

## 10. Strict and Absolute Liability

---

### Contents

Summary	285
A common law principle	286
Protections from statutory encroachment	289
Australian Constitution	289
Principle of legality	289
International law	290
Justifications for imposing strict and absolute liability	291
Laws that impose strict or absolute liability	292
Corporate and prudential regulation	293
Environmental protection	296
Work health and safety	298
Customs and border protection	298
National security	300
Other laws	304
General review	307
Conclusion	307

### Summary

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

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

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

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

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

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

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

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

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

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

## **A common law principle**

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

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

---

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

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

3 *Ibid.*

10.11 Professors Andrew Ashworth and Jeremy Horder commented that:

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

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

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

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

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

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

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

- *mens rea* offences—the prosecution must prove a physical element (*actus reus*) and a mental element (*mens rea*);
- strict liability offences<sup>9</sup>—the prosecution is not required to prove *mens rea*, but there is a defence of reasonable mistake available;<sup>10</sup> and
- absolute liability offences—proof of *mens rea* is not required and the defence of reasonable mistake is not available.<sup>11</sup>

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

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

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

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

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

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

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

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

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

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

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

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

10.20 A number of Commonwealth laws expressly impose strict or absolute liability on some physical elements of an offence.<sup>20</sup> Most commonly, these relate to technical<sup>21</sup>

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

13 *Criminal Code* s 3.1(1).

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

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

16 *Ibid* ss 6.1, 6.2.

17 *Ibid* s 3.1(2).

18 *Ibid* s 5.6(1).

19 *Ibid* s 5.6(2).

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

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

or jurisdictional<sup>22</sup> elements, and as such don't offend the common law principle. However, problems arise when strict or absolute liability applies to physical elements that would normally require fault to render them culpable.<sup>23</sup> Professor Jeremy Gans submitted:

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

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

## Protections from statutory encroachment

### Australian Constitution

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

### Principle of legality

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

---

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

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

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

24 J Gans, *Submission 2*.

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

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

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

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

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

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

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

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

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

## International law

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

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

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

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

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

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

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

will generally favour a construction that accords with Australia's international obligations.<sup>35</sup>

### **Justifications for imposing strict and absolute liability**

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

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

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

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

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

---

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

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

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

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

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

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

## Laws that impose strict or absolute liability

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

- corporate and prudential regulation;

37 Ibid 283–6.

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

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

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

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

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

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

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



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

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

### Corporate and prudential regulation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3A) For the purposes of an offence based on subsection (3), absolute liability applies to paragraph 3(a).

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

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

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

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

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

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

---

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

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

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

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

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

### **Environmental protection**

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

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

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

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

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

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

10.50 Additionally, the Minister noted that strict liability is appropriate

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

---

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

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

63 See also Ch 20.

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

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

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

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

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

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

(1A) Strict liability applies to paragraph (1)(d).<sup>68</sup>

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

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

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

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

---

66 Ibid.

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

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

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

70 Ibid.

71 Ibid 235.

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

### **Work health and safety**

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

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

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

### **Customs and border protection**

#### *Strict liability offences*

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

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

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

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

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

76 *Ibid.*

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

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

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

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

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

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

---

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

78 Law Council of Australia, *Submission 75*.

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

80 *Ibid* [1.27].

81 *Ibid*.

82 *Ibid*.

83 *Ibid* [1.46].

84 *Ibid* [1.47].

85 *Ibid* [1.50].

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

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

### ***Absolute liability offences***

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

## **National security**

### ***Strict liability offences***

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

### ***Associating with a terrorist organisation***

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

---

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

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

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

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

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



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

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

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

10.70 The *Sheller Report* also concluded that:

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

10.71 The Council of Australian Governments, in its 2013 review of counter-terrorism legislation, adopted the Sheller Report's comments relating to s 102.5,<sup>95</sup> and recommended the repeal of s 102.8.<sup>96</sup>

#### **Financial transactions**

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

91 Attorney-General's Department (Cth), Submission No 14(a) to Security Legislation Review Committee, *Report of the Security Legislation Review Committee*, 2006, 21.

92 Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006), [10.36].

93 Ibid.

94 Council of Australian Governments, *Review of Counter-Terrorism Legislation* (2013) [104], quoting Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) [10.32].

95 Ibid [104]–[105].

96 Ibid rec 23.

97 The Minister must proscribe a person or entity if they are satisfied on reasonable grounds of matters prescribed by regulation. These matters must give effect to a decisions related to terrorism and dealings with assets made by the Security Council under ch VII of the Charter of the United Nations, which must be carried out by Australia under art 25: *Charter of the United Nations Act 1945* (Cth) s 15.

98 Inserted into the *Charter of the United Nations Act 1945* (Cth) by the *Suppression of the Financing of Terrorism Act 2002* (Cth).

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

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

#### ***Disclosure of information***

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

#### ***Declared area offences***

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

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

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

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

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

---

99 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2002* (May 2002) 180.

100 Councils for Civil Liberties, *Submission 142*; Australian Lawyers for Human Rights, *Submission 43*; Gilbert and Tobin Centre of Public Law, *Submission 22*; UNSW Law Society, *Submission 19*. The extent to which this provision encroaches on freedom of movement is discussed in Chapter 7.

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

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

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

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

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

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

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

---

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

102 Ibid.

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

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

105 Ibid.

106 Ibid 59.

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

108 UNSW Law Society, *Submission 19*.

## Other laws

### *Copyright*

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

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

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

10.86 Associate Professor Kimberlee Weatherall stated:

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

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

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

---

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

110 Ibid.

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

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

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

114 Ibid rec 2.

115 Ibid [3.17].

116 Ibid [3.18].

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

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

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

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

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

10.92 The Australian Digital Alliance submitted that

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

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

---

117 Ibid [3.128].

118 Ibid.

119 Ibid rec 2.

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

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

122 Ibid.

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

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

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

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

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

### **Family law**

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

10.98 It submitted that

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

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

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

---

124 *Australasian Performing Right Association Ltd v Commonwealth Bank of Australia* (1992) 40 FCR 549, [55].

125 *Australasian Performing Right Association Ltd v Commonwealth Bank of Australia* (1992) 40 FCR 549.

126 The terms of reference for the Productivity Commission's inquiry are available on its website: <[www.pc.gov.au](http://www.pc.gov.au)>

127 These include: *Child Support (Registration and Collection) Act 1988* (Cth) ss 23(7), 33(2), 34(2), 72W(2), 111(3), 113A(3), 120(3); *Child Support (Assessment) Act 1989* (Cth) ss 160(3), 161(3).

128 Law Council of Australia, *Submission 75*.

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

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

## General review

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

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

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

## Conclusion

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

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

---

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

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

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

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

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

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

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

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