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

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.

Enterprises and Tax Administrations (the OECD Guidelines), but the Court rejected this approach.[130]

13.112 Consequently, on 1 November 2011, the Australian Government proposed amendments to confirm that the transfer pricing rules contained in Australia's tax treaties provide a power, through express incorporation into Australia's domestic law, to make transfer pricing adjustments independently of div 13. In introducing the legislation, it was explained that this would 'ensure the Parliament's view as to the way in which treaty transfer pricing rules operate is effective, that the Australian revenue is not compromised, and that international consistency is maintained with our tax treaty partners'.[131] Further, the Explanatory Memorandum stated:

> There are strong arguments … for concluding that under the current income tax law, treaty transfer pricing rules apply alternatively to Division 13. If this is the case, these amendments constitute a mere rewrite of those rules. To the extent that some deficiency exists in the current law, these amendments ensure the law can operate as the Parliament intended.[132]

13.113 The amending act commenced on the date of assent, but the provisions apply to income years starting on or after 1 July 2004.[133] The Explanatory Memorandum observed that the introduction of retrospective taxation is not done lightly and generally only 'where there is a significant risk to revenue that is inconsistent with the Parliament's intention'. The arguments for retrospective operation were set out at length in the Explanatory Memorandum. Emphasis is placed on evidence that, since 1982, Parliament has assumed that treaty pricing rules are available as an alternative to div 13, and the Commissioner has also publicly maintained this view.

13.114 This analysis has been criticised. The Law Council, for example, submitted to the Senate Economics Legislation Committee that the provisions of the Bill cannot be regarded as merely 'clarifying' the law:

> To the contrary, the Bill introduces a new test for interpretation. This test requires taxpayers and the Court to read relevant provisions of the tax treaties 'consistently' with OECD guidance, fundamentally changing the interpretation and application of the law.[134]

13.115 In a submission to this ALRC Inquiry, the Law Council argued that these retrospective laws were not justified for two reasons. First, it could not be said that the amendments merely restored a prior understanding of the law, as differing views and questions had been raised by the courts. Secondly, there was no evidence of avoidance behaviour.[135]

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130 Ibid [116]–[118].

131 Explanatory Memorandum, Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No 1) 2012.

132 Ibid.

133 *Tax Laws Amendment (Cross-Border Transfer Pricing) Act (No 1) 2012* Sch 1.

134 Law Council of Australia, Submission to Senate Economics Legislation Committee, *Tax Laws Amendment (Cross-Border Transfer Pricing) Bill (No 1)*, 2012.

135 Law Council of Australia, *Submission 75*. Bridie Andriske has also challenged the assertion that taxpayers should have assumed that the law was always intended to operate in the way that the amendments provided: Bridie Andriske, *Are the Retrospective Transfer Pricing Measures Unconstitutional?* (18 October 2012) <www.corrs.com.au/thinking/insights>.

13.116 There may be significant public interest reasons for these laws—for example, to allow the Commissioner to re-examine past transfer pricing transactions, in light of overseas examples of unacceptable abuse of corporate tax arrangements.[136] Any disadvantage to taxpayers needs to be balanced against concerns about protection of public revenue and the extent to which major multinational companies are contributing tax in Australia—a matter of concern to Australian governments and the current Senate inquiry into corporate tax avoidance.[137]

Concerns about retrospective taxation laws

13.117 Concerns about the scope of retrospective taxation laws have been widely expressed. For example, in 2012, the Tax Institute made a submission to Treasury in which it noted an 'extremely concerning trend in recent months of the Government announcing retrospective changes to the tax law'. It stated that

> [c]hanges to reverse consolidation tax laws were preceded by amendments to the Petroleum Resource Rent Tax backdated to 1990; and an overhaul of transfer pricing laws, with effect from 2004. More recently, amendments to the general anti-avoidance law in Part IVA, were announced to apply from the date of announcement in March 2012, despite the community not knowing the detail of those changes and most likely not being able to know the detail for some months hence.[138]

13.118 The Tax Institute warned that retrospective changes in tax law are likely to 'interfere with bargains struck between taxpayers who have made every effort to comply with the prevailing law at the time of their agreement'.[139] Similar concerns were expressed in the Institute's submission to this ALRC Inquiry.[140]

13.119 The Tax Institute accepted that retrospective tax laws are justified in the case of

> (a) concessional announcements, where it is proposed that a person should have a benefit from a given date but the legislative programme does not allow for immediate enactment; and
>
> (b) strengthening of tax laws, where an issue has come to the attention of the Commissioner requiring prompt attention (subject again to the legislative programme).[141]

13.120 The Tax Institute stressed that once an announcement has been made, legislation should be introduced promptly.

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136 Les Nielson, Department of Parliamentary Services (Cth), *Bills Digest*, No 91 of 2012–13, 15 March 2013 22.
137 Senate Economic References Committee, *Corporate Tax Avoidance*, due to report on 26 February 2016.
138 Tax Institute, *2012–13 Federal Budget Submission*, 2012 covering letter.
139 Ibid.
140 The Tax Institute, *Submission 68*.
141 Ibid.

Migration laws

13.121 Laws with retrospective operation are not uncommon in migration law. As noted in Chapter 2, the enjoyment of common law rights and freedoms is not confined to Australian citizens, and a non-citizen in Australia is entitled to the same protection of the law as a citizen.[142] It follows that the presumption against retrospective operation of law would apply to laws affecting non-citizens, but of course that presumption can be rebutted by plain words in the statute. Similarly, retrospective laws affecting non-citizens require appropriate justification, as do those affecting citizens. As noted above, the burden of justification for a retrospective civil law is not as high as for criminal laws. In considering whether a retrospective law is justified, the proportionality principle may be relevant—that is, laws should have a legitimate objective, and the means chosen to achieve that objective should be rationally connected with that objective.[143] Thus, a retrospective law is more likely to be justified if its retrospective nature is necessary to achieve its objective.

13.122 Two retrospective migration laws have been identified by stakeholders as raising concerns.

Migration Act s 45AA: unauthorised maritime arrivals

13.123 *Migration Act* s 45AA allows an application for one type of visa to be considered as an application for a different type of visa, as specified by regulations.[144] It was inserted by sch 6 of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). Regulation 2.08F was then inserted into the *Migration Regulations 1994* (Cth) to convert all protection visas into temporary protection visas.[145] The amendment changes rights and obligations retroactively in that an existing application is taken to have never been a valid application for a permanent protection visa, and always to have been an application for a temporary protection visa.[146]

13.124 The Explanatory Memorandum to the amending Bill indicated that the measures were intended to 'make it clear that there will not be permanent protection for those who travel to Australia illegally'. It also said the 'intention is that those who are found to be in need of protection … will be eligible only for grant of temporary protection visas'.[147]

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142 *Bradley v Commonwealth* (1973) 128 CLR 557, 580.

143 See further Ch 2.

144 Section 45AA(8)(b) expressly excludes the operation of s 7(2) of the *Acts Interpretation Act 1901* (Cth).

145 Briefly, a temporary protection visa is valid for up to three years. It allows a person to work and have access to various benefits but unlike a permanent protection visa does not confer any family reunion rights and requires the holder to apply for permission to travel outside of Australia.

146 Melinda Jackson, Clare Hughes, Marina Brizar, Besmellah Rezaee, Submission No 129 to Senate Standing Committee on Legal and Constitutional Affairs, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*.

147 Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).

13.125 The Explanatory Statement to the regulation emphasised that it was intended to remove the incentive to undertake a dangerous journey:

> The conversion of unfinalised PPV applications made by unauthorised arrivals into TPV applications is one of the many key measures for implementing the government's policy in combating people smuggling. The conversion ensures that applicants who are found to engage Australia's protection obligations will only be granted a TPV instead of a PPV, thereby removing an incentive for asylum seekers to use irregular channels including dangerous journey to Australia by sea to seek protection.[148]

13.126 Stakeholders commented critically on the effect of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* on protection visa applications.[149] For example, the Refugee Council of Australia claimed that, as a result of these provisions,

> thousands of asylum seekers who arrived in Australia without valid visas and whose protections claims have not yet been finally determined are now no longer eligible for permanent Protection Visas. If they are found to be refugees, they will have far fewer rights than was previously the case …[150]

13.127 The Refugee Council submitted that retrospective reintroduction of temporary protection is unjustified:

> The Australian Government maintains that Temporary Protection Visas act as a deterrent to unauthorised arrival. If the Government believes this to be the case, it makes little sense to apply these changes to people who could not possibly have known that they would be eligible for temporary protection only should they arrive without a visa and thus could not possibly have been deterred from seeking to arrive in an authorised manner.[151]

13.128 The Refugee Advice and Casework Service (RACS) also expressed concern about s 45AA of the *Migration Act.* RACS considered that these changes destabilised an administrative framework that should be certain, predictable and impartial.[152] Similarly, the Human Rights Law Centre stated that:

> The justification offered by the Government, namely to deter asylum seekers from coming, does not justify retrospectively offering an inferior form of protection to those already here.[153]

13.129 The Australian National University Migration Law Program observed that the provisions converting visa applications are 'an attempt to give effect to the

148 *Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015*.

149 ANU Migration Law Program, *Submission 59*; Refugee Council of Australia, *Submission 41*; Human Rights Law Centre, *Submission 39*; Refugee Advice and Casework Service, *Submission 30*.

150 Refugee Council of Australia, *Submission 41*. For example, 'they will not be permitted to sponsor family members for resettlement in Australia, have limited access to support services and can only travel overseas with right of return if there are "compassionate or compelling circumstances" necessitating travel and only with written approval from Minister for Immigration': Ibid.

151 Refugee Council of Australia, *Submission 41*. See also Human Rights Law Centre, *Submission 39* regarding the absence of a deterrent effect.

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

153 Human Rights Law Centre, *Submission 39*.

government's policy that no unauthorized maritime arrival will be granted a permanent protection visa'. It submitted that:

> This policy position is an inadequate justification for retrospectively removing the accrued rights of those who applied for a permanent protection visa. The retrospective nature of the provision will mean that those found to be genuine refugees [will be] on rolling temporary protection visas, which in our view, may give rise to breaches of fundamental rights, including the right to freedom of movement.[154]

Migration Act ss 500A(3)(d), 501(6)(aa): the character test

13.130 These sections were inserted by sch 1 of the *Migration Amendment (Strengthening the Character Test and Other Provisions) Act 2011* (Cth). They provide that the Minister may refuse to grant, or may cancel, a person's safe haven visa on the grounds that the person committed an offence while in immigration detention, while escaping from immigration detention or when having escaped from immigration detention. They also provide that a person does not pass the character test if the person has been convicted of an offence.

13.131 The amending Act received assent on 25 July 2011, and was stated to commence on 26 April 2011 (the date of the announcement of the intention to make the changes). However the changed powers apply regardless of whether the conviction or immigration detention offence concerned occurred before, on or after 26 April 2011.

13.132 The Explanatory Memorandum explained that, on 26 April 2011, the Minister's announcement 'put all immigration detainees on notice that the Australian government takes criminal behaviour very seriously and will take appropriate measures to respond to it'.[155]

13.133 The Law Council submitted that these measures may not be justified in that they impose a penalty—liability to have one's visa application refused—for an offence that may have occurred before the legislation commenced.[156] As noted above, there is a question over whether laws that change the present consequences of past acts can be correctly called retrospective.

Other laws

Native title law

13.134 The *Native Title Act 1993* (Cth) includes provisions that validate past acts that extinguished native title. These provisions are retroactive because they provide that certain acts are valid and are 'taken always to have been valid'.[157]

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154 ANU Migration Law Program, *Submission 59*.
155 Explanatory Memorandum, Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 (Cth).
156 Law Council of Australia, *Submission 75*.
157 *Native Title Act 1993* (Cth) s 14.

13.135 These provisions were a response to *Mabo v Queensland [No 2]*, which is an example of a judicial decision that unsettled existing understandings of the law, with extensive retrospective effect.[158] By making clear that the common law recognises native title, *Mabo [No 2]* cast doubt on land tenures that had been granted since the passage of the *Racial Discrimination Act 1975* (Cth). Grants that purported to extinguish native title may have been invalid because of their inconsistency with the *Racial Discrimination Act*. They may also have been invalid because they were acquisitions of property other than on just terms, as required by s 51(xxxi) of the Constitution. The *Native Title Act* validated, or allowed states and territories to validate, certain acts that took place before the commencement of the Act on 1 January 1994, and would otherwise be invalid because of native title.[159]

Validating acts

13.136 Legislation with retroactive operation may be enacted to validate decisions that have been made, or powers exercised, by government agencies, the validity of which is in doubt. In *Statutory Interpretation in Australia*, Pearce and Geddes note that such statutes 'clearly must operate retrospectively and from their very nature refute the applicability of the presumption against retrospectivity'.[160]

13.137 One example is the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Act 2015* (Cth). Schedule 5 validates access by the Australian Federal Police to certain investigatory powers in designated state airports. The stated aim of the legislation was to 'ensure continuity in policing services at Australia's major airports, required as a result of an administrative error that led to certain investigatory powers not being available to AFP and special members in those airports for a short period of time'.[161] The Senate Scrutiny of Bills Committee expressed concerns about this amendment. It noted that coercive powers are only available if expressly authorised by statute, and retrospective validation of such powers should only occur in 'exceptional circumstances where a compelling need can be demonstrated'. The Committee did not consider that such exceptional circumstances had been demonstrated.[162]

13.138 A second example is the *Environment Legislation Amendment Act 2013* (Cth) which retrospectively validated decisions that were made under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*). This amendment followed a Federal Court finding that the Minister's decision to approve a mine was invalid, because it was made in breach of s 139(2) of the *EPBC Act*, which required the Minister to consider certain conservation advice.[163] The Explanatory Memorandum

158 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.
159 *Native Title Act 1993* (Cth) div 2A. See also Ch 20.
160 Pearce and Geddes, above n 29, [10.14].
161 Explanatory Memorandum, Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 (Cth).
162 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *13th Report of 2014* (October 2014) 697–8.
163 *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 (17 July 2013).

indicated that the amendment was 'to address the implications arising from the Tarkine case' and would 'apply retrospectively and prospectively to provide certainty for past and future decisions'.[164]

Powers to make subordinate legislation

13.139 Subordinate legislation with retrospective operation may be more difficult to justify as these instruments are less visible to the public. Unless the enabling Act specifies to the contrary, a legislative instrument has no effect if it has retrospective operation and, as a result, disadvantages or imposes liabilities on a person.[165] A range of statutes specifically allow for legislative instruments to have effect before the date on which they are registered:

- *Customs Tariff Act 1995* (Cth) s 16A(5), concerning special safeguards for goods originating from Thailand;
- *Excise Tariff Act 1921* (Cth) s 6CA(1D), (5), concerning excise duties on condensate;
- *Income Tax Assessment Act 1997* (Cth) s 293-115, concerning defined benefit contributions, and s 293-145, concerning constitutionally protected superannuation funds;
- *Liquid Fuel Emergency Act 1984* (Cth) ss 9(2), 10(5), 11(6), 12(7), 13(4), 14(5), 14A(5), 17(6), 20(6), 21(5), 21(8), 22(8), 23(8), 24(8), concerning Ministerial directions and determinations regarding fuel emergencies;
- *Migration Act 1958* (Cth) s 198AB, concerning the designation of a regional processing country;
- *National Rental Affordability Scheme Act 2008* (Cth) s 12, concerning the operation of the scheme;
- *Petroleum Excise (Prices) Act 1987* (Cth) s 4(1C), concerning excise on condensate;
- *Superannuation Act 1990* (Cth) s 5A, concerning amendments of trust deeds to implement family law interest splitting, and s 45(6), concerning ministerial amendment of trust deed;
- *Taxation Administration Act 1953* (Cth) s 133-130, concerning superannuation end benefits; and
- *Veterans' Entitlements Act 1986* (Cth) s 29(11), concerning assessment of rates of veterans' pensions 45TO(1A), concerning members of pension bonus schemes, and s 196B(13) concerning the functions of the Repatriation Medical Authority.

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164 Explanatory Memorandum, Environment Legislation Amendment Bill 2013 (Cth).
165 *Legislative Instruments Act 2003* (Cth) s 12.

13.140 The ALRC has not sought to establish the extent to which these regulation-making powers have actually been exercised in a retrospective manner.

Judicial clarification of uncertain laws

13.141 Professor Jeremy Gans observed that the requirement that laws be sufficiently clear is breached when the scope of an offence is unclear until it has been interpreted by the courts. He gave the example of the offence of 'market manipulation' in the *Corporations Act 2001* (Cth), which prohibits actions that create or maintain an 'artificial price' in financial products'.[166] This offence came into effect on 11 March 2002, but its scope was not defined until it was considered by the High Court in 2013.[167] Professor Gans suggested that the ALRC should consider whether 'current criminal offences are sufficiently certain, precise and accessible to give a reasonably informed lay person fair warning of what conduct is prohibited'.[168]

13.142 The Law Council raised a related concern about statutes with key terms that are not defined, so that 'business is unable to gauge the compliance burden and feasibility until after the legislation has commenced'.[169]

13.143 The clarification by the courts of an uncertain law necessarily imports an element of retrospectivity. Indeed, all judicial decisions about common law, constitutional matters or statutory interpretation are essentially retrospective.[170] In *PGA v The Queen*, Heydon J said that to 'the extent that they may be changed retrospectively, uncertainty is inherent in common law rules'.[171] Fuller considers that the argument that judicial decisions should be retrospective is very strong.[172]

13.144 The courts do not state what the law is from the date of a decision, but declare the law as it has always been. Where this declaration is in conflict with the previous understanding, this may be used to justify a statute that reinstates the previous understanding with retrospective effect, as is discussed above with regard to taxation. However there are practical difficulties in reviewing laws on the basis that they are uncertain and require statutory interpretation. This chapter focuses on Commonwealth laws with declared retrospective operation, rather than those that may require clarification.

Conclusion

13.145 Commonwealth laws creating offences with retrospective operation are rare, and when such offences have been created, they have largely concerned conduct with such a high degree of moral culpability that no-one could consider them legitimate.

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166 *Corporations Act 2001* (Cth) s1041A.
167 *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135.
168 J Gans, *Submission 2*.
169 Law Council of Australia, *Submission 75*.
170 Hugh Tomlinson, Richard Clayton and Victoria Butler-Cole, *The Law of Human Rights* (University Press, 2009) 822. See also Enid Campbell, 'The Retrospectivity of Judicial Decisions and the Legality of Governmental Acts' (2003) 29 *Monash University Law Review* 49.
171 *PGA v The Queen* (2012) 245 CLR 355, [126].
172 Fuller, above n 63, 57.

13.146 The ALRC considers that the *Deterring People Smuggling Act 2011* (Cth), which has retroactive operation for 11 years and may have enlarged the scope of the offence of people smuggling, should be further reviewed to determine whether the retroactive operation is justified.

13.147 Commonwealth laws that retrospectively change legal rights and obligations are common. The ALRC considers that the following could be further reviewed to determine whether their retrospective operation is justified:

- taxation laws that provide for lengthy periods of retrospectivity; and
- *Migration Act* s 45AA and *Migration Regulations* 2.08F, which converted applications for permanent protection visas into temporary protection visas.