proposes to adduce is wholly independent of the compelled testimony. Such an approach is said to lead to the exclusion of evidence even where that evidence would or could have been discovered without the compelled testimony, and to have led to the failure of many prosecutions.[162] ASIC reported that the likely result of the introduction of such immunity in Australian corporations law is that ASIC would exercise its compulsory information-gathering powers less frequently, undermining the public purpose for which those powers were created.[163]

11.120 In contrast, bare use immunity only renders inadmissible the statements made and documents provided by the compelled witness. Evidence discovered as a result of those statements is not rendered inadmissible, even where it could not have been discovered, or its significance could not been understood, without the compelled disclosure.

11.121 Professor Gans suggested that consideration should be given to whether Commonwealth statutes abrogating the privilege should contain a flexible, or partial, derivative use immunity. Such an immunity would render inadmissible only evidence which would not have been discovered without the compelled disclosure (rather than all evidence that was in fact discovered in reliance on leads from the disclosure).[164]

11.122 Warren CJ of the Supreme Court of Victoria considered that the partial derivative use immunity adopted in Canada was the appropriate protection for the privilege. The Canadian Supreme Court held that Charter protection is only given to derivative evidence which 'could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a witness'.[165] However, Warren CJ found that, while Australian courts have inherent powers to exclude evidence that would render a trial unfair, a discretionary or case-by-case approach would not provide sufficient protection.[166]

11.123 ASIC also considered that the Canadian approach offered a useful model for the appropriate immunity but emphasised that the Canadian courts rejected US style statutory derivative use immunity in favour of 'use immunity plus a flexible judicial discretion to exclude a narrow category of derivative evidence'.[167]

11.124 The ALRC has considered this question in three reports—*Principled Regulation* (2003), *Privilege in Perspective* (2008), and *Making Inquiries* (2009). In

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162 Australian Securities and Investments Commission, *Submission 125*.
163 Australian Securities and Investments Commission, *Submission 74*.
164 J Gans, *Submission 77*.
165 *R v S (RJ)* [1995] 1 SCR 451, 561.
166 *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 [159].
167 Australian Securities and Investments Commission, *Submission 125*.

each of these it concluded that use immunity was appropriate.[168] The Queensland Law Reform Commission in 2004 also concluded that the default position should be use immunity, rather than derivative use.[169] However, those inquiries did not address some issues that have only recently arisen, including the compelled questioning of persons subject to charge regarding the subject matter of the charge, and the publication of transcripts of compelled questioning to prosecutors. These inquiries also did not consider whether statutes should include partial derivative use immunity.

Conclusion

11.125 The ALRC considers further review of the encroachments on the privilege against self-incrimination in Commonwealth laws is warranted. The following matters have led to this conclusion:

- the large number of Commonwealth acts that encroach upon the privilege, and the apparent inconsistency regarding the availability of use and derivative use immunity;
- the serious concerns raised by the High Court in *X7 v ACC* and *Lee v The Queen*, and by Warren CJ in the Victorian Supreme Court, regarding the impact on the fair trial of compelled questioning of a person who is subject to charge; and
- concerns heard from stakeholders and commentators.[170]

11.126 Such a review could consider:

- whether the many encroachments on the privilege against self-incrimination on Commonwealth laws are justified, either by implied waiver (by persons participating in a regulatory scheme), or by the serious public risks that are sought to be averted by the encroachment;
- if an encroachment is justified, then whether use immunity, partial derivative use immunity, or full US-style derivative use immunity is appropriate;
- if partial derivative use immunity is appropriate, then whether the inherent powers of the court already provide, or could provide, such an immunity, or whether statutory protection is necessary;
- whether there should be any statutory immunity in relation to compelled examinations in taxation law;

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168 Australian Law Reform Commission, 'Principled Regulation: Federal Civil and Administrative Penalties in Australia' (No. 95 2003) ch 18; Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) ch 7; Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, Report No 111 (2009) ch 17.

169 Queensland Law Reform Commission, *The Abrogation of the Principle against Self-Incrimination* Report No 59 (2004) [9.89].

170 National Association of Community Legal Centres, *Submission 143*; Councils for Civil Liberties, *Submission 142*; Law Council of Australia, *Submission 140*; J Gans, *Submission 77*; The Tax Institute, *Submission 68*; J Gans, *Submission 2*.

- whether compelled examinations of persons subject to charge, regarding the subject matter of the charge, should be permitted, and if so, under what conditions; and
- whether it is appropriate for a prosecutor to be given transcripts of compelled questioning.

12. Legal Professional Privilege

Contents

Summary

12.1 Legal professional privilege is a common law immunity. It allows a person to resist demands to disclose information or produce documents which would reveal communications between a client and their lawyer, where those communications were made for the dominant purpose of giving or obtaining legal advice or services.

12.2 It 'exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers'.[1] It has also been said to protect the right to privacy, the dignity of the individual, access to justice and equality before the law.

1 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [35] (Gleeson CJ, Gaudron and Gummow JJ).

12.3 A statutory form of the privilege is known as 'client legal privilege', and is found in the Uniform Evidence Acts. Client legal privilege is only available to resist disclosure of information in a court. The common law privilege can be claimed in both judicial and non-judicial proceedings.

12.4 Many Commonwealth agencies have coercive information-gathering powers, but almost all of those powers are subject to legal professional privilege. This chapter will focus on the infrequent exceptions to that rule.

12.5 Some statutes concerned with open government and preventing corruption, such as the *Ombudsman Act 1976* (Cth) and the *Law Enforcement Integrity Commissioner Act 2006* (Cth), empower agencies to require persons to reveal privileged communications, but the material is not admissible in proceedings against the person. Two statutes concerned with terrorism and the proceeds of crime abrogate the privilege, but the material is not admissible in proceedings against the person. The *Royal Commissions Act 1902* (Cth) allows a Commission to require a person to provide documents or information over which privilege is claimed, but only for the purpose of determining whether the material is in fact privileged. If it is, it must be returned and no use may be made of it.

12.6 Only one Commonwealth statute has been identified that abrogates the privilege completely. The *James Hardie (Investigations and Proceedings) Act 2004* (Cth) allowed the Australian Securities and Investments Commission (ASIC) and the Commonwealth Director of Public Prosecutions to obtain and use privileged information for both investigation and prosecution. This appears to have been in response to concerns about unwarranted claims of privilege during a special commission of inquiry into the James Hardie companies' handling of asbestos claims. ASIC's proceedings against the James Hardie companies concluded in 2012.

12.7 Concerns were expressed to this Inquiry about statutes that require communications between a person and their legal adviser to be monitored: *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZQ(2) and *Criminal Code* s 105.38(1). Both statutes provide that communications that are subject to privilege are not admissible against the person. Legal professional privilege allows a person to resist the compulsory disclosure of communications. It is not clear that it extends to prevent monitoring of communications.

12.8 Similarly, while concerns were expressed to this Inquiry regarding the mandatory data retention scheme in the *Telecommunications (Interception and Access) Act 1979* (Cth), it is not clear that legal professional privilege extends to prevent the surveillance of communications. It also does not extend to prevent the disclosure of the fact that a communication occurred, but only to the content of the communication.

12.9 While laws requiring monitoring of communications between lawyer and client may not limit legal professional privilege, they are not consistent with the underlying rationale for the privilege, that communications between client and lawyer should be confidential. They also interfere with the right to legal assistance and representation, an important fair trial right. They should be further reviewed to consider whether they are proportionate and justified.

12.10 In its 2008 report, *Privilege in Perspective*, the ALRC envisaged that abrogation of legal professional privilege would occur only in exceptional circumstances. This is indeed currently the case in Commonwealth laws. The ALRC recommended that, if the privilege is abrogated, the default position should be that the material should not be admissible against the client.

12.11 This has also been the case in Commonwealth laws, with the single exception of the *James Hardie* legislation.

A common law right

12.12 Legal professional privilege is an important common law right. It allows a person to 'resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services'.[2] It has been described as 'fundamental to the due administration of justice'.[3]

12.13 This chapter discusses the rationales for the privilege, its history and scope, and the protections that are available from statutory encroachment. It also identifies some laws that encroach on the privilege, and discusses the justifications offered for those encroachments. The common law privilege is less relevant to trial procedures, as the statutory privilege has largely taken its place. Accordingly, this chapter will focus on laws that require production of information or documents to government agencies with coercive information-gathering powers.

Rationale

12.14 The rationale most commonly given for the privilege is an instrumental one—that it serves the administration of justice by encouraging full and frank disclosure by clients to their lawyers.[4] Without a relationship of confidence and trust between a lawyer and a client, a person may choose not to engage a lawyer, or not to reveal all of the facts to their lawyer. The rationale is set out in detail in *Baker v Campbell*:

> It is necessary for the proper conduct of litigation that the litigants should be represented by qualified and experienced lawyers rather than that they should appear for themselves, and it is equally necessary that a lawyer should be placed in full possession of the facts to enable him to give proper advice and representation to his client. The privilege is granted to ensure that the client can consult his lawyer with freedom and candour, it being thought that if the privilege did not exist 'a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case'.[5]

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2 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [9].

3 *Baker v Campbell* (1983) 153 CLR 52, 65 (Gibbs CJ).

4 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, 35 (Gleeson CJ, Gaudron and Gummow JJ). See further Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.8]–[2.34] regarding instrumental rationales for the privilege.

5 *Baker v Campbell* (1983) 153 CLR 52, 68 (Gibbs CJ).

12.15 In *Carter v Northmore Hale Davey & Leake*, Toohey J emphasised the instrumental nature of the privilege:

> Important, indeed entrenched, as legal professional privilege is, it exists to serve a purpose, that is to promote the public interest by assisting and enhancing the administration of justice. It is not an end in itself.[6]

12.16 The ALRC's 2008 *Privilege in Perspective* report identified the following potential benefits arising from the privilege:

- encouraging full and frank disclosure;
- encouraging compliance with the law—because a lawyer in possession of all the facts can more effectively provide appropriate advice;
- discouraging litigation and encouraging settlement—because a fully briefed lawyer can better advise the client about their prospects in court; and
- promoting the efficient operation of the adversarial system—because a party should gather their own evidence, not merely subpoena the work done by another.[7]

12.17 An alternative, rights-based, rationale for the privilege is sometimes offered. The privilege is said to protect individual rights, such as the right to privacy and the right to consult a lawyer.[8] Justice Kirby has described the privilege as 'an important human right deserving of special protection'[9] and, in *Esso Australia Resources v Commissioner of Taxation* (*Esso*), he spoke about the fundamental purpose of the privilege:

> It arises out of 'a substantive general principle of the common law and not a mere rule of evidence'. Its objective is 'of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law and to the administration of justice and law'. It defends the right to consult a lawyer and to have a completely candid exchange with him or her. It is in this sense alone that the facility is described as 'a bulwark against tyranny and oppression' which is 'not to be sacrificed even to promote the search for justice or truth in the individual case'.[10]

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6 *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121, 147. See also Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.43].

7 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.8]–[2.20].

8 See further Jonathon Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing, 2000) 13–35 on instrumental and rights based rationales for the privilege.

9 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [86].

10 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, 92 [111] (Kirby J in obiter). Kirby J is quoting Deane J in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, 490. See also Young J in *AWB v Cole* (2006) 152 FCR 382 [37]: 'the privilege operates to secure a fair civil or criminal trial within our adversarial system'.

12.18 Murphy J in *Baker v Campbell* emphasised the protection of a client's privacy from the intrusion of the state:

> The client's legal privilege is essential for the orderly and dignified conduct of individual affairs in a social atmosphere which is being poisoned by official and unofficial eavesdropping and other invasions of privacy. [11]

12.19 In the same case, Wilson J commented that the 'adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society'.[12]

12.20 As with the privilege against self-incrimination,[13] legal professional privilege is sometimes said to be a necessary part of an adversarial system of justice.[14] However, this rationale has not featured expressly in recent judgments of Australian courts.

12.21 Regardless of which rationale is adopted, the courts have been clear that the privilege is not to be weighed against other competing rights and interests, such as the public interest in having all relevant information before the court. In *Esso*, the court said

> … legal professional privilege is itself the product of a balancing exercise between competing public interests and that, given the application of the privilege, no further balancing exercise is required.[15]

12.22 The rationale that is relied upon for the privilege may have consequences when considering justifications for abrogating it. If the privilege is seen as having an instrumental justification, for example, then evidence that the privilege does not in fact contribute to the administration of justice would be relevant.[16] If the predominant justification is the protection of individual liberties and human rights, however, then withholding the privilege from companies and state agencies might be easier to justify.[17]

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11 *Baker v Campbell* (1983) 153 CLR 52, 89. However, Auburn notes that only two of the seven judges in *Baker v Campbell* adopted a rights-based rationale, and Gibbs CJ explicitly rejected it: Auburn, above n 8, 21.

12 *Baker v Campbell* (1983) 153 CLR 52, 95. See further Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [2.35]–[2.61].

13 See Ch 11.

14 *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121, 133, 139 (Deane J); 158 (Gaudron J); Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [3.22].

15 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [35]. See also *Waterford v Commonwealth* (1987) 163 CLR 54, 164–165.

16 See Liam Brown, 'The Justification of Legal Professional Privilege When the Client Is the State' (2010) 84 *Alternative Law Journal* 624, 636–8 for a discussion of the research on the impact of the privilege on client behaviour. Mason J observed in *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1, 26 that 'it is impossible to assess how significantly the privilege advances the policy which it is supposed to serve. The strength of this public interest is open to question.'

17 Brown, above n 16, 635–6; The claim of the privilege by corporations is discussed at length in *Grant v Downs* (1976) 135 CLR 674, 685–6.

History and scope

12.23 Legal professional privilege has existed for over 400 years in English law.[18] Indeed American legal historian, Professor John Wigmore, described the privilege as 'the oldest of the privileges for confidential communications'.[19] Despite its age, it has undergone considerable change and development in recent times. The Administrative Review Council noted in 2008 that legal professional privilege continues to be an 'evolving and often contentious area of the law'.[20]

12.24 The privilege may have been developed by the courts as a mechanism to underscore the 'professional obligation of the barrister or attorney to preserve the secrecy of the client's confidences'.[21] The privilege is now separate from the lawyer's duty to maintain confidentiality[22] and its name has been described as 'unfortunate, because it suggests that the privilege is that of the members of the legal profession, which it is not. It is the client's privilege'.[23] The name of the statutory privilege, client legal privilege, reflects the understanding that the privilege is that of the client, and can only be waived by the client. However in this Inquiry, the ALRC has referred to legal professional privilege as this phrase refers specifically to the common law privilege.

12.25 When the principles relating to legal professional privilege were developed, it was confined to legal proceedings, because at that time, there were no powers to compel the giving of information or documents other than those that were available in legal proceedings.[24] However, the scope of the common law privilege expanded significantly in the 20th century to take account of new government agencies empowered with coercive information-gathering powers.[25] The courts have indicated that the privilege is not merely a rule of evidence—which would only be available in judicial proceedings—but a rule of substantive law.[26] It is therefore available to resist a demand for information or documents made by any agency with coercive information-gathering powers.[27]

12.26 The privilege was limited in its scope by the High Court in the 1976 case of *Grant v Downs*, where it was held that the privilege only protected documents brought into existence for the sole purpose of obtaining legal advice or use in legal

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18 *Baker v Campbell* (1983) 153 CLR 52, 84 (Murphy J). See further Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) 80–7.

19 John Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed, 1940) [2290].

20 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* Report No 48 (May 2008) 51.

21 *Baker v Campbell* (1983) 153 CLR 52, 66 (Deane J). However Auburn has argued that this is likely to be a misconception: Auburn, above n 8, 3–8.

22 *Baker v Campbell* (1983) 153 CLR 52, 65 (Gibbs CJ).

23 Ibid 85 (Murphy J).

24 Ibid 61 (Gibbs CJ).

25 Auburn, above n 8, 13.

26 *Baker v Campbell* (1983) 153 CLR 52; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [11]. See also Suzanne McNicol, *Law of Privilege* (Law Book Company Ltd, 1992) 52.

27 *Baker v Campbell* (1983) 153 CLR 52.

proceedings.[28] However, in 1991 the High Court rejected the sole purpose test and expanded the scope of the privilege to documents brought into existence for the dominant purpose of seeking legal advice.[29] This brought the Australian common law into line with England, New Zealand, Ireland and Canada.[30]

12.27 The High Court was also influenced by the development of a statutory privilege. In 1985, the ALRC recommended uniform comprehensive laws of evidence, and suggested that a dominant purpose test would strike the correct balance.[31] Five Australian jurisdictions now have such a statutory privilege, known as client legal privilege. This privilege is relevant only to the admissibility of communications into evidence, and in New South Wales, to pre-trial procedures, but not to non-judicial demands for disclosure.[32] In other situations, the common law privilege is available.

12.28 The privilege is not available to protect communications between a client and lawyer in the furtherance of wrongdoing. This limitation is sometimes known as 'the fraud exception' and it withdraws protection from communications in furtherance of the commission of a crime or the abuse of a statutory power, or where a claim would frustrate the process of law.[33] It also excludes communications made for illegal or improper purposes, trickery and shams.[34] It is 'sufficiently flexible to capture a range of situations where the protection of confidential communications between lawyer and client would be contrary to the public interest'.[35]

Protections from statutory encroachment

Australian Constitution

12.29 The *Australian Constitution* contains no express provision regarding legal professional privilege. However, the Australian Parliament's power to make laws of evidence to be applied in Chapter III courts is not unlimited.[36] The text and structure of Ch III imply that Parliament cannot make a law requiring the court to exercise judicial power in a way that is inconsistent with the nature of that power.[37]

12.30 The High Court has yet to consider whether legal professional privilege is protected by any implication arising from Ch III of the *Constitution.*

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28 *Grant v Downs* (1976) 135 CLR 674.
29 Ibid.
30 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [2].
31 Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) [11].
32 Sue McNicol, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189, 195–6. In NSW the statutory privilege has been extended to pre-trial procedures in civil matters: *Uniform Civil Procedure Rules* r 5.7. See further Tom Bathurst, 'Lawyer/Client Privilege' in *College of Law Judges' Series* (2015). In its review of the Uniform Evidence Act, the ALRC recommended that the statutory provisions should apply to any compulsory process for disclosure: Australian Law Reform Commission; New South Wales Law Reform Commission; Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2006).
33 Dyson Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2013) [25290].
34 *AWB Limited v Cole (No 5)* (2006) 155 FCR 30, [210]–[233].
35 Ibid [215].
36 *Nicholas v The Queen* (1998) 193 CLR 173. See further Enid Campbell, 'Rules of Evidence and the Constitution' (2000) 26 *Monash University Law Review* 312.
37 See further Ch 8.

12.31 The Full Federal Court has considered whether the abrogation of the privilege in the context of a royal commission would interfere with the judicial power of the Commonwealth. The court noted that the High Court has repeatedly confirmed that Parliament may abrogate the privilege, at least in the context of executive inquiries.[38] The Full Federal Court concluded that, while the High Court has not explicitly mentioned the constitutional question, '[w]e take the High Court's silence on this point as an indication that such an argument has no merit'.[39]

Principle of legality

12.32 The principle of legality provides some protection to legal professional privilege.[40] When interpreting a statute, courts will presume that Parliament did not intend to interfere with legal professional privilege, unless this intention was made unambiguously clear.[41] In *Baker v Campbell*, Deane J said:

> It is to be presumed that if the Parliament intended to authorize the impairment or destruction of that confidentiality by administrative action it would frame the relevant statutory mandate in express and unambiguous terms.[42]

12.33 Similarly, in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*, the majority noted:

> Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.[43]

International law

12.34 While legal professional privilege is not a human right in itself, the European Court of Justice has recognised the right to confidential communication with a lawyer as 'a fundamental, constitutional or human right, accessory or complementary to other such rights'.[44]

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38 *Esso Australia Resources Ltd v Dawson* (1999) 87 FCR 588, [21] referring to ; *Baker v Campbell* (1983) 153 CLR 52; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

39 *Esso Australia Resources Ltd v Dawson* (1999) 87 FCR 588, [22]; see also *John Fairfax Publications Pty Limited v A-G (NSW)* (2000) 158 FLR 81, [51].

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

41 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [106] (Kirby J); *Valantine v Technical and Further Education Commission* (2007) 97 ALD 447, [37] (Gzell J; Beazley J and Tobias JJA agreeing). Legislative intention to displace the privilege may be clearer where the privilege against self-incrimination is also abrogated: *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319.

42 *Baker v Campbell* (1983) 153 CLR 52, 117 (Deane J).

43 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

44 *AM & S Europe Ltd v Commission of the European Communities* [1982] ECR 157, [8]. This approach was approved by Murphy J in *Baker v Campbell* (1983) 153 CLR 52, 85.

12.35 Article 14 of the *International Covenant on Civil and Political Rights* protects the right to a fair trial, including the right to legal assistance. The United Nations' *Basic Principles on the Role of Lawyers* call on governments to respect the confidentiality of 'all communications and consultations between lawyers and their clients'.[45]

12.36 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[46] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[47]

Bills of rights

12.37 In some jurisdictions, bills of rights or human rights statutes provide some protection to certain rights and freedoms relevant to legal professional privilege. The Victorian *Charter of Human Rights and Responsibilities* provides that a person has the 'right not to have his or her privacy or correspondence unlawfully or arbitrarily interfered with'[48] and the right to a fair hearing and to communicate with his or her lawyer in criminal proceedings.[49] There is also protection for a fair hearing in *Human Rights Act 2004* (ACT).[50]

Justifications for encroachment

12.38 Legal professional privilege is the common law's way of resolving competing public interests: the public interest in the administration of justice, and the public interest in having all relevant evidence before the courts, in the interests of a fair trial.[51]

12.39 In *Esso Australia Resources v Commissioner of Taxation*, the High Court noted the 'obvious tension' between the policy behind legal professional privilege and 'the desirability, in the interests of justice, of obtaining the fullest possible access to the facts relevant to the issues in a case':

> Where the privilege applies, it inhibits or prevents access to potentially relevant information. The party denied access might be an opposing litigant, a prosecutor, an accused in a criminal trial, or an investigating authority.[52]

12.40 ASIC also noted the public interest in having all relevant information 'available to a court and to government agencies conducting investigations'.[53]

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45 United Nations, *Basic Principles on the Role of Lawyers*, Adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (7 September 1990) Principle 22.
46 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).
47 *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.
48 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13a.
49 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24–25.
50 *Human Rights Act 2004* (ACT) s 21.
51 *Waterford v Commonwealth* (1987) 163 CLR 54, 64 (Mason and Wilson JJ).
52 *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [35] (Gleeson CJ, Gaudron and Gummow JJ).
53 Australian Securities and Investments Commission, *Submission 74*.

12.41 An encroachment of the privilege may be justified when Parliament considers that the common law has not struck the correct balance between the competing public interests in a particular instance. Two competing public interests are discussed below: the public interest in open and accountable government, and the public interest in the efficient and effective investigation of wrongdoing.

Open government

12.42 Moves towards more open government in Australia have included the passage of freedom of information legislation, the establishment of the office of the Commonwealth Ombudsman, protected disclosure legislation and the Australian Government Information Publication Scheme.[54] Some of these schemes require government agencies to make information available, for example, to an Ombudsman. Such activities may be inhibited by the strict application of legal professional privilege.

12.43 Legal advice to government is one example where legislatures may be justified in limiting or abrogating the privilege in the public interest of transparency and open government. Liam Brown has argued that the privilege is 'difficult to rationalise when the client is the state', and that a better position would be to require governments to justify the need for secrecy on a case by case basis.[55] Abrogating legal professional privilege for communications between lawyers and government representatives involved in proceedings relating to public misfeasance, for instance, may be in the interests of open and representative government. Several states in the United States have abolished legal professional privilege for state governments.[56]

Assisting investigations

12.44 Abrogation of legal professional privilege may sometimes be justified where the law is aimed at improving regulatory or investigative processes.

12.45 Some Commonwealth agencies possess coercive information-gathering powers to investigate complaints or instigate inquiries. It might be argued that the privilege should be abrogated when it creates an intolerable interference with these activities. ASIC has argued that the privilege may prevent or delay access to

> material that may otherwise facilitate an expeditious and thorough investigation, the results of which would inform subsequent, likely more speedy, action, to be taken by ASIC. Litigating claims of client legal privilege, if necessary, is also costly.[57]

12.46 In its *Privilege in Perspective* report, the ALRC recommended that

> in the absence of any clear, express statutory statement to the contrary, client legal privilege should apply to the coercive information-gathering powers of federal bodies. However, where the Australian Parliament believes that exceptional circumstances exist to warrant a departure from the standard position, it can legislate to abrogate

54 *Government accountability—Commonwealth Ombudsman* <http://www.ombudsman.gov.au>.
55 Brown, above n 16.
56 Ibid 638.
57 Australian Securities and Investments Commission, *Submission 74*.

> client legal privilege in relation to a particular investigation undertaken by a federal investigatory body, or a particular power of a federal investigatory body.[58]

12.47 This recommendation was qualified by consideration of the following factors:

> (a) the subject of the investigation, including whether the inquiry concerns a matter (or matters) of major public importance that has (or have) a significant impact on the community in general or on a section of the community, or is a covert investigation;
>
> (b) whether the information sought can be obtained in a timely and complete way by using alternative means that do not require abrogation of client legal privilege; and especially,
>
> (c) the degree to which a lack of access to the privileged information will hamper or frustrate the operation of the investigation and, in particular, whether the legal advice itself is central to the issues being considered by the investigation.[59]

12.48 The recommendations in that report serve as a useful guide for legislatures considering abrogating legal professional privilege. They are consistent with the proportionality approach taken in this Inquiry and discussed in Chapter 2. That is, an important common law right such as legal professional privilege should only be limited by statute when the limitation has a legitimate objective, is suitable and necessary to meet that objective, and when the public interest pursued by the law outweighs the public interest in preserving the right.

12.49 The Administrative Review Council's 2008 report into the *Coercive Information-Gathering Powers of Government Agencies* supported the ALRC's recommendations. The Council wrote that abrogation of the privilege should occur

> only rarely, in circumstances that are clearly defined, compelling and limited in scope—for example, for limited purposes associated with the conduct of a royal commission.[60]

Unfounded claims

12.50 The privilege has the potential to hinder access by Commonwealth regulatory agencies to material that is *not* privileged. At common law a court may inspect documents over which privilege is claimed, to determine whether the claim is well founded.[61] However it does not appear that Commonwealth agencies, even those with coercive information-gathering powers, have the power to inspect documents over which privilege is claimed.[62] There is a risk that improper claims could be made. Over-claiming may cause considerable delay and expense if agencies are required to go to

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58 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) Rec 6–1.

59 Ibid.

60 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies* Report No 48 (May 2008) 57.

61 *Grant v Downs* (1976) 135 CLR 674, 688.

62 *AWB Limited v Cole* (2006) 152 FCR 382, [59]. One exception is the *Royal Commissions Act 1902* (Cth) which was amended to allow a Commissioner to inspect documents following the *AWB v Cole* decision.

the courts to test claims of privilege.[63] Practices such as 'blanket claims' and over-claiming were discussed in the ALRC's 2008 *Privilege in Perspective* report and procedural reforms were recommended to address this issue.[64] Such reforms could sometimes avoid the need to abrogate the privilege. ASIC supported the implementation of such mechanisms.[65]

12.51 To date, only the *Royal Commissions Act 1902* (Cth) has been amended to allow the Commissioner to inspect documents for the purpose of determining whether the document is privileged. This amendment occurred in 2006, following the decision of Young J in *AWB Ltd v Cole (No 5)*.[66] The Law Council of Australia (Law Council) has questioned whether this amendment was sufficiently justified, and suggested that it would have been preferable to abrogate the privilege for the AWB inquiry rather than more generally.[67]

Statutory protection

12.52 Most laws that abrogate legal professional privilege provide that the privileged material is not admissible in evidence against the person (except for proceedings relating to a failure to comply with a direction to provide information or documents, or proceedings for giving false or misleading information).[68] The protection afforded by such provisions may justify the abrogation of the privilege, by ensuring that the privilege is impaired as little as possible.[69]

12.53 The Law Council suggested that where the privilege is abrogated, use and derivative immunity should ordinarily apply to documents or communications revealing the content of legal advice, in order 'to minimise harm to the administration of justice and individual rights'.[70] This Inquiry has not identified any statutes that abrogate the privilege and provide derivative use immunity—use immunity is the norm.

Laws that abrogate legal professional privilege

12.54 Commonwealth laws that abrogate legal professional privilege are rare. For example, this Inquiry has identified five that could be broadly described as concerning open government and two concerning crime and the proceeds of crime. Despite the large number of Commonwealth agencies with coercive information-gathering powers, none has the power to require the production of privileged material. The one exception in Commonwealth law, and it is of historic relevance only, was the power of ASIC to

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63 Australian Securities and Investments Commission, *Submission 74*. See also Auditor-General, 'Administration of Project Wickenby' (Audit Report 25, 2012) 185 regarding the cost of disputed claims of privilege.
64 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) Ch 8.
65 Australian Securities and Investments Commission, *Submission 74*.
66 *AWB Limited v Cole (No 5)* (2006) 155 FCR 30.
67 Law Council of Australia, *Submission 75*.
68 *Ombudsman Act 1976* (Cth) s 9.
69 See the discussion of proportionality in Ch 2.
70 Law Council of Australia, *Submission 75*.

require the production of privileged material in the James Hardie asbestos investigation and prosecution.

12.55 Stakeholders also raised concerns about laws that affect the right to confidential legal advice: mandatory data retention laws; and statutory access to communications between lawyers and individuals suspected of terrorism-related offences. It is not clear that these laws encroach upon legal professional privilege, but they do represent an infringement on the right to confidential legal advice.

Open government and accountability in decision-making

12.56 Documents over which legal professional privilege could be claimed do not have to be produced under the *Freedom of Information Act 1982* (Cth).[71] However there are some Commonwealth laws that abrogate legal professional privilege by compelling individuals to produce evidence or information to government oversight bodies such as the Commonwealth Ombudsman. The purpose of these laws is to strengthen oversight and promote transparency in government decision-making. The following laws abrogate legal professional privilege, but provide that the privileged material is not admissible against the person:

- *Ombudsman Act 1976* (Cth) s 9(4)(ab)(ii)—the Ombudsman may require a person to furnish information or produce documents, and legal professional privilege cannot be used as an excuse to avoid producing those documents. The information or document is not admissible in evidence against the person who produced it, and the statute does not affect any claim of privilege that anyone may make: ss 7A(1B), (1E), 8(2B), (2E), 9(5A).
- *Crimes Act 1914* (Cth) s 3ZZGE(1)(d)(ii)—legal professional privilege is not an excuse for not disclosing information to the Commonwealth Ombudsman regarding the inspection of a prescribed Commonwealth agency's records. Information, answers or documents given are not admissible except for prosecutions for unauthorised disclosures under s 3ZZHA or pt 7 of the *Criminal Code* (Cth).
- *Crimes Act* s 15HV—legal professional privilege is not an excuse for not giving information, answering a question or giving access to a document to the Commonwealth Ombudsman regarding controlled operations. Privileged material is not admissible except for prosecutions for unauthorised disclosures, and the statute does not affect claims for legal professional privilege that anyone may make: s 15HV(2), (5).
- *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 96(5)—where a person is summoned to give evidence at a hearing before the Commissioner, they are not excused from answering a question or producing a document or information on public interest grounds that it would disclose a communication between an officer of a Commonwealth body and another person that is

71 *Freedom of Information Act 1982* (Cth) s 42.

protected by legal professional privilege. The privilege may still be claimed in other proceedings.

- *Inspector-General of Intelligence and Security Act 1986* (Cth) s 18—a person is not excused from giving information, producing a document or answering a question on the basis that it would disclose legal advice given to a Minister or a Commonwealth agency, but the material is not admissible in evidence against the person (with some exceptions).

Crime and the proceeds of crime

12.57 Section 3ZQR of the *Crimes Act 1914* (Cth) provides that a person cannot rely on legal professional privilege to avoid producing a document, information or other evidence related to a serious terrorism offence. This evidence is inadmissible in future proceedings against the person. The Explanatory Memorandum did not explain why the privilege was abrogated.[72]

12.58 Section 206 of the *Proceeds of Crime Act 2002* (Cth) provides that a person cannot rely on legal professional privilege to avoid producing a document. The document is not admissible in evidence in a criminal proceeding against the person, except in proceedings regarding providing false or misleading information. The Explanatory Memorandum did not explain why the privilege was abrogated, or why the statutory protection only extends to criminal proceedings, and not civil proceedings.[73]

Coercive information-gathering powers of government agencies

12.59 Commonwealth agencies, including the Australian Crime Commission, the Australian Competition and Consumer Commission, the ASIC and the Australian Taxation Office (ATO), have statutory coercive information-gathering powers, enabling them to investigate complaints and initiate inquiries into illegal activities such as corruption. Statutory officers are often empowered to compel witnesses to provide documents, information or evidence. None of these statutes include explicit abrogation of legal professional privilege, and therefore the privilege is preserved.[74]

12.60 There has been some doubt about whether the *Australian Securities and Investments Commission Act 2001* (Cth) abrogates legal professional privilege.[75] In *Corporate Affairs Commission (NSW) v Yuill*, the High Court held that the compulsory examination powers of the Corporate Affairs Commission of NSW (a precursor to ASIC) abrogated legal professional privilege.[76] The High Court in *Daniels* cast doubt on *Yuill* but did not overturn it.[77] Associate Professor Tom Middleton has argued that

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72 Explanatory Memorandum Anti-Terrorism Bill (No 2) 2005.
73 Explanatory Memorandum, Proceeds of Crime Bill (Cth) 2002.
74 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.
75 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) 198–206.
76 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319.
77 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

the issue remains unresolved.[78] Since 3 December 2007, ASIC has notified persons subject to compulsory powers that they are not required to provide documents or information that are subject to privilege[79] and its *Information Sheet 165* indicates that a person may withhold information that attracts a valid claim of legal professional privilege.[80] If a person makes a statement at an examination that discloses information that might attract a claim of privilege, and the person objects to the admission of that evidence, then it is not admissible against them.[81]

12.61 The *James Hardie (Investigations and Proceedings) Act 2004* (Cth) provided that legal professional privilege may be abrogated in relation to a James Hardie investigation or proceeding, or James Hardie 'material'. This allowed ASIC and the Commonwealth DPP to obtain and use records produced to the James Hardie Special Commission of Inquiry and produced under ASIC's information-gathering powers.

12.62 This Act was passed after the report by DF Jackson QC included observations about 'claims for legal professional privilege that [the witness] knew could not honestly be made'.[82] The Explanatory Memorandum for the James Hardie (Investigations and Proceedings) Bill 2004 outlined the policy justification for the abrogation of legal professional privilege in that Bill:

> Any uncertainty over the power to obtain and use privileged material has the potential to severely inhibit ASIC's ability to exercise efficiently its information-gathering and investigative powers in relation to the conduct that gave rise to the James Hardie Special Commission of Inquiry.
>
> …
>
> The community must have confidence in the regulation of corporate conduct, financial markets and services. This confidence would be undermined if ASIC was unduly inhibited in its ability to obtain and use material necessary to conduct investigations … In relation to matters concerning, or arising out of, the James Hardie Special Commission of Inquiry, the Government considers that it is clearly in the public interest that any investigation and subsequent action by ASIC and the DPP be unfettered by claims of legal professional privilege.[83]

12.63 Section 6 provides that this does not create a general abrogation of legal professional privilege.

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78 Thomas Middleton, 'The Privilege against Self-Incrimination, the Penalty Privilege and Legal Professional Privilege under the Laws Governing ASIC, the ACCC and the ATO—suggested Reforms' (2008) 30 *Australian Bar Review* 282, 119.

79 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [5.50].

80 Australian Securities and Investments Commission, *Claims of Legal Professional Privilege*, Information Sheet 165.

81 *Australian Securities and Investments Commission Act 2001* (Cth) s 76(1)(d).

82 DF Jackson, 'Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation' (2004) 419.

83 Explanatory Memorandum, James Hardie (Investigations and Procedures) Bill 2004 (Cth) [4.24].

12.64 The Senate Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills Committee) drew attention to s 4 of the Bill, noting that it

> would abrogate legal professional privilege in relation to a wide range of records and books connected with the Special Commission of Inquiry conducted in New South Wales into the conduct of the James Hardie Group of companies. In his second reading speech the Treasurer acknowledges that 'legal professional privilege is … an important common law right' that ought to be abrogated only in special circumstances, but goes on to assert that such abrogation is justified 'in order to serve higher public policy interests' such as the 'effective enforcement of corporate regulation'.[84]

12.65 The use of compulsory examination powers by regulatory agencies may result in the inadvertent disclosure of privileged communications, and the subsequent loss of privilege.[85] AWB Ltd raised this concern when its employees were subject to compulsory examination during the Oil for Food investigation. Subsequent litigation resulted in a settlement in which ASIC agreed to allow AWB access to transcripts of interviews in order to ensure the protection of privileged information.[86]

12.66 The access and information-gathering powers of the ATO are subject to legal professional privilege, so that privileged documents or communications need not be disclosed or produced to the ATO, whether in response to those powers or to an informal request.[87] The ATO must, in the exercise of its powers, ensure that a reasonable opportunity to claim the privilege is provided.[88]

Monitoring and surveillance

12.67 Stakeholders have raised concerns that laws that allow monitoring of contact between a person and their lawyer, or require the retention of telecommunications metadata to be retained and accessed, encroach upon legal professional privilege.[89] It is not clear that the common law privilege protects confidential communications from monitoring and surveillance. The privilege is usually described as a right to resist demands for documents or information made by judicial or administrative bodies,[90]

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84 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Seventh Report of 2005* (August 2005) 151.

85 Emily Rumble, 'Conflicting (Public) Interests Affecting Disclosure: Section 19 Examinations, Legal Professional Privilege, and Public Interest Immunity' (2014) 32 *Company and Securities Law Journal* 44.

86 Australian Securities and Investments Commission, *ASIC and AWB Reach Settlement of Privilege Claims* Media Release 10-41AD.

87 *Commissioner of Taxation v Citibank* (1989) 85 ALR 588, [22]. In the exercise of its statutory powers, the ATO must ensure that there is a reasonable opportunity provided to claim legal professional privilege: *Commissioner of Taxation v Citibank* (1989) 85 ALR 588. In relation to legal professional privilege, the Federal Court considered whether s 263 of the *Income Tax Assessment Act 1936* (Cth) overrode legal professional privilege.

88 *Commissioner of Taxation v Citibank* (1989) 85 ALR 588, [17]; *JMA Accounting Ptd Ltd v Commissioner of Taxation* (2004) 139 FCR 537.

89 See, eg, National Association of Community Legal Centres, *Submission 143*; Law Council of Australia, *Submission 75*; Gilbert and Tobin Centre of Public Law, *Submission 22*.

90 See, eg, *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

although it is sometimes conceived more broadly as a protection of the confidentiality of communications between clients and lawyers.[91]

12.68 The Full Federal Court appeared to take the latter approach in *Carmody v Mackellar*. It was asked to consider whether the *Telecommunications (Interception) Act 1979* (Cth) empowers a person to issue warrants authorising the interception of communications between lawyer and client. The court assumed that the privilege would protect such communications from interception and held the statute must be construed so as to abrogate the privilege, because it would be unworkable otherwise.[92]

12.69 Monitoring and surveillance of communications between a person and their lawyer might also be seen as an encroachment on the right to legal representation, as an essential element of legal assistance is that it is confidential. The right to legal representation is an important fair trial right, and is discussed further in Chapter 8.

12.70 The United Nations Human Rights Committee warned against 'severe restrictions or denial'[93] of this right for individuals to communicate confidentially with their lawyers:

> Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.[94]

12.71 Some Commonwealth laws require the monitoring of communications between a lawyer and a client.

Monitoring contact under preventative detention orders

12.72 Section 105.38(1) of the *Criminal Code* requires that any contact between a lawyer and a person being detained under a preventative detention order must be capable of being 'effectively monitored by a police officer'. Communications that are for the purposes listed in s 105.37(1), which include obtaining legal advice about limited matters, are not admissible against the detained person.[95]

12.73 The Law Council submitted that 'such restrictions could create unfairness to the person under suspicion by preventing a full and frank discussion between a client and his or her lawyer and the ability to receive relevant legal advice'.[96]

Monitoring contact under questioning or detention warrant

12.74 Section 34ZQ(2) of the *Australian Security Intelligence Organisation Act 1979* (Cth) requires that contact between a lawyer and a person who is the subject of a

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91 See, eg, Nick Goiran, Michael Burton, 'Integrity Bodies, Witness Surveillance and Legal Professional Privilege: A Case Study' (Paper, West Europe Pacific Legal Conference, Paris, France, January 2014). On the other hand, Jonathan Auburn said 'the privilege is not a branch or variant of any over-arching confidentiality doctrine': Auburn, above n 8, 1.

92 *Carmody v Mackellar* (1997) 148 ALR 210.

93 United Nations Human Rights Committee, *General Comment No 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial* 90th Sess, UN Doc CCPR/C/GC/32 (23 August 2007) [23].

94 Ibid [34].

95 *Criminal Code* s 105.38(5).

96 Law Council of Australia, *Submission 75*.

questioning or detention warrant 'must be made in a way that can be monitored'. The provision is said not to affect the law relating to legal professional privilege.[97]

12.75 The Explanatory Memorandum to the ASIO Legislation Amendment (Terrorism) Bill 2002 that introduced s 34ZQ(2) did not provide specific justification for the monitoring requirement, other than a general statement that the Bill will 'assist in the investigation of terrorism offences'.[98]

12.76 The Law Council's submission to the Independent National Security Legislation Monitor's Inquiry into questioning and detention warrants commented on the operation of s 34ZQ(2). It expressed concern that persons detained be entitled to a lawyer without that communication being monitored or otherwise restricted. The Law Council stated that, 'unless detainees can freely access legal advice and communicate confidentially with their lawyer, there are no practical means to challenge any ill-treatment'.[99]

Listening devices and telephone intercepts

12.77 The *Telecommunications (Interception and Access) Act 1979* (Cth) (the TIA Act) and the *Surveillance Devices Act 2004* (Cth) do not explicitly refer to the privilege. As noted above, the court has held that these statutes abrogate the privilege, 'at least to the extent necessary to permit interception'.[100] Section 79 of the TIA provides that evidence that is otherwise inadmissible is not rendered admissible, thus preserving the privilege in its application to judicial proceedings.

Telecommunications data retention

12.78 The *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2014* (Cth) amended the TIA Act to introduce a mandatory data retention scheme. The scheme requires service providers to retain some telephone and web data for two years.

12.79 The statement of compatibility with human rights that accompanied the amending Bill acknowledged that the Bill engages and limits the right to privacy. The statement identifies the object of the legislation as being 'the protection of national security, public safety, [and] addressing crime'.[101]

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97 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34ZV.

98 Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.

99 Law Council of Australia, Submission to Independent National Security Legislation Monitor, *Inquiry into Questioning and Detention Warrants, Control Orders and Preventative Detention Orders*, 2012 [141]–[143].

100 *Carmody v Mackellar* (1997) 148 ALR 210; See further Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [5.24].

101 Explanatory Memorandum, Telecommunications (Interception and Access Amendment (Data Retention) Bill 2014 (Cth) [33].

12.80 Several stakeholders raised concerns about whether the legislation abrogated legal professional privilege.[102] The National Association of Community Legal Centres (NACLC), for example, argued that the Bill did not appear to protect communications between client and lawyer and therefore appears to be an unjustifiable encroachment on legal professional privilege.[103] Australian Lawyers for Human Rights proposed that the Bill include exemptions for lawyer/client communications,[104] and NACLC proposed that consideration be given to requiring agencies to obtain a warrant to access a lawyer's metadata.[105]

12.81 In evidence and submissions to the Parliamentary Joint Committee on Intelligence and Security's Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, several stakeholders raised concerns about the potential abrogation of legal professional privilege under that Bill. For instance, the Law Institute of Victoria provided evidence to the Committee that

> telecommunications data is capable of revealing substantial information, and this could include information about communications between a lawyer and their client. For example, information exchanged by email or calls about potential witnesses between the lawyer and associates of the client, experts or other relevant parties, could disclose a defence case. A litigation strategy or case theory could be identified based on witnesses or experts contacted by the lawyer.[106]

12.82 Similarly, the Law Council submitted to the Committee that, although telecommunications data alone may not reveal the content or substance of lawyer/client communications, it would, at the very least, be able to provide an indication of whether:

- a lawyer has been contacted;
- the identity and location of the lawyer;
- the identity and location of witnesses; [and]
- the number of communications and type of communications between a lawyer and a client, witnesses and the duration of these communications.[107]

12.83 In response to such concerns, the Attorney-General's Department noted that, at common law, legal professional privilege attaches to the 'content of privileged

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102 Law Council of Australia, *Submission 140*; Australian Privacy Foundation, *Submission 116*; Law Council of Australia, *Submission 75*; Australian Privacy Foundation, *Submission 71*; National Association of Community Legal Centres, *Submission 66*; Free TV Australia, *Submission 48*; Australian Lawyers for Human Rights, *Submission 43*; C Shah, *Submission 16*. A court may construe legislation to infer that the legislature intended to abrogate legal professional privilege where the legislative intention to do so is clear.

103 National Association of Community Legal Centres, *Submission 66*.

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

105 National Association of Community Legal Centres, *Submission 143*.

106 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (February 2015) [6.194].

107 Law Council of Australia, Submission No 126 to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, 20 January 2015.

communications, not to the fact of the existence of a communication between a client and their lawyer'.[108] The Parliamentary Joint Committee on Intelligence and Security relied on the Department's response when concluding that there was no need for 'additional legislative protection in respect of accessing telecommunications data that may relate to a lawyer'.[109]

12.84 In a submission to this ALRC inquiry, ASIC suggested that the privilege would not attach to the type of data retained under the data retention laws, citing *Commissioner of Taxation v Coombes* where it was held that the privilege did not attach to a list of names and addresses of clients who had entered into a certain type of transaction.[110]

Other laws

12.85 The *Judiciary Act 1903* (Cth) s 55ZH provides that where a Legal Services Direction is made by the Attorney-General that requires a person to provide documents or information in relation to the Australian Government Solicitor, a person may not refuse to comply on the basis of legal professional privilege. The privilege will continue to be available in respect of the communication.[111]

12.86 The *Criminal Code* s 390.3(6)(d) provides a defence for criminal association offences where the association is for the sole purpose of providing legal advice or representation. A lawyer bears the evidential burden to prove this defence, and the Law Council argued that this burden may result in the need to disclose information that may otherwise be subject to legal professional privilege.[112]

12.87 Uniform evidence legislation, including the *Evidence Act 1995* (Cth) and its equivalents in some states and territories, provides a statutory form of privilege that applies to evidence adduced in court. The statutory privilege is similar in its scope to the common law privilege, with the limitations on the privilege in Uniform Evidence Act ss 121–126 largely reflecting the limits at common law. McNicol has identified some instances in which the scope of the statutory privilege is narrower than that of the common law privilege,[113] and these could be regarded as encroachments on the common law privilege.

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108 Attorney-General's Department, Submission No 27 to the Joint Parliamentary Committee on Intelligence and Security, Parliament of Australia, *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2014).

109 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (February 2015) [6.210]–[6.213]. The Senate Standing Committee on the Scrutiny of Bills also raised concerns about the Bill in relation to the right to privacy: Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest* No 16 of 2014, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (2014) 213.

110 *Commissioner of Taxation v Coombes* [1999] FCA 842 (25 June 1999).

111 *Judiciary Act 1903* (Cth) s 55ZH(4).

112 Law Council of Australia, *Submission 75*.

113 McNicol, above n 32.

Conclusion

12.88 Commonwealth laws that abrogate legal professional privilege are rare. Some Commonwealth laws allow agencies to require a person to produce privileged documents or information. However, the material produced is not admissible in proceedings against the person. The ALRC does not consider further review of these laws is necessary.

12.89 Some Commonwealth laws allow or require the monitoring of communications between a person and their lawyer. While it is arguable that these laws do not limit legal professional privilege, they do interfere with its underlying rationale, that communications between lawyer and client should be confidential. They may also be characterised as interfering with the right to legal assistance and representation, an important element of the right to a fair trial. The following laws could be further reviewed:

- *Criminal Code* s 105.38(1) which requires contact between a lawyer and a detained person to be capable of being monitored; and
- *ASIO Act* s 34ZQ(2) which requires contact between a lawyer and a person the subject of a questioning or detention warrant to be capable of being monitored.

13. Retrospective Laws

Contents

Summary

13.1 At common law, a statute will be presumed not to have retrospective operation. In the case of criminal laws, this presumption is based on a firm disapproval of laws that impose a penalty for an action that was lawful when it was done. Such laws make it difficult or impossible for individuals to choose to avoid conduct that will attract criminal sanction.

13.2 In the case of civil laws, there is a presumption that a civil law is not intended to have retrospective operation. However the common law does not condemn retrospective civil laws with the vigour reserved for retrospective criminal laws.

13.3 This chapter discusses concerns about laws with retrospective or retroactive operation. It identifies retrospective laws in a wide range of areas, including criminal, taxation, and migration laws, and the justifications that have been put forward for those laws.

13.4 Retrospective criminal laws may be justified where the law in question prohibits behaviour that could never have been considered innocent, legitimate or moral. The Australian Parliament has rarely made retrospective criminal laws, and those that have been made—including legislation prohibiting war crimes, hoaxes using the postal service, and offences against Australians overseas—would largely fall within this justification.

13.5 Retrospective civil laws—that is, those that retrospectively change rights and obligations—are reasonably common. Retrospective civil laws may create uncertainty for individuals and may disappoint legitimate expectations. Where they operate retrospectively only from the date of a government announcement of an intention to legislate, they do not generally disappoint legitimate expectations. They are not an effective way of deterring behaviour, but they may have other objectives, such as restoring a previous understanding of the law that has been unsettled by a court, validating decisions that have been found to be invalid, or protecting public revenue. Retrospective laws may also operate to extend a benefit to an individual who would not otherwise have been entitled to it.

13.6 Taxation law provides numerous examples of laws with retrospective operation. Taxation measures are often enacted with some retrospective operation and it is a 'constant fact that a change to tax law is announced and applied to transactions that took place before the relevant legislation commences'.[1] There is widespread acceptance of retrospective taxation laws that commence from the date of the announcement, where the period of retrospectivity is short and the announcement is clear.

13.7 However, laws with a significant period of retrospectivity may be harder to justify. For example, the *Tax Laws Amendment (Cross-Border Transfer Pricing) Act (No 1) 2012* (Cth) made changes to the *Income Tax Assessment Act 1997* (Cth) with retrospective operation from 1 July 2004. The extent to which these changes merely confirmed previous understandings of the law, or introduce a new test, is contested. They were said to be necessary to avoid 'a significant risk to revenue'.[2] Taxation laws that provide for lengthy periods of retrospectivity might be reviewed to ensure that their retrospective nature has been adequately justified.

13.8 There are concerns that the retrospective operation of some of Australia's migration laws has not been sufficiently justified. The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) inserted reg 2.08F into the *Migration Regulations 1994* (Cth). Reg 2.08F converted all applications for protection visas into applications for temporary protection visas. The regulation commenced on 16 December 2014 and applied to visa applications made before that date. This change had very significant consequences for the people affected. The regulation was said to remove 'an incentive for asylum seekers to use irregular

1 Les Nielson, Department of Parliamentary Services (Cth), *Bills Digest*, No 91 of 2012–13, 15 March 2013 22.
2 Explanatory Memorandum, Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No 1) 2012.

channels including dangerous journeys to Australia by sea'. It is not clear that retrospective operation is necessary to achieve the objectives of the legislation.

13.9 There have been people smuggling offences in the *Migration Act 1958* (Cth) since 1999. In 2011, there was a question before the courts as to whether an asylum-seeker had a 'lawful right to come to Australia'—if this was the case, then it would not be an offence to assist that person. The *Deterring People Smuggling Act 2011* (Cth) amended the people smuggling offences with retrospective effect, so that it had always been an offence to assist the entry of an asylum-seeker into Australia. The amendment may have retrospectively enlarged the scope of the criminal offence, criminalising behaviour that was not unlawful when it occurred. The stated intention of the retrospective aspect of the law was to 'address doubt that may be raised about convictions that have already been made'.[3]

13.10 The retrospective operation of these migration laws could be considered in the broader review of migration laws discussed in Chapter 1.

A common law principle

Criminal law

13.11 The common law's disapproval of retrospective criminal laws has deep roots and a long history.

13.12 In *Leviathan*, Thomas Hobbes wrote that 'harm inflicted for a fact done before there was a law that forbade it, is not punishment, but an act of hostility: for before the law, there is no transgression of the law'.[4] William Blackstone wrote in his *Commentaries on the Laws of England*:

> [h]ere it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence *in futuro*, and be notified before their commencement.[5]

13.13 This approach has become part of the common law of Australia. In *Polyukhovich*, Deane J said:

> The basic tenet of our penal jurisprudence is that every citizen is 'ruled by the law, and by the law alone'. The citizen 'may with us be punished for a breach of law, but he can be punished for nothing else'. Thus, more than two hundred years ago, Blackstone taught that it is of the nature of law that it be 'a rule prescribed' and that, in the criminal area, an enactment which proscribes otherwise lawful conduct as criminal will not be such a rule unless it applies only to future conduct.[6]

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3 Explanatory Memorandum, Deterring People Smuggling Bill 2011 (Cth).
4 Thomas Hobbes, *Leviathan*, (Oxford University Press, first published 1651, 1996 ed) 207.
5 William Blackstone, *Commentaries on the Laws of England*, (Clarendon Press reprinted by Legal Classics Library, first published 1765–1769, 1983 ed) vol 1, Introduction, section 2, 46.
6 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, [27].

13.14 In *PGA v R*, Bell J indicated that the rule of law was an important rationale for the common law's disapproval of retroactive criminal offences.

> The rule of law holds that a person may be punished for a breach of the law and for nothing else. It is abhorrent to impose criminal liability on a person for an act or omission which, at the time it was done or omitted to be done, did not subject the person to criminal punishment. Underlying the principle is the idea that the law should be known and accessible, so that those who are subject to it may conduct themselves with a view to avoiding criminal punishment if they choose.[7]

13.15 Retrospective criminal laws are commonly considered inconsistent with the rule of law, which requires all members to be subject to publicly disclosed laws. In *The Rule of Law*, Lord Bingham wrote:

> Difficult questions can sometimes arise on the retrospective effect of new statutes, but on this point the law is and has long been clear: you cannot be punished for something which was not criminal when you did it, and you cannot be punished more severely than you could have been punished at the time of the offence.[8]

13.16 In *Director of Public Prosecutions (Cth) v Keating*, the High Court of Australia emphasised the common law principle that the criminal law 'should be certain and its reach ascertainable by those who are subject to it'.[9] This idea is 'fundamental to criminal responsibility' and 'underpins the strength of the presumption against retrospectivity in the interpretation of statutes that impose criminal liability'.[10]

13.17 In *Polyukhovich v Commonwealth* (*Polyukhovich*), Toohey J said:

> All these general objections to retroactively applied criminal liability have their source in a fundamental notion of justice and fairness. They refer to the desire to ensure that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal sanction; a choice made impossible if conduct is assessed by rules made in the future.[11]

Civil law

13.18 The common law does not condemn retrospective civil laws with the vigour reserved for retrospective criminal laws. Perhaps the strongest statement of the principle is found in *Maxwell on Statutes*, as cited by Isaacs J in the High Court in 1923:

> Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation.[12]

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7 *PGA v The Queen* (2012) 245 CLR 355, 245.

8 Tom Bingham, *The Rule of Law* (Penguin UK, 2011). The analogous principle regarding increased punishment is embodied in the ICCPR art 15(1), and in *Crimes Act 1914* (Cth) s 4F. It has not been addressed in this chapter, as the Terms of Reference direct the Inquiry to consider the creation of offences with retrospective application.

9 *DPP (Cth) v Keating* (2013) 248 CLR 459, 479 [48] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

10 Ibid [48].

11 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 608 (Toohey J).

12 *George Hudson Limited v Australian Timber Workers' Union* (1923) 32 CLR 413, 434.

13.19 However Isaacs J went on to say that, when the whole circumstances are considered, a retrospective law may be 'absolutely just'.[13]

13.20 Dixon CJ's formulation is often cited, but it is a statement of the common law's approach to statutory interpretation, rather than a statement of disapproval:

> The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.[14]

13.21 In *Polyukhovich*, Dawson J indicated that retrospective civil laws do not raise the same concerns as retrospective criminal laws:

> Ex post facto laws may be either civil or criminal, but the description is frequently used to refer only to criminal laws, perhaps because the creation of crimes ex post facto is, for good reason, generally considered a great deal more objectionable than retrospective civil legislation … [15]

13.22 He also noted that the 'resistance of the law to retrospectivity' is found in the presumption against retrospective operation of civil laws, but that 'justice may lay almost wholly upon the side of giving remedial legislation a retrospective operation', in which case the presumption must 'at best, be a weak presumption'.[16]

13.23 Retrospective civil laws are looked upon with disfavour by some legal commentators. Friedrich Hayek said that the rule of law means that

> the government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's affairs on the basis of this knowledge.[17]

13.24 As French CJ, Crennan and Kiefel JJ noted, rule of law principles underpin the common law presumption against retrospective operation of a statute:

> In a representative democracy governed by the rule of law, it can be assumed that clear language will be used by the Parliament in enacting a statute which falsifies, retroactively, existing legal rules upon which people have ordered their affairs, exercised their rights and incurred liabilities and obligations. That assumption can be viewed as an aspect of the principle of legality … [18]

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13 *George Hudson Limited v Australian Timber Workers' Union* (1923) 32 CLR 413. Justifications for retrospective laws are discussed further below.

14 *Maxwell v Murphy* (1957) 96 CLR 261, 637–8. See also *Coleman v Shell Co of Australia Ltd* 45 SR NSW 27, 30.

15 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 642.

16 Ibid 642–3.

17 Friedrich Hayek, *The Road to Serfdom* (1944). See also HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994).

18 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, [30].

13.25 Concerns have been raised about the efficacy of retrospective civil laws. If a person does not know or is uncertain about the law, it is difficult for the person to comply with it. The law does not, in this circumstance, guide behaviour. As the Law Council of Australia (Law Council) submitted:

> If such laws cannot be known ahead of time, individuals and businesses may not be able to arrange their affairs to comply with them. It potentially exposes individuals and businesses to sanctions for non-compliance and despite the high societal cost, such retrospective laws cannot guide action and so are unlikely to achieve their 'behaviour modification' policy objectives in any event.[19]

13.26 Similarly, the Tax Institute emphasised that laws need to be certain and prospective for the proper functioning of the tax system, particularly to allow:

> (a) taxpayers to self-regulate behaviour in order to minimise tax risk;
>
> (b) the fostering of voluntary and informed compliance with tax laws;
>
> (c) taxpayers to make investment decisions and strike commercial bargains with certainty as to the tax cost resulting from the relevant transaction;
>
> (d) corporate taxpayers to make informed dividend policy decisions; and
>
> (e) listed companies to produce timely financial statements that accurately reflect their tax expense.[20]

13.27 The Law Council observed that retrospective laws can cause a 'number of practical difficulties for business, and the wider economy', including: actual and reputational damage to the market (sovereign risk); disruption to business planning processes resulting in high compliance costs; and unintended consequences from increased regulatory complexity.[21]

13.28 In relation to commercial and corporate laws, the Law Council stated that it is possible for laws to be 'effectively retrospective'. That is, where laws are introduced so abruptly that they do not give businesses sufficient time to adjust their practices; or capture activities that will occur after the law has commenced but which are the result of arrangements entered into before the law commenced.[22]

Retrospective or retroactive?

13.29 A useful distinction may be made between retrospective and retroactive laws. The High Court has noted that retrospectivity is 'a word that is not always used with the constant meaning'.[23] Associate Professor Andrew Palmer and Professor Charles Sampford note that 'a range of definitions is on offer'.[24] This Inquiry uses Professor Elmer Driedger's distinction:

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19 Law Council of Australia, *Submission 75*.
20 The Tax Institute, *Submission 68*.
21 Law Council of Australia, *Submission 75*.
22 Ibid.
23 *Chang v Laidley Shire Council* 234 CLR 1, [111].
24 Andrew Palmer and Charles Sampford, 'Retrospective Legislation in Australia—Looking Back at the 1980s' (1994) 22 *Federal Law Review* 217, 220; Jeremy Waldron, 'Retroactive Law: How Dodgy Was Duynhoven?' (2004) 10 *Otago Law Review* 631, 632.

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted.[25]

13.30 For example, the *Criminal Code Amendment (Offences Against Australians) Act 2002* (Cth) created an offence of causing the death of an Australian overseas. It was assented to on 14 November 2002, but commenced on 1 October 2002.[26] It was retroactive, because it operates before the date of assent, although only for 45 days.

13.31 The *Native Title Act 1993* (Cth) is an example of a retroactive civil law. It commenced on 1 July 1994, but validated certain 'past acts' that occurred before that date and may have been invalid because of native title.[27] Section 14 provides that the past act is 'valid, and is taken always to have been valid'.

13.32 According to Driedger, retrospective (but not retroactive) laws change *present* legal rights and obligations with reference to *past* events or statuses. For example, a law that changes the maximum penalty, or non-parole period, for a crime that occurred in the past is retrospective, because it refers to a past event, but not retroactive, because the sentencing takes place in the present.[28] This definition is not universally accepted. For example, Pearce and Geddes, authors of *Statutory Interpretation in Australia*, consider that a law is only retrospective 'if it provides that rights and obligations are changed with effect prior to the commencement of the legislation'.[29] On this approach, retrospective is synonymous with retroactive. This approach to the definition is certainly well founded, as the High Court has said that 'interference with existing rights does not make a statute retrospective'.[30]

13.33 Laws that introduce legal consequences based on a person's history are retrospective (in Driedger's sense), but not retroactive. *Re a Solicitor's clerk* concerned a law that allowed an order to be made prohibiting a person convicted of larceny from being employed as a solicitor's clerk. The Lord Chief Justice held that the law was not retrospective as the prohibition was for the future only, even though it allowed the prohibition of a person because of a larceny conviction prior to the commencement of the law.[31] Such an approach has been taken in Australia, with the Victorian Supreme Court noting that where a statute relies upon past history as an indicator of present fitness, then the presumption against retrospectivity has no application.[32] However, it

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25 EA Driedger, 'Statutes: Retroactive Retrospective Reflections' (1978) 56 *Canadian Bar Review* 264, 268–269.

26 The amendment was introduced in response to the Bali Bombings which occurred on 12 October: Department of Parliamentary Services (Cth), *Bills Digest*, No 67 of 2002–03, 25 November 2002.

27 After 1975, grants of land that were incompatible with native title rights may have been invalid because of the *Racial Discrimination Act 1975* (Cth). See further Ch 18.

28 Waldron, above n 24, 634.

29 DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) [10.3] relying on Dixon J in *Maxwell v Murphy* (1957) 96 CLR 261.

30 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, [26].

31 *Re a Solicitor's Clerk* [1957] 1 WLR 1219.

32 *Nicholas v Commissioner for Corporate Affairs* [1987] 1988 VR 289.

has been argued that laws that impose civil deprivations based on past behaviour—for example, the exclusion of communists from labour organisations—amounts to the infliction of punishment without a trial, thus eliding the civil-criminal distinction.[33]

13.34 The Senate Standing Committee on the Scrutiny of Bills (Scrutiny of Bills Committee) considers that a law has 'retrospective effect when it makes a law applicable to an act or omission that took place before the legislation was enacted'—it is concerned with both retroactive and retrospective laws.[34] This chapter uses 'retrospective' to refer generally to both types of laws, and 'retroactive' to refer specifically to a law that takes effect at a time prior to its enactment.

Protections from statutory encroachment

Australian Constitution

13.35 There is no express or implied prohibition on the making of retrospective laws in the *Australian Constitution*. In *R v Kidman*, the High Court found that the Commonwealth Parliament had the power to make laws with retrospective effect.[35] In that case, which concerned a retrospective criminal law, Higgins J said:

> There are plenty of passages that can be cited showing the inexpediency, and the injustice, in most cases, of legislating for the past, of interfering with vested rights, and of making acts unlawful which were lawful when done; but these passages do not raise any doubt as to the power of the Legislature to pass retroactive legislation, if it sees fit.[36]

13.36 Similarly, in *Mutual Pools & Staff Pty Ltd v Commonwealth*, Mason CJ said:

> The power of the Parliament to pass retrospective criminal legislation is beyond doubt. Similarly, the federal Parliament can retrospectively validate unlawful conduct either absolutely or conditionally if that conduct is a matter falling within a federal head of power.[37]

13.37 The *Constitution* also permits retrospective laws that affect rights in issue in pending litigation.[38]

13.38 The power of the Australian Parliament to create a criminal offence with retrospective application has been affirmed in a number of cases, and is discussed in

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33 Suri Ratnapala, 'Reason and Reach of the Objection to Ex Post Facto Law' [2007] *The Indian Journal of Constitutional Law* 140, 157.

34 Senate Standing Committee on Scrutiny of Bills, 'The Work of the Committee in 2014' (Parliament of Australia) 39.

35 *R v Kidman* (1915) 20 CLR 425.

36 Ibid 451. 'No doubt a provision making criminal and punishable future acts would have more direct tendency to prevent such acts than a provision as to past acts; but whatever may be the excellence of the utilitarian theory of punishment, the Federal Parliament is not bound to adopt that theory. Parliament may prefer to follow St Paul (Romans IX 4), St Thomas Aquinas, and many others, instead of Bentham and Mill': Ibid 450.

37 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1993) 179 CLR 155, [13] (Mason CJ). See also *Chevron Australia Holdings Pty Ltd v Commissioner of Taxation (No 4)* [2015] FCA 1092 (23 October 2015) [548].

38 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96.

Polyukovich.[39] In that case, McHugh J said that '*Kidman* was correctly decided'[40] and that

> numerous Commonwealth statutes, most of them civil statutes, have been enacted on the assumption that the Parliament of the Commonwealth has power to pass laws having a retrospective operation. Since *Kidman*, the validity of their retrospective operation has not been challenged. And I can see no distinction between the retrospective operation of a civil enactment and a criminal enactment.[41]

13.39 However, retrospective laws that amount to the exercise of judicial power by the legislature, or interfere with the exercise of judicial power by Ch III courts, may be unconstitutional. A bill of attainder is a statute that finds 'a specific person or specific persons guilty of an offence constituted by past conduct and impos[es] punishment in respect of that offence'.[42] In *Polyukhvich*, the High Court said that such a statute would contravene Ch III of the *Constitution* which requires judicial powers to be exercised by courts, and not the legislature.[43] Emeritus Professor Suri Ratnapala noted that the 'common theme' in the judgments was that

> a law that retrospectively makes an act punishable as a crime does not offend the separation doctrine, provided it is general and not directed at specific individuals.[44]

13.40 Thus, bills of attainder are prohibited not because they are retrospective, but because determining the guilt or innocence of an individual amounts to an exercise of judicial power.[45]

13.41 Similarly, a retrospective law that interferes with the functions of the judiciary, such as by altering the law of evidence or removing discretion regarding sentencing of particular persons, may be unconstitutional because of Ch III.[46] Again, the concern is not the retrospective nature of the law, but its interference with the judicial process.[47]

Principle of legality

13.42 The principle of legality provides some protection from retrospective laws.[48] When interpreting a statute, courts will presume that Parliament did not intend to create offences with retrospective application unless this intention was made unambiguously

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39 *Polyukhovich v Commonwealth* (1991) 172 CLR 501. See also *Millner v Raith* (1942) 66 CLR 1.
40 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 721 [30] (McHugh J).
41 Ibid 718 [23] (McHugh J).
42 Ibid [30].
43 Ibid 539, 649, 686, 721.
44 Ratnapala, above n 33.
45 Ibid 539, 649, 686, 721.
46 *Liyanage v The Queen* [1967] AC 259; approved in *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96. In *Liyanage*, a retroactive law was passed after an attempted coup against the Ceylon Government. The law was expressed to come into effect at a date just prior to the coup and, while it did not name the accused, was clearly directed to them. It legalised their detention, allowed them to be tried by three judges nominated by the Minister and without a jury, created a minimum penalty of not less than ten years' imprisonment, and removed protections regarding the admissibility of confessions.
47 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96.
48 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 2.

clear.[49] With regard to civil laws, courts will presume that Parliament did not intend to retrospectively change legal rights and obligations. For example, in *Maxwell v Murphy*, Dixon CJ said:

> the general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events.[50]

13.43 However, this presumption does not apply to procedural (as opposed to substantive) changes to the application of the law.[51]

International law

13.44 The principle that a person should not be prosecuted for conduct that was not an offence at the time the conduct was committed is a rule of customary international law.[52] It is embodied in the maxim *nullem crimen sine lege, nulla poena sine lege*.[53] It has been incorporated into art 15 of the *International Covenant on Civil and Political Rights* (ICCPR):

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
>
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

13.45 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[54] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[55]

Bills of rights

13.46 In other countries, bills of rights or human rights statutes provide some protection from retrospective laws. There are prohibitions on the creation of offences

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49 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, [17] (Dawson J); *DPP (Cth) v Keating* (2013) 248 CLR 459, [48] per curiam; citing Francis Alan Roscoe Bennion, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 2008) 807.

50 *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ); See also *George Hudson Limited v Australian Timber Workers' Union* (1923) 32 CLR 413; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1993) 179 CLR 155.

51 *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ). For further on the distinction between matters of substance and matters of procedure, see *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, [99].

52 See *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 574 (Brennan CJ).

53 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 3rd ed, 1889).

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

55 *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.

that apply retrospectively in the United States,[56] the United Kingdom,[57] Canada[58] and New Zealand.[59] For example, the *Canadian Charter of Rights and Freedoms* provides that any person charged with an offence has the right

> not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations.[60]

13.47 The right not to be charged with a retrospective offence is also protected in the Victorian and ACT human rights statutes.[61]

Justifications for encroachments

13.48 While laws should generally not be retrospective, there are circumstances where retrospective laws are justified. Isaacs J, after referring to the presumption against retrospective operation, said:

> That is the universal touchstone for the Court to apply to any given case. But its application is not sure unless the whole circumstances are considered, that is to say, the whole of the circumstances which the Legislature may be assumed to have had before it. What may seem unjust when regarded from the standpoint of one person affected may be absolutely just when a broad view is taken of all who are affected. There is no remedial Act which does not affect some vested right, but, when contemplated in its total effect, justice may be overwhelmingly on the other side.[62]

13.49 Similarly, Lon L Fuller said that, while laws should generally be prospective,

> situations can arise in which granting retroactive effect to legal rules not only becomes tolerable, but may actually be essential to advance the cause of legality … It is when things go wrong that the retroactive statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about to pick up the pieces.[63]

13.50 Some more specific justifications for retrospective laws are suggested below.

Justifications for retrospective criminal laws

13.51 It is difficult to justify the creation of retrospective *criminal* offences. Article 15 of the ICCPR may not be derogated from, even in times of 'public emergency which threatens the life of the nation'. However art 15.2 contains one specific limitation:

> Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

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56 *United States Constitution* art I § 9, 10. ('No Bill of Attainder or ex post facto Law shall be passed': § 9).
57 *Human Rights Act 1998* (UK)) c 42, sch 1 pt I, art 7.
58 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 11(g).
59 *New Zealand Bill of Rights Act 1990* (NZ) s 26(1).
60 *Canada Act 1982* (UK) c 11, Sch B Pt 1 (*Canadian Charter of Rights and Freedoms*) s 11(g).
61 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 27; *Human Rights Act 2004* (ACT) s 25.
62 *George Hudson Limited v Australian Timber Workers' Union* (1923) 32 CLR 413, 434.
63 Lon L Fuller, *The Morality of Law* (Yale University Press, 2nd ed, 1972) 53.

13.52 For example, retrospective provisions criminalising war crimes might fall within the permissible limitation in art 15(2), if drafted appropriately.[64]

13.53 The Refugee Advice and Casework Service agreed that in 'extreme circumstances, retrospective laws may be justified in order to prevent particularly grave injustices'.[65]

Justifications for laws that change rights and obligations

13.54 Retrospective laws in the civil arena have not been as energetically condemned by judicial officers as have those in the criminal sphere, and the burden of justification is not heavy. The Scrutiny of Bills Committee is required to report on laws that could 'trespass unduly on personal rights and liberties', and it expects the explanatory memorandum for a bill with retrospective effect to detail the reasons retrospectivity is sought.[66] The Committee has indicated that it will not comment adversely on bills that are for the benefit of those affected, that make technical amendments or correct drafting errors, or implement a tax measure that applies from the date it was announced.[67]

13.55 Retrospective laws create uncertainty and can disappoint the expectations of those who have relied on the known state of the law to plan their actions. However, it has often been pointed out that prospective laws (and many other decisions of governments) also create such uncertainty and disappointment.[68] It may not be rational to expect that laws will not change, or that Parliament will never pass retrospective laws.[69] Both retrospective and prospective laws that disappoint expectations may sometimes be justified on grounds that other public interests outweigh that inconvenience and disappointment. Retrospective laws are not an effective way of deterring behaviour, but may serve other policy objectives.

13.56 The following justifications have been offered for retrospective laws in the civil arena.

- The law operates retrospectively only from the date upon which it was announced by the Government that it intended to legislate, thereby fulfilling

64 Laws retrospectively criminalising marital rape might also fall within the limitation. Australian Lawyers for Human Rights observed that as marital rape is 'a gross breach of human rights', but has been 'historically protected or not prosecuted', retrospective liability may be justified: Australian Lawyers for Human Rights, *Submission 43*. Laws regarding marital rape are a state or territory responsibility and are not explored in this Inquiry.

65 Refugee Advice and Casework Service, *Submission 30*.

66 Senate Standing Committee on Scrutiny of Bills, above n 34, 40.

67 Senate Standing Committee for the Scrutiny of Bills *The Work of the Committee During the 41st Parliament November 2004–October 2007* (2008) 16.

68 Palmer and Sampford, above n 24, 221; AD Woozley, 'What Is Wrong with Retrospective Law?' (1968) 18 *The Philosophical Quarterly* 40, 46.

69 Palmer and Sampford, above n 24, 230; Bruce Cohen and Malcolm Abbott, 'On Regulatory Change and "Retrospectivity": Insights from the CPRS and the RSPT' (2012) 227 *Australian Tax Forum* 815, 820.

Blackstone's call for laws to be 'notified to the public'.[70] Most retrospective taxation laws fall into this category.

- The retrospective law operates to restore an understanding of the law that existed before a court decision unsettled that understanding—see, for example, the transfer pricing laws discussed below.
- The retrospective law operates to address the consequences of a court decision that unsettled previous understandings of the law—see for example the validation provisions in the *Native Title Act* discussed below.
- The retrospective law operates to validate decisions that have been subsequently found to be invalid, in the interests of certainty—see the amendments to the *Environment Protection and Biodiversity Act* discussed below.
- The law addresses tax avoidance behaviour that was not foreseen and that poses a significant threat to revenue—see dividend washing, discussed below.

13.57 Whether these justifications are considered acceptable and sufficient by those affected by the retrospective law will depend upon the particular circumstances. For example, as the Tax Institute indicated, if the Government announces an intention to legislate, and then legislates promptly, with retrospective operation to the date of the announcement, this will be more acceptable than if the legislation is delayed. A retrospective law that operates to restore a prior understanding will be more acceptable if that prior understanding was widely held and uncontested.

Laws with retrospective operation

13.58 Retrospective laws are enacted quite frequently in Australia. Palmer and Sampford identified 99 retrospective laws (that is, either retroactive or retrospective) passed by the Commonwealth Parliament between 1982 and 1990, not including 'routine revision' statutes.[71]

13.59 This chapter will discuss four retroactive criminal laws, which may in fact be the only retroactive criminal laws passed by the Commonwealth.[72] It will also discuss some retrospective civil laws, chosen either because they have been criticised for having insufficient justification or because they are examples of laws that have relied on the justifications identified above.

Criminal laws

13.60 The *Guide to Framing Commonwealth Offences* states that 'an offence should be given retrospective effect only in rare circumstances and with strong justification'.

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70 William Blackstone, *Commentaries on the Laws of England*, (Clarendon Press reprinted by Legal Classics Library, first published 1765–1769, 1983 ed) 46.

71 Palmer and Sampford, above n 24, 234.

72 And there is some uncertainty about whether the fourth listed, people smuggling offences, belongs in this list, as it removes a defence rather than creating a new offence. It is also unclear whether the defence was available before the retrospective law was introduced, as there had been no judicial determination.

Further, if legislation is amended with retrospective effect, this should generally be 'accompanied by a caveat that no retrospective criminal liability is thereby created'.[73]

13.61 However, laws that create criminal offences with retrospective application have occasionally been created by the Australian Parliament. The *Guide to Framing Commonwealth Offences* states that such exceptions have 'normally been made only where there has been a strong need to address a gap in existing offences, and moral culpability of those involved means there is no substantive injustice in retrospectivity'.[74]

War crimes

13.62 Perhaps the most well-known retroactive criminal law is the *War Crimes Act 1945* (Cth), which was amended by the *War Crimes (Amendment) Act 1988* (Cth). The original Act made provision for the trial and punishment of war crimes committed against anyone who was at any time resident in Australia, or against British subjects or citizens of Britain's allies.[75]

13.63 The amending Act repealed almost all of the original Act. It created an offence of committing a war crime in Europe between 1 September 1939 and 8 May 1945.[76] A person who is an Australian citizen or resident at the time of charge may be liable for the offence.[77]

13.64 Ivan Polyukhovich, an Australian citizen, was charged with crimes said to have been committed in the Ukraine in 1942 and 1943. At that time, there was no Australian legislation which criminalised the acts that Polukhovich was alleged to have done.[78] Polyukhovich challenged the constitutional validity of s 9 of the *War Crimes Act* on the ground that it usurped the judicial power of the Commonwealth by providing that past conduct shall constitute a criminal offence.[79] The validity of the provision was upheld in *Polyukhovich*. Dawson J commented that

> the ex post facto creation of war crimes may be seen to be justifiable in a way that is not possible with other ex post facto criminal laws, particularly where the conduct proscribed would have been criminal conduct had it occurred within Australia. The wrongful nature of the conduct ought to have been apparent to those who engaged in it even if, because of the circumstances in which the conduct took place, there was no offence against domestic law.[80]

13.65 This is consistent with art 15.2 of the ICCPR which creates an exception for retrospective laws prohibiting acts which are criminal 'according to the general

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73 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 15.
74 Ibid.
75 *War Crimes Act 1945* (Cth) ss 7, 12.
76 Ibid ss 5, 9.
77 Ibid s 11.
78 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, [1].
79 Ibid [3].
80 Ibid [18].

principles of law recognised by the community of nations'.[81] It is also consistent with the *Guide to Framing Commonwealth Offences* which indicates that retrospective laws may be justified where the 'moral culpability of those involved means there is no substantive injustice in retrospectivity'.[82]

Hoaxes using the postal service

13.66 In 2001, following the terrorist acts of 11 September 2001 and anthrax attacks in the United States, s 471.10 of the *Criminal Code* (Cth), concerning hoaxes using the postal service, was enacted by the *Criminal Code Amendment (Anti-Hoax and other Measures) Act 2002* (Cth). The amending legislation was assented to on 4 April 2002, with retroactive operation from 16 October 2001.

13.67 The offences created were said to be in response to a 'significant number of false alarms involving packages or letters containing apparently hazardous material' in late 2001.[83] These had resulted in an announcement by the then Prime Minister on 16 October 2001 that new anti-hoax legislation would be introduced if the Coalition were returned to Government.

13.68 The Explanatory Memorandum stated that it was necessary to ensure that hoaxes using the postal service were 'adequately deterred in the period before the resumption of Parliament'.[84] The Prime Minister's announcement provided this deterrent. While one of the criticisms that can be directed at retrospective criminal legislation is that people will be unaware that their conduct is an offence, the Prime Minister's announcement was said to be in very clear terms, and received immediate, widespread publicity.[85] An additional consideration was outlined in the Explanatory Memorandum:

> there is no circumstance in which the perpetration of a hoax that a dangerous or harmful thing has been sent could be considered a legitimate activity in which a person was entitled to engage pending these amendments. The amendments do not retrospectively abrogate a legitimate right or entitlement. For all these reasons, the retrospective application of these amendments is not considered to contravene fundamental principles of fairness or due process.[86]

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81 Brennan J found that the offence created in s 9 of the *War Crimes Act* 'did not correspond with the international law definition of international crimes existing at the relevant time', so the retrospective provision is therefore 'offensive to international law' and not supported by the external affairs power: Ibid [49]–[71]; See further Gillian Triggs, 'Australia's War Crimes Trials: All Pity Choked' in Timothy LH MacCormack and Gerry J Simpson (eds), *The Law of War Crimes: National and International Approaches* (Martinus Nijhoff Publishers, 1997) 143.

82 Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 15.

83 Explanatory Memorandum, Criminal Code Amendment (Anti-Hoax and Other Measures) Act (Cth) 2002.

84 Ibid.

85 Ibid.

86 Ibid.

13.69 Despite these justifications, the Scrutiny of Bills Committee expressed concern about these provisions, saying that 'declaring something "illegitimate", and then retrospectively declaring it to be a crime, would seem to establish an unfortunate and undesirable precedent'.[87]

Offences against Australians overseas

13.70 Sections 115.1 to 115.4 of sch 1 of the *Criminal Code Act 1993* (Cth) (*Criminal Code*) provide that any person may be prosecuted in Australia for the murder or manslaughter of, or for causing serious harm to, an Australian citizen or resident outside Australia.

13.71 These provisions were enacted in the *Criminal Code Amendment (Offences Against Australians) Act 2002* (Cth), assented to on 14 November 2002, with retroactive application from 1 October 2002.

13.72 The Attorney-General's Department advised the Parliamentary Joint Committee on Human Rights (Human Rights Committee) that the impetus for the introduction of these offences was the Bali bombings, which occurred on 12 October 2002. To allow for the prosecution of the perpetrators of the Bali bombings, the offences were given 'very limited retrospective operation to commence on 1 October 2002, only 45 days prior to the enactment of the Act'.[88]

13.73 The Explanatory Memorandum to the Bill explained that retrospective application was justifiable in the circumstances because

> the conduct which is being criminalised—causing death or serious injury—is conduct which is universally known to be conduct which is criminal in nature. These types of offences are distinct from regulatory offences which may target conduct not widely perceived as criminal, but the conduct is criminalised to achieve a particular outcome.[89]

Migration Act s 228B: people smuggling offences

13.74 Sections 233A and 233C of the *Migration Act* establish a primary people smuggling offence and an aggravated people smuggling offence. Section 233A was introduced in 1999 and s 233C in 2001.[90]

13.75 Both of these offences are established where another person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry to Australia, of another person who is a non-citizen, and that non-citizen had, or has, 'no lawful right to come to Australia'.

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87 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Second Report of 2002* (March 2002) 99.

88 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourth Report of the 44th Parliament* (March 2014) Appendix, Submission from Attorney–General's Department.

89 Explanatory Memorandum, Criminal Code Amendment (Offences Against Australians) Bill 2002 (Cth).

90 *Migration Legislation Amendment Act (No. 1) 1999* (Cth) sch 1, cl 7; *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) sch 2, cl 5.

13.76 The *Deterring People Smuggling Act 2011* (Cth) was enacted on 29 November 2011 and inserted s 228B which defined the words 'no lawful right to come to Australia', with retroactive effect from 16 December 1999. It was introduced to Parliament at a time when the Victorian Court of Appeal was being asked to consider the meaning of the phrase.

13.77 The Explanatory Memorandum stated that the people smuggling offences 'have been consistently interpreted since 1999 as applying where a person does not meet the requirements for coming to Australia under domestic law'. The amendments were intended to 'ensure that the original intent of the Parliament is affirmed', and

> to address doubt that may be raised about convictions that have already been made under sections 233A and 233C of the Migration Act, and previous section 232A of the Migration Act as in force before 1 June 2010.[91]

13.78 A number of agencies and individuals raised concerns before the Senate Standing Committee on Legal and Constitutional Affairs about the retrospective nature of this provision.[92] The Human Rights Law Centre said that this retrospective law is in breach of art 15 of the ICCPR, other human rights instruments, and government policy, and could not (unlike the war crimes legislation) be justified by reference to the seriousness of the offence.[93] Another submission to the Committee emphasised that it is the function of the courts to interpret legislation, and if that interpretation is not consistent with the 'existing understanding' held by the government or prosecutorial agencies, 'then that understanding is incorrect'.[94] Adam Fletcher noted:

> Unlike the law in question in *Polyukhovich*, the present Bill does not create any new offence. However, it arguably enlarges an offence retrospectively by removing a potential defence. The law may render an act—namely the unauthorised transportation of asylum-seekers (as opposed to other migrants)—criminal retrospectively and pre-empt findings of the courts in ongoing prosecutions.[95]

Proceeds of crime

13.79 The *Proceeds of Crime Act 2002* (Cth) applies to offences and convictions regardless of whether they occurred before or after the commencement of the Act, with the result that proceeds for forfeiture and recovery of assets may involve consideration

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91 Explanatory Memorandum, Deterring People Smuggling Bill 2011 (Cth).

92 See, eg, New South Wales Council for Civil Liberties, Submission to Senate Legal and Constitutional Affairs Committee on the Deterring People Smuggling Bill 2011, 2011; Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Committee on the Deterring People Smuggling Bill 2011, 2011.

93 Human Rights Law Centre, *Submission to the Senate Legal and Constitutional Affairs Committee Regarding the Deterring People Smuggling Bill 2011* (2011).

94 Thomas Bland and Others, Submission to Senate Legal and Constitutional Affairs Committee on the Deterring People Smuggling Bill 2011, 2011.

95 Adam Fletcher, *Retrospective People Smuggling Bill: A Breach of Our Constitution?* <http://castancentre.com/2011/11/09/retrospective-people-smuggling-bill-a-breach-of-our-constitution>. The Act provides that it applies to 'proceedings (whether original or appellate) commenced before the day on which this Act receives the Royal Assent, being proceedings that had not been finally determined as at that day': *Deterring People Smuggling Act 2011* (Cth) sch 1, item 2.

of offences that were committed, or are suspected to have been committed, at any time in the past.[96] The statute is retrospective (but not retroactive).

13.80 The *Crimes (Superannuation Benefits) Act 1989* (Cth) and the *Australian Federal Police Act 1979* (Cth) pt VA contain similar provisions providing for the forfeiture and recovery of employer funded superannuation benefits of Commonwealth employees who have been convicted of corruption offences and sentenced to more than 12 months imprisonment.

13.81 It has been suggested that proceeds of crime proceedings need to involve consideration of offences that were committed, or are suspected to have been committed, at any time in the past, 'due to the fact that criminal conduct from which a person may have profited or gained property may continue over several years or may not be discovered immediately'.[97]

13.82 For example, in determining 'unexplained wealth amounts' under the *Proceeds of Crime Act*,[98] the amount of wealth a person has is calculated having regard to property owned, effectively controlled, disposed of or consumed by the person, including before the time the law commenced. This is said to be necessary to ensure that

> orders are not frustrated by requiring the precise point in time at which certain wealth or property was acquired to be established, as this can be extremely difficult for law enforcement agencies to obtain evidence of and prove.[99]

13.83 The Explanatory Memorandum for the amending Bill noted that orders under proceeds of crime legislation are 'civil asset confiscation orders that cannot create any criminal liability, do not result in any finding of criminal guilt and do not expose people to any criminal sanctions'.[100]

13.84 The Human Rights Committee has argued, however, that the fact that a sanction or proceeding is characterised as civil under Australian law, and has civil rather than criminal consequences, is not determinative of whether a sanction is 'criminal' for the purposes of human rights law. In this context, it stated that a 'punitive and deterrent goal'—as intended by unexplained wealth proceedings—would generally suggest that the measure should be characterised as criminal.[101]

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96 Proceeds of crime legislation is also discussed in Ch 19.

97 Explanatory Memorandum, Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth).

98 *Proceeds of Crime Act 2002* (Cth) s 179G.

99 Explanatory Memorandum, Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (Cth).

100 Ibid.

101 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 2013* (May 2014) 191. See also Ratnapala, above n 33, 155–159.

Social security law

13.85 A retroactive social security law was passed in response to the decision in *Poniatowska v Director of Public Prosecutions (Cth)*.[102] Ms Poniatowska was charged with 17 counts of obtaining a financial advantage from the Commonwealth, contrary to s 1325.2 of the *Criminal Code*. She had failed to declare income from employment to the Department of Human Services while receiving a social security payment. However the Full Court of the Supreme Court of South Australia held that the *Social Security (Administration) Act 1999* (Cth) (*Administration Act*) did not impose any obligation on persons in receipt of social security payments to declare income. Noting the general principle that 'an omission will attract criminal liability only if the omission is a failure to perform a legal obligation', the Court set aside the convictions.

13.86 In response to this decision, an amending act inserted s 66A into the *Administration Act*. This section imposed a duty on social security claimants to inform the Department of a change of circumstances which might affect payments. The amendment received assent on 4 August 2011, and was described as having commenced on 20 March 2000—the date the *Administration Act* commenced.[103]

13.87 The Explanatory Memorandum noted that *Poniatowska v DPP (Cth)* had cast doubt on 'a large number of past convictions' for social security fraud.[104] The intention of Parliament in creating a provision with retrospective application was 'to ensure that certain criminal convictions … cannot be overturned on the basis that the physical element of the offence, being an omission, was not established'.[105]

13.88 However, the High Court held that, while s 66A operates with retrospective effect, it does not have the effect of attaching criminal liability to a failure to advise the Department of an event:

> A clear statement of legislative intention is required before the courts will find that liability for a serious Commonwealth offence is imposed by means of a statutory fiction.[106]

Taxation laws

13.89 It is not uncommon for taxation measures to be enacted with retrospective operation. Indeed, budget measures often commence from the date of the budget announcement, rather than the date of enactment. Such legislation does not retrospectively alter the rights and obligations of taxpayers before the date of the announcement—mitigating much of the negative impact that arises from the retrospective application. Indeed, as Fuller noted, taxation legislation is never, strictly speaking, retroactive, because it does not create an obligation to pay tax in the past.

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102 *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578.
103 *Social Security and Other Legislation Amendment (Miscellaneous Measures) Act 2011* (Cth).
104 Explanatory Memorandum, Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2011.
105 Ibid 6.
106 *DPP (Cth) v Keating* (2013) 248 CLR 459, [47] (footnote omitted).

Retrospective tax legislation refers to past acts, but imposes an obligation to pay tax in the present.[107]

13.90 There is wide acceptance that amendments to taxation law may apply retrospectively where the Government has announced, by press release, its intention to introduce such legislation, particularly when the announcement is sufficiently detailed. The situation is common enough for the Australian Taxation Office (ATO) to have issued guidance on its administrative treatment of taxpayers where taxation legislation has retrospective operation.

13.91 One ATO practice note provides that, when legislation has been announced but not yet enacted, taxpayers who exercise reasonable care and follow the existing law will suffer no tax shortfall penalties and nil interest charges up to the date of enactment for the legislative change. Taxpayers will also be given a 'reasonable time' to get their affairs in order, post enactment of the measure, without incurring any interest charges.[108]

13.92 Another practice note provides that, where the ATO changes its view or practices, the Commissioner of Taxation has a general policy of not applying these changed views and practices retrospectively. Typically, retrospective application will only be justified where the ATO has not contributed to the taxpayer adopting a contrary view, where there is fraud or evasion, or where tax avoidance may be involved.[109] However a taxpayer cannot enforce adherence to a practice statement.[110]

13.93 The Senate has scrutiny processes intended to minimise periods of retrospectivity. Standing Order 44 provides that where taxation legislation has been announced by press release more than six months before the introduction of the relevant legislation into Parliament (or publication of a draft bill), that legislation will be amended to provide for a commencement date after the date of introduction (or publication).

13.94 In 2004, a Treasury Department review of aspects of income tax self-assessment considered suggestions that Parliament should not pass retrospective tax laws. The review concluded that the commencement date of measures should remain an issue to be 'examined and determined by Parliament on a measure-by-measure basis'.[111]

13.95 The review stated that while, ideally, tax measures imposing new obligations should apply prospectively, retrospective commencement dates may be appropriate where a provision:

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107 Fuller, above n 63, 59.

108 See Australian Taxation Office, 'Administrative Treatment of Taxpayers Affected by Announced but Unenacted Legislative Measures Which Will Apply Retrospectively When Enacted' (PS LA 2007/11). This statement addresses '[a]dministrative treatment of taxpayers affected by announced but unenacted legislative measures which will apply retrospectively when enacted'.

109 Australian Taxation Office, 'Matters the Commissioner Considers When Determining Whether the ATO View of the Law Should Only Be Applied Prospectively' (PS LA 2011/27). This statement addresses '[m]atters the Commissioner considers when determining whether the ATO view of the law should only be applied prospectively'.

110 *Macquarie Bank Limited v Commissioner of Taxation* [2013] FCAFC 119 (24 October 2013) [11].

111 Department of the Treasury (Cth), *Report on Aspects of Income Tax Self Assessment* (2004) 70.

- corrects an 'unintended consequence' of a provision and the ATO or taxpayers have applied the law as intended;
- addresses a tax avoidance issue; or
- might otherwise lead to a significant behavioural change that would create undesirable consequences, for example bringing forward or delaying the acquisition or disposal of assets.[112]

Bottom of the harbour schemes

13.96 The *Taxation (Unpaid Company Tax) Assessment Act 1982* (Cth), which allowed for the recovery of tax avoided under 'bottom of the harbour' tax schemes entered into between 1 January 1972 and 4 December 1980,[113] was highly controversial. It was introduced in response to tax avoidance schemes that the Government described as 'pre-tax strips of company profits'.[114] Sampford and Crawford note that the schemes often 'required links with organised crime and the deliberate flouting of company and tax laws'.[115]

13.97 When these laws were introduced, the then Treasurer, the Hon John Howard MP, said:

> Our normal and general reluctance to introduce legislation having any retrospective element has, on this occasion, been tempered by the competing consideration of overall perceptions as to the equity and fairness of our taxation system and the distribution of the tax burden.[116]

13.98 The Treasurer also emphasised that the tax to be recovered had been illegally evaded,[117] and referred to revenue losses of 'hundreds of millions of dollars'.[118]

Tax offset for films

13.99 In 2011, the Administrative Appeals Tribunal (AAT) held that *Lush House*, a television program about household management hosted by 'domestic guru' Shannon Lush, was a documentary, and therefore eligible for a tax offset.[119]

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112 Ibid [7.3].
113 *Taxation (Unpaid Company Tax) Assessment Act 1982* (Cth) s 5.
114 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 1982, 1866 (John Howard). The companies involved were stripped of assets, left with only tax liabilities, and transferred to someone with no capacity to pay the tax bill. The company records were often lost, or sent to 'the bottom of the harbour'.
115 Palmer and Sampford, above n 24, 256.
116 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 September 1982, 1866 (John Howard).
117 Ibid.
118 Palmer and Sampford, above n 24, 260.
119 *EME Productions No 1 Pty Ltd and Screen Australia* [2011] AATA 439. The approach of the AAT to the term 'documentary' was upheld by the Full Federal Court: *Screen Australia v EME Productions No 1 Pty Ltd* (2012) 200 FCR 282.

13.100 According to the Government, the definition of 'documentary' adopted by the AAT

> represents a departure from both the ACMA Guidelines and the long-held understanding of the term in the context of government regulation of, and support for, documentaries. That has created uncertainty for Government and industry in relation to the film tax offsets.[120]

13.101 In response, an amendment to the *Income Tax Assessment Act 1997* (Cth) was made to alter the definition of 'documentary' in s 376-25 and limit the types of films eligible for tax offsets.[121] The amending Act was assented to on 28 June 2013, but the amendments were stipulated to 'apply to films that commence principal photography on or after 1 July 2012'.

13.102 The amendments were consistent with the guidelines previously used in offset applications prior to the AAT decision and were seen as restoring an original understanding of the term 'documentary' in the taxation context.

Dividend washing

13.103 The *Tax and Superannuation Laws Amendment (2014 Measures No 2) Act 2014* (Cth) included provisions intended to close a loophole that allowed sophisticated investors to acquire dividend franking credits disproportionate to their shareholdings, through a process known as 'dividend washing'. The then Assistant Treasurer, David Bradbury MP, announced the intention to close the loophole on 14 May 2013.[122] The Act was assented to on 30 June 2014 with application to distributions made on or after 1 July 2013.

13.104 The retrospective nature of the Bill was justified in the Explanatory Memorandum on the grounds that affected taxpayers would be aware of the change from the date of the announcement and would be unlikely to be affected in an unexpected way. The statement of compatibility with human rights stated that the laws limited 'the tax benefits that are available in respect of certain financial transactions without any wider impact'.[123]

13.105 While retrospective legislation may disadvantage individual taxpayers, this may be justified when the overall fairness of taxation laws is considered. The ATO reported that

> [w]hile relatively modest amounts of revenue are being lost as a result of this conduct, significant amounts of revenue would be at risk if the practice were to become widespread.[124]

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120 Explanatory Memorandum, Tax and Superannuation Laws Amendment (2013 Measures No 2) Bill 2013 (Cth) 12.

121 *Tax and Superannuation Laws Amendment (2013 Measures No. 2) Act 2013* (Cth).

122 Assistant Treasurer David Bradbury, 'Protecting the Corporate Tax Base From Erosion and Loopholes - Measures and Consultation Arrangements' (Media Release, No 71, 14 May 2013).

123 Explanatory Memorandum, Tax and Superannuation Laws Amendment (2014 Measures No 2) Bill 2014 (Cth).

124 Australian Tax Office, 'Protecting the Corporate Tax Base from Erosion and Loopholes: Preventing. Dividend Washing' (Discussion Paper, 2013) 2.

13.106 The Tax Institute agreed that dividend washing 'threatens the integrity of the dividend imputation system'.[125]

Tax avoidance

13.107 In relation to concerns about tax avoidance, the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Act 2013* (Cth) was enacted on 29 June 2013 with retrospective operation to 16 November 2012—the date on which an exposure draft of the legislation was released.

13.108 The Act inserted new provisions into the *Income Tax Assessment Act 1936* (Cth), making changes to the general anti-avoidance provisions of pt IVA, which operate to protect the integrity of the tax law from contrived or artificial arrangements designed to obtain a tax advantage.

13.109 The statement of compatibility with human rights noted that retrospective operation was 'necessary to ensure that taxpayers are not able to benefit from artificial or contrived tax avoidance schemes entered into in the period between that date and the date of Royal Assent' and that application from that date does not affect the operation of any criminal law.[126]

Transfer pricing

13.110 An important example of retrospectivity in taxation law arose in relation to amendments to Australia's transfer pricing rules. Transfer pricing is the pricing of goods and services provided by one member of a multinational group of companies to another member of the group—for example, the price charged by a parent company for goods purchased by a subsidiary. Transfer pricing creates opportunities for companies to shift profits to lower tax jurisdictions. Australia's transfer pricing rules 'seek to ensure that the appropriate return for the contribution made by Australian operations is taxable in Australia for the benefit of the community'.[127]

13.111 In 1982, transfer pricing rules were introduced into div 13 of the *Income Tax Assessment Act 1997* (Cth). They provide that if parties are not dealing with each other at arm's length with regard to a transfer, consideration equal to arm's length consideration shall be deemed to have been given.[128] There was no substantive judicial consideration of these rules until June 2011 when the Full Federal Court decided *Commissioner of Taxation v SNF (Australia) Pty Ltd*.[129] In this case, the Commissioner argued that the rules should be interpreted in light of the Organisation for Economic Cooperation and Development's Transfer Pricing Guidelines for Multinational

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125 Tax Institute, Submission to ATO Consultation, *Protecting the Corporate Tax Base from Erosion and Loopholes: Preventing Dividend Washing*.
126 Explanatory Memorandum, Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013.
127 Explanatory Memorandum, Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No 1) 2012.
128 *Income Tax Assessment Act 1997* (Cth) s 136AD.
129 *Commissioner of Taxation v SNF (Australia) Pty Ltd* (2011) 193 FCR 149.