

14. Strict and Absolute Liability

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A common law presumption

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

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

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

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

3 *Ibid.*

14.2 Professors Andrew Ashworth and Jeremy Horder write:

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

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

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

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

14.4 Historically, criminal liability at common law necessarily involved proof of *mens rea*.⁶ In *Williamson v Norris*, Lord Russell CJ said:

The general rule of the English law is that no crime can be committed unless there is *mens rea*.⁷

14.5 In his *Commentaries on the Laws of England* (1765), William Blackstone wrote that, to ‘constitute a crime against human laws, there must be first a vitious will, and secondly, an unlawful act consequent upon such vitious will’.⁸

14.6 Some criminal offences, however, do not require proof of fault—these are described as strict and absolute liability offences. Criminal offences are generally characterised in one of three ways:

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

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

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

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

7 *Williamson v Norris* 1899 1 QB 14 (Lord Russell CJ).

8 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol IV, bk IV, ch 2, 21.

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

10 *Wamphler v R* (1987) 67 CLR 531. See further, Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC Report 95 (2003) [4.4].

14.7 In the mid to late 19th century, strict and absolute liability offences were increasingly developed, particularly so-called ‘regulatory offences’.¹¹ Regulatory offences were designed to protect individuals from the risks that came with greater industrialisation and mass consumerism. This trend has continued, with a recognition that the imposition of strict liability ‘may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment or financial or corporate regulation’.¹² Similarly, there is a recognition that while absolute liability offences should be rare, it may be appropriate for jurisdictional or similar elements, or ‘where an element is essentially a precondition of an offence, and the state of mind of the offender is not relevant’.¹³

14.8 In Australia, the common law presumption of fault-based liability is reflected in statute. Chapter 2 of sch 1 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*) codifies the general principles of criminal responsibility which apply to all Commonwealth offences. Section 5.6 of the *Criminal Code* states that where an offence does not specify a fault element, the prosecution must prove fault: intention in relation to conduct, recklessness in relation to a circumstance or result. As a result, unless a Commonwealth statute states that an offence is one of strict or absolute liability, a fault element is read into the offence.

14.9 The Terms of Reference for this Inquiry ask the ALRC to consider laws that apply strict or absolute liability to *all* physical elements of a criminal offence. However, the ALRC considers that it is useful to consider laws that apply strict or absolute liability to *any* physical elements of a criminal offence.

14.10 Where a provision is silent on the question of fault, s 5.6 of the *Criminal Code* operates to impose a requirement for the prosecution to prove fault for all elements of the offence, including technical and jurisdictional elements. The effect of this is that, unless expressly stated in the provision, strict or absolute liability does not apply to physical elements of an offence. Most commonly, such express statements are made in relation to jurisdictional elements. However, problems arise when strict or absolute liability applies to physical elements that would normally require fault to render them culpable.¹⁴

14.11 Professor Jeremy Gans, in his submission to this ALRC Inquiry noted:

Some physical elements of a criminal offence almost never lack subjective intent in practice (eg most conduct) and many others in Commonwealth legislation are technical/jurisdictional elements with no relevance to responsibility. The relevant

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

12 Senate Standing Committee for the Scrutiny of Bills, ‘Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation’ (26 June 2002), 284.

13 *Ibid* 285.

14 See, eg, *Corporations Act 2001* (Cth) ss 952E, 952J, 1021E, 1021FA–FB, 1021H, 1021NA–NC; *Fisheries Management Act 1991* (Cth) s 100B; *Criminal Code* (Cth) s 102.5(2)(b).

question is whether or not absolute/strict liability applies to any element of a Commonwealth offence that may plausibly be committed without subjective intent or knowledge and that is relevant to criminal responsibility.¹⁵

14.12 As a result, this chapter relates to offences where strict or absolute liability is imposed on *any* element of the offence. It discusses the source and rationale of the common law presumption; how it is protected from statutory encroachment; and when Commonwealth laws that impose strict or absolute liability may be justified.

Protections from statutory encroachment

Australian Constitution

14.13 The *Australian Constitution* does not expressly require that criminal offences include the element of *mens rea*, nor has it been implied into the *Constitution* by the High Court.

Principle of legality

14.14 The principle of legality provides some protection to the principle of *mens rea*.¹⁶ When interpreting a statute, courts will presume that Parliament did not intend to create a strict liability offence, unless this intention was made unambiguously clear.¹⁷

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

While the strength of the consideration may vary according to the subject matter of the legislation, when an offence created by Parliament carries serious penal consequences, the courts look to Parliament to spell out in clear terms any intention to make a person criminally responsible for conduct which is based on an honest and reasonable mistake.¹⁸

14.16 As demonstrated by the majority decision in *CTM v The Queen*, this represents a high bar. Amendments to the *Crimes Act 1900* (NSW) in 2003 removed the express statutory defence under s 77(2)(c) that the person ‘had reasonable cause to believe, and did in fact believe, that the child was of or above the age of 16 years’.¹⁹

14.17 These amendments were designed ‘to provide equal treatment of sexual offences against males and females’.²⁰ A majority of the High Court held that the offence in s 66C is not an absolute liability offence (ie, an offence of honest and reasonable mistake is available), despite the repeal of s 77(2), because it does not preclude the ongoing

15 J Gans, *Submission 2*.

16 The principle of statutory interpretation now known as the ‘principle of legality’ is discussed more generally in Ch 1.

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

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

19 New South Wales, Legislative Assembly, *Parliamentary Debates* (7 May 2003), 376.

20 New South Wales, Legislative Assembly, *Parliamentary Debates* (21 May 2003), 900.

operation of the common law principle that an honest and reasonable mistake generally precludes criminal liability. The Court stated:

The New South Wales Parliament regarded the ‘express defence’ in s 77(2) as no longer appropriate. It was a defence that, in its terms, differentiated between homosexual and heterosexual activity, so it at least had to be changed if there were to be the desired equalisation. It could not have been left as it was. Yet the problem to which that provision was addressed did not disappear; and the long-standing and well-understood principle which provided an alternative response to the same problem remained potentially applicable in the absence of ‘the clearest and most indisputable evidence [concerning] the meaning of the Act’.²¹

International law

14.18 Article 14(2) of the *International Covenant on Civil and Political Rights* (ICCPR), which relates to the presumption of innocence, provides protection to the principle of *mens rea*. However, international instruments cannot be used to ‘override clear and valid provisions of Australian national law’.²² However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia’s international obligations.²³

Relevant statutory provisions

14.19 There are a range of Commonwealth laws that could be said to impose strict or absolute liability. The Terms of Reference for this Inquiry asked the ALRC to include consideration of Commonwealth laws in commercial and corporate regulation, environmental regulation and workplace relations law that impose strict liability. This chapter will examine these areas, as well as some laws that arise in the following areas:

- customs and border protection legislation
- national security legislation; and
- copyright legislation.

14.20 The imposition of absolute liability is relatively rare, and is largely confined to technical or jurisdictional elements.²⁴ Some notable exceptions arise in relation to customs and border protection and national security.

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

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

23 *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 1.

24 For example, absolute liability is imposed on elements relating to the value of the property and cash (in the proceeds of crime context), the time period in which the conduct occurred, or whether the conduct contravenes particular legislation: *Criminal Code* (Cth) ss 360.2, 360.3, 400.3(4)–400.7(4). Another example relates to extradition. A nominal offence is created to facilitate prosecution in lieu of extradition. It applies where a person is remanded by a magistrate under s 15 of the *Extradition Act 1988* (Cth), and the person engaged in conduct outside Australia which would have constituted an offence if it had occurred in Australia: *Extradition Act 1988* (Cth) s 45. Absolute liability applies to these two elements, on the basis that the prosecution would have to prove all elements of the underlying offence beyond reasonable doubt. These elements are technical elements, and if the prosecution, for instance, could prove

Corporate and prudential regulation

14.21 Strict liability offences are a common feature of regulatory frameworks underpinning corporate and prudential regulation.²⁵ Examples include the composition of corporate entities and licensing,²⁶ the provision of information, both to the general public and the regulator,²⁷ compliance with regulator and court/tribunal directions,²⁸ directors' duties and remuneration,²⁹ corporate governance including audit requirements,³⁰ and the holding of monies on behalf of others.³¹

Insolvent trading

14.22 The Australian Institute of Company Directors (AICD) submitted that many provisions imposing criminal liability on company directors do so on a strict or absolute liability basis. The AICD was of the view that criminal liability on any basis other than because the director 'knowingly authorised or recklessly permitted a contravention fosters an approach to business which is overly risk averse and which stifles economic growth and innovation'.³²

14.23 In particular, the AICD identified s 588G of the *Corporations Act 2001* (Cth) (*Corporations Act*) as the 'most notable example' of the imposition of strict liability on directors' duties. It said that 'where directors must make complex judgments or where the penalties applied as a result of a breach are significant,' strict or absolute liability should not be imposed.

14.24 Section 588G makes it an offence for a director to incur a debt if the company is insolvent at the time of incurring the debt, or if incurring the debt would result in the company becoming insolvent. Strict liability is imposed in relation to whether the person is a director, and the company is insolvent at the time the debt is incurred, or would become insolvent as a result of incurring the debt. Section 588G(3)(c) and (d) require that the director must reasonably suspect that the company is or would become insolvent at the time of incurring the debt, and that the failure to prevent the company incurring the debt is dishonest.

all the fault elements relating to the offence of murder, it should not also be required to prove that the defendant knew or was reckless to the fact that murder constitutes an offence under Australian law.

25 The report states that 'strict liability may be appropriate to ensure the integrity of [a financial or corporate regulatory regime]': Senate Standing Committee for the Scrutiny of Bills, above n 12, 284.

26 See eg, *Corporations Act 2001* (Cth) ss 113, 115, 624, 630, 633, 640, 664D, 672B, 723–5, 734, 736, 791A, 820A.

27 See, eg, *Ibid* ss 123, 136, 139, 142–4, 146, 148, 153, 157, 162, 178A, 178C, 205B, 235, 246B, 246D, 246F–G, 249Z, 250BB, 250P, 250S, 250W, 314, 316, 316A, 317, 348D, 349A, 428, 601CW, 601DD, 601DE, 601DH, 643–4, 648G, 650B, 650E–F, 651A, 652C, 661B, 662A, 665A, 666A–B, 667A, 670C, 912F, 952C, 952E, 952G, 985J, 1020AI, 1021C, 1021E, 1021FA–FB, 1021H, 1021M, 1021NA–NC, 1041E, 1274, 1299G, 1300, 1308. See also *Australian Securities and Investments Commission Act 2001* (Cth) ss 12GN, 66, 72, 73, 91, 200, 220.

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

29 See, eg, *Corporations Act 2001* (Cth) ss 191, 195, 199B, 200B, 201D, 202B, 203D, 205G, 206J–K, 206M, 585G.

30 See, eg, *Ibid* ss 249K, 250PA, 307A–C, 308–9, 312, 324B, 601HG, 989CA.

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

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

14.25 On the question of the imposition of strict liability, the ALRC, in its 2003 report, ‘Principled Regulation: Federal Civil and Administrative Penalties’, stated that dispensing the need to prove fault would risk unfairness to those who are subject to deemed liability provisions. It considered that ‘the potential for unfairness of deeming provisions necessitates the inclusion of the protection of a fault element in provisions that deem an individual liable for a civil penalty’.³³ The ALRC recommended that

in the absence of any clear, express statutory statement to the contrary, any legislation that deems an individual to be personally liable for the contravening conduct of a corporation should include a fault element that the individual knew that, or was reckless or negligent as to whether, the contravening conduct would occur.³⁴

Prudential regulation

14.26 Strict liability offences relating to prudential regulation are primarily found in the *Superannuation Industry (Supervision) Act 1993* (Cth), *Insurance Act 1973* (Cth), and *Life Insurance Act 1995* (Cth).³⁵ Strict liability in prudential regulation is targeted at ensuring the fidelity of the regulatory framework. As a regulatory agency, the Australian Prudential Regulatory Authority (APRA) relies strongly on the deterrence effect of regulatory mechanisms, and incentives to enter into administrative arrangements to prevent contravening conduct. Where prosecutions prove difficult, or provisions are virtually unenforceable, the overall efficacy of the regulatory regime is jeopardised. APRA has contended that, where it becomes known that the regulatory regime is difficult to enforce, it could encourage disreputable practices in the industry, putting the pool of superannuation savings in Australia at risk.³⁶

14.27 Based on this reasoning, non-compliance provisions relating to APRA directions,³⁷ superannuation payments and related commissions and brokerages,³⁸ false, misleading or defective statements and representations are designated strict liability offences. Additionally, as APRA relies on information from industry participants in fulfilling its regulatory responsibilities, a failure to provide APRA with information, documents or assistance is also designated a strict liability offence.

33 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC Report 95 (2003), 329.

34 *Ibid* Rec 8–1.

35 See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth) ss 11B–C, 18, 29JA, 29JB, 29JCA, 29W–WB, 34M–Q, 34Z, 35A–D, 63, 64, 71EA, 103–5, 107–8A, 122–4, 126K, 129–30, 130C, 131AA, 131B–C, 135, 140, 141A, 154, 159–60, 201, 242P, 252A, 254, 260, 262, 265, 299C, 299F–K, 299M, 299Y, 303, 331; *Insurance Act 1973* (Cth) ss 7A, 9, 10, 14, 17, 20, 24, 27, 43A, 49, 49A, 49F, 49L, 62ZD, 62ZQ, 108.

36 Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2000* (28 June 2000), 247.

37 See, eg, *Superannuation Industry (Supervision) Act 1993* (Cth) ss 29JB, 34P, 34Q, 63, 131AA, 159–60; *Life Insurance Act 1995* (Cth) ss 88B, 98B, 125A, 230F; *Insurance Act 1973* (Cth) ss 7A, 17, 27, 49, 49F, 62ZD, 108.

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

14.28 While this general approach to prudential regulation has been accepted,³⁹ the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) drew attention to amendments inserted by the *General Insurance Reform Act 2001* (Cth). This inserted the following new strict liability offences:

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

14.29 While the Scrutiny of Bills Committee accepted that strict liability sought to ‘ensure the effectiveness of using the prospect of prosecutions as a deterrent to imprudent behaviour or an incentive to negotiate a rectification plan’, it noted that the provisions were modelled on ss 7 and 8 of the *Banking Act 1959* (Cth), which are fault-based provisions. The committee left the question for the Senate as a whole to consider.⁴⁰

Environmental protection

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

14.31 The Environmental and Planning Law Committee in its submission to this ALRC inquiry, stated:

On balance, removing strict liability for offences under Commonwealth environmental legislation would, in the EPLC’s view, significantly reduce the efficacy of the EPBC Act and other Commonwealth environmental legislation in deterring environmental crime.⁴¹

39 See, eg, Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2000* (28 June 2000), 245–7; Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2002* (June 2002), 304–5; Senate Standing Committee for the Scrutiny of Bills, *Fifteenth Report of 2002* (December 2002), 509–11; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *First Report of 2008* (March 2008), 11–12; Senate Standing Committee for the Scrutiny of Bills, *Second Report of 2008* (March 2008), 61–4.

40 Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 2001* (29 August 2001), 483. Note, by the time the SBC had published its report, the Bill had already been passed, and there was no whole of Senate consideration of the issue.

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

14.32 The ALRC did not receive any other submissions raising concerns about the imposition of strict liability for environmental offences.

14.33 The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) is the central plank of environmental regulation at the Commonwealth level.⁴² It contains a number of strict liability offences. The effect of the majority of these provisions is that the prosecution does not need to prove fault in relation to a particular property or species being protected.⁴³ In justifying a number of these provisions to the Scrutiny of Bills Committee in 2006, the Minister stated:

The relevant offence provisions of the EPBC Act form part of a fundamental environmental regulatory regime that is aimed at protecting matters of national environmental significance. The application of strict liability to elements of these offences is considered appropriate for ensuring the maintenance of the integrity of the regulatory regime of the EPBC Act.⁴⁴

14.34 Additionally, the Minister noted that strict liability is appropriate

where it has proved difficult to prosecute fault provisions ... The experience of the [Department], as confirmed by the Commonwealth Director of Public Prosecutions, is that the requirement to prove a mental element (for example that a person knew or was reckless as to the fact that a species is a listed threatened species) is a substantial impediment to proving these offences.⁴⁵

14.35 Strict liability has also been justified on the grounds that it overcomes a knowledge of law problem.⁴⁶

14.36 By contrast, the Scrutiny of Bills Committee did not accept such justifications for similar provisions in the *Fisheries Management Act 1991* (Cth). The relevant provisions impose strict liability to the element that a foreign fishing boat is located in the Australian Fishing Zone.⁴⁷

14.37 In its consideration of the insertion of ss 100B and 101AA of the *Fisheries Management Act 1991* (Cth), the Scrutiny of Bills Committee, in 2007, expressed an initial view that these provisions did not appear to comply with the principles set out in its report on the application of strict and absolute liability (Strict and Absolute Liability Report).⁴⁸

14.38 The Strict and Absolute Liability Report states that where strict liability is imposed because proving fault is undermining the deterrent effect of the offence, there must be 'legitimate grounds for penalising persons lacking 'fault' in respect of that element'.⁴⁹ The Scrutiny of Bills Committee

42 See also Ch 8.

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

44 Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 2006* (29 November 2006), 214.

45 Ibid.

46 See eg, Ibid.

47 See, eg, *Fisheries Management Act 1991* (Cth) ss 95, 99–100, 100B, 101–104, 105AA.

48 Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2007* (20 June 2007), 233.

49 Ibid.

[was] concerned about the fairness of applying strict liability to the element of the location of a foreign fishing boat in the territorial sea of Australia when ‘the territorial sea is not generally depicted on Australian charts or charts issued under other jurisdictions’, thus making it virtually impossible for a foreign fishing boat to know whether or not it has entered the territorial sea.⁵⁰

14.39 The ALRC has identified a number of provisions in the *Great Barrier Reef Marine Park Act 1975* (Cth), which are potentially analogous. These provisions impose strict liability in relation to whether certain conduct was engaged within specified zones in the Great Barrier Reef Marine Park,⁵¹ and do not appear to have raised concerns with stakeholders or parliamentary scrutiny committees.

Workplace relations

14.40 Strict liability offences are largely focused on workplace health and safety concerns.⁵² Stakeholders did not raise any concerns about the imposition of strict or absolute liability in this context, and based on its research, the ALRC has not identified any statutory provisions subject to controversy in this field of operation.

Customs and border protection

Strict liability offences

14.41 The customs and border protection regulatory framework hinges upon a risk assessment approach. These risk assessments rely on information provided to Customs officials.⁵³ Inaccurate, false or misleading information can result in inaccurate risk assessments, and may result in the entry of prohibited imports (e.g. narcotics or weapons) into the community.⁵⁴ As a result, the *Customs Act 1901* (Cth) (*Customs Act*) includes a number of strict liability offences relating to the failure to keep records or provide information, and the provision of false or misleading information.⁵⁵

14.42 The Law Council of Australia submitted that

the failure to report the entry of cargo on time or in an untimely or incorrect fashion (s 64AB(10) of the *Customs Act*) may be an unjustified use of strict liability where the provision of that information has been made in an untimely or incorrect fashion by a contracting party overseas. In that case the imposition of a penalty may be unfair on the Australian party who becomes liable for the offence.⁵⁶

50 Ibid 235.

51 See, eg, *Great Barrier Reef Marine Park Act 1975* (Cth) ss 38AA, 38BA(2), (3A), 38BC(2), 38BD(2), 38CA(2), 38DA, 38DD(3), 38GA(4)c, 38GA(11).

52 The key piece of legislation regulating workplace health and safety imposes strict liability to all physical elements of offences under it, unless stated otherwise: *Work Health and Safety Act 2011* (Cth) s 12F(2). See, also, *Industrial Chemicals (Notification and Assessment) Act 1989*; *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth); *Seafarers Rehabilitation and Compensation Act 1992*.

53 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2002* (15 May 2002), 149.

54 Ibid.

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

56 Law Council of Australia, *Submission 75*.

14.43 The Senate Standing Committee on Legal and Constitutional Affairs (Legal and Constitutional Affairs Committee) stated that the imposition of strict and absolute liability was justified in such circumstances during its 1999 inquiry into the *Customs Legislation Amendments and Repeal (international Trade Modernisation) Bill 2000*, *Customs Depot Licensing Charges Amendment Bill 2000* and *Import Processing Charges Bill 2000* (the ITM inquiry).

14.44 The strict liability regime was introduced to ‘preserve appropriate border control’⁵⁷ and reflects the view that isolated non-compliance, when viewed in its entirety ‘can have significant consequences for the community as a whole’,⁵⁸ as ‘[i]ncorrect information renders ineffective Customs [sic] capacity to detect offences using risk management techniques’.⁵⁹

14.45 However, bodies such as the Australian Federation of International Forwarders (AFIF) and Customs Brokers and Forwarders Council of Australia Inc (CBFCA) raised concerns about the application of strict liability, particularly in relation to false or misleading statements and late reporting.

14.46 AFIF noted that, in some cases, data is simply on-forwarded directly, and shipping companies are reliant on overseas exporters for the accuracy and timeliness of the reporting.⁶⁰ CBFCA noted that late reporting is caused by user error, inadequate systems or operating hours and lack of data from overseas sources. It submitted that the first of these could be remedied with training, and contended that it ‘is unreasonable that infringement notices and penalties should apply for late reports caused by the overseas source not supplying data in the time stipulated by the Australian regulatory authorities’.⁶¹ In relation to false or misleading statements, the Legal and Constitutional Affairs Committee noted that a person is not liable if they make a statement that the person is uncertain about the information provided.⁶²

14.47 By contrast, in 2002, the Scrutiny of Bills Committee expressed the view that the imposition of strict liability for a failure to provide information in the customs context may trespass on personal rights and liberties. The Scrutiny of Bills Committee said that these provisions did not comply with the principles relating to ‘the protection of people affected by strict liability provisions and for the administration of such provisions’.⁶³ By way of example, one of the principles for the protection of people affected by strict liability provisions states:

Strict liability should depend as far as possible on the actions or lack of action of those who are actually liable for an offence, rather than be imposed on parties who

57 Senate Legal and Constitutional Legislation Committee, ‘Inquiry into the Customs Legislation Amendment and Repeal (International Trade Modernisation) Bill 2001, Import Processing Charges Bill 2000, and the Customs Depot Licensing Charges Amendment Bill 2000’ (Parliament of the Commonwealth of Australia), [1.27].

58 Ibid.

59 Ibid.

60 Ibid [1.46].

61 Ibid [1.47].

62 Ibid [1.50].

63 Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2000* (28 June 2000), 374.

must by necessity rely on information from third parties in Australia or overseas; offences which do not apply this principle have the potential to operate unfairly.⁶⁴

Absolute liability offences

14.48 In the customs and border protection context, some provisions impose absolute liability on elements other than technical or jurisdictional elements. One such example is ss 233BABAB and 233BABAC of the *Customs Act*, which impose absolute liability in relation to whether importation was prohibited. In response to concerns raised by the Scrutiny of Bills Committee about the application of absolute liability for offences that are more traditionally subject to strict liability, the Minister stated that this departure from general policy is justified to ‘ensure consistency across similar offences’.⁶⁵

National security

Strict liability offences

14.49 A number of submissions to this inquiry have identified strict liability offences relating to counter-terrorism and national security as examples of an unjustified imposition of strict or absolute liability.⁶⁶

Associating with a terrorist organisation

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

14.51 The Attorney-General’s Department argued that the default elements

need to be clarified, first by applying strict liability to the question of whether the organisation is a proscribed or listed organisation and secondly by introducing a new offence that the person was reckless as to the nature of the organisation.⁶⁷

14.52 The Security Legislation Review Committee, chaired by Simon Sheller QC OA, considered this submission, and stated in its report (the Sheller Report) that, it ‘does not regard it as according with justice and proportionate to apply strict liability to offences under either ss 102.5 or 102.8’.⁶⁸ Further, it concluded that offences that carry penalties of 25 years (s 102.5) and three years (s 102.8) should not be subject to strict liability.⁶⁹

64 Senate Standing Committee for the Scrutiny of Bills, above n 12, 286.

65 Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2007* (8 August 2007), 297.

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

67 Attorney-General’s Department, *Submission No 14(a) to the Security Legislation Review Committee*, 2006.

68 Sheller Committee, *Report of the Security Legislation Review Committee*, June 2006 [10.36].

69 *Ibid.*

14.53 The Sheller Report also concluded that:

Even if strict liability applies only to make it unnecessary for the prosecution to prove that the organisation is a terrorist organisation as a result of proscription, the defendant is denied by the process of proscription any opportunity to resist the factual conclusion that it is a terrorist organisation, at any time, either by resisting the process of proscription, which results in the executive act of proscription, or at the trial for the offence.⁷⁰

14.54 The Council of Australian Governments, in its 2013 review of counter-terrorism legislation, adopted the Sheller report's comments relating to s 102.5,⁷¹ and recommended the repeal of s 102.8.⁷²

Financial transactions

14.55 Under ss 20 and 21 of the *Charter of the United Nations Act 1945* (Cth), strict liability applies such that a person does not need to know that any use of, dealing with, or making available of an asset is not in accordance with a notice under the Act. The Attorney-General, in response to the Scrutiny of Bills Committee's initial concerns stated that the imposition of strict liability

is necessary to ensure that the offences can be effectively prosecuted ... if the prosecution was required to prove not only that the defendant was aware that the asset was a freezable asset but also that he or she was aware that a particular dealing with the asset was not in accordance with a notice under section 22, defendants would be able to avoid liability by demonstrating that they did not turn their minds to the question of whether there was a notice permitting the dealing ... A person who acts in the mistaken but reasonable belief that a dealing is in accordance with a notice would be able to rely on the defence of mistake of fact under section 9.2 of the Criminal Code.⁷³

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

Disclosure of information

14.57 Section 34ZS of the *Australian Security Intelligence Organisation Act 1979* (Cth) imposes strict liability in relation to the disclosure of operational information concerning a warrant issued under s 34D by the subject of the warrant or a legal representative. Chapter 3 discusses this provision in greater detail, including the ALRC's recommendations in relation to such secrecy provisions.

70 'Review of Counter-Terrorism Legislation' (Council of Australian Governments, 2013), [104]. The cited extract is from: Sheller Committee, *Report of the Security Legislation Review Committee*, June 2006, [10.32].

71 'Review of Counter-Terrorism Legislation', above n 70, [104] – [105].

72 Ibid rec 23.

73 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourth Report of 2002* (15 May 2002), 180.

Declared area offences

14.58 The UNSW Law Society, Gilbert and Tobin Centre for Public Law and Australian Lawyers for Human Rights identified s 119.2 of the *Criminal Code*, as inserted by the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth). The discussion below focuses on concerns relating to the imposition of strict liability. The extent to which this provision encroaches on freedom of movement is discussed in Chapter 6.

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

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

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

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

14.62 The Gilbert and Tobin Centre for Public Law submitted that, while not expressed as an offence of strict liability, s 119.2 operates such that, in effect, it is an offence of strict liability. Criminal liability is established, *prima facie*, when a person enters or remains in a declared area. The Gilbert and Tobin Centre for Public Law noted that ‘the prosecution need not establish, for example, that the person travelled to the area for the purpose of engaging in terrorism’.⁷⁴ It contends that the provision is problematic because it is the malicious purpose of engaging in terrorism, rather than the mere fact of travel, ‘which should render the conduct an appropriate subject for criminalisation’.⁷⁵ Australian Lawyers for Human Rights echoed the concerns raised by the Gilbert and Tobin Centre for Public Law.⁷⁶

14.63 The Scrutiny of Bills Committee raised concerns about the breadth of this provision, noting that ‘it appears that the offence is made out simply for being in a declared area’.⁷⁷ Following consideration of the legitimate purposes set out in s 119.2(3) of the *Criminal Code*, the Scrutiny of Bills Committee stated:

The potential difficulty with this provision, however, is that the legitimate purposes are listed and it is not clear that the listed purposes cover the field of purposes which

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

75 *Ibid.*

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

77 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014* (October 2014), 58.

would demonstrate that there was no intent to support terrorist groups or engage in terrorist activities overseas.⁷⁸

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

The areas targeted by the ‘declared area’ provisions are extremely dangerous locations in which terrorist organisations are actively engaging in hostile activities. The Committee notes the declared area provisions are designed to act as a deterrent to prevent people from travelling to declared areas. The Committee considers it is a legitimate policy intent for the Government to do this and to require persons who choose to travel to such places despite the warnings to provide evidence of a legitimate purpose for their travel. This is particularly the case given the risk individuals returning to Australia who have fought for or been involved with terrorist organisations present to the community.⁷⁹

14.65 The Human Rights Committee also noted that a person could commit the offence without intending to engage in or support terrorist activity.⁸⁰

14.66 The UNSW Law Society conducted a proportionality analysis of the provision, and noted that a provision which includes an intent to engage in hostile or terrorist activity as an element of the offence would be a less rights-encroaching alternative.⁸¹

Other laws

Copyright

14.67 The Australian Digital Alliance identified a number of strict liability offences in the *Copyright Act 1968* (Cth) (*Copyright Act*), and submitted that ‘to date there has been no evidence that these provisions have led to a reduction in commercial scale copyright infringement ... [and] by removing the *mens rea* element from the offences, strict liability provisions could easily see people innocently committing an offence’.⁸² The Australian Digital Alliance also raised concerns about the broad discretion given to prosecutors and police arising from a strict liability regime coupled with an infringement notice scheme.⁸³

14.68 In its consideration of the provisions of the *Copyright Amendment Act 2006*, the Legal and Constitutional Affairs Committee noted that a number of submissions found the imposition of strict liability for copyright infringement ‘unprecedented and troubling, to the extent that [the provisions imposing such liability] should not be passed in its current form’.⁸⁴

78 Ibid.

79 Ibid 59.

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

81 UNSW Law Society, *Submission 19*.

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

83 Ibid.

84 Senate Standing Committee on Legal and Constitutional Affairs, *Copyright Amendment Bill 2006 [Provisions]* (November 2006), [3.16].

14.69 Associate Professor Kimberlee Weatherall stated:

The key to understanding the regulatory potential of [the strict liability] provisions lies in appreciating their breadth. Historically, there is no quantitative threshold for criminal liability for copyright infringement: almost all offences under the *Copyright Act 1968* (Cth) apply to the making of, or dealing with, a single infringing article, provided it is made for the purposes of trade or commercial advantage. As a result, behaviour extending all the way from the obviously ‘pirate’ through to quite commonplace commercial acts falls within the scope of the criminal offences ... The provisions confer considerable discretion on the executive branch, in the form of enforcement agencies and prosecution agencies, without parliamentary oversight.⁸⁵

14.70 Other jurisdictions such as the United Kingdom, Canada and the United States have not imposed strict liability for copyright infringements.⁸⁶ Similar offences do not exist in the regulatory framework for patents and trademarks.⁸⁷

14.71 A number of submissions stated that strict liability for copyright infringement ‘should be rejected as a matter of principle’.⁸⁸ Additionally, concerns were raised that the provisions were overly broad, and most problematically, could be applied to non-commercial acts, acts undertaken by the public in general, and conduct undertaken in the course of ordinary, legitimate business.⁸⁹

14.72 The Legal and Constitutional Affairs Committee agreed that ‘there is merit in attempting to limit the scope of these provisions to the actual activities that the committee understands they are intended to target’.⁹⁰ It was of the view that ‘strict liability provisions could be narrowed in a way that would significantly reduce the risk of their application to ordinary Australians and legitimate businesses’,⁹¹ and recommended that

the Federal Government re-examine with a view to amending the strict liability provisions in Schedule 1 of the Bill to reduce the possible widespread impact of their application on the activities of ordinary Australians and legitimate businesses.⁹²

14.73 Following this recommendation, the government removed 11 proposed strict liability offences and amended one to address the perception of possible overreach.⁹³

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

(5) A person commits an offence if:

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

86 Senate Standing Committee on Legal and Constitutional Affairs, *Copyright Amendment Bill 2006 [Provisions]* (November 2006), [3.16], [3.36].

87 *Ibid* rec 2.

88 *Ibid* [3.17].

89 *Ibid* [3.18].

90 *Ibid* [3.128].

91 *Ibid*.

92 *Ibid* rec 2.

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

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

14.75 The phrase ‘in public’ is not defined in the *Copyright Act*. A place of public entertainment is also not exhaustively defined.⁹⁴ Divisions 3 and 4 of pt III outline relevant acts which do not constitute infringements of copyright.

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

in coming together to form the audience ... were the persons concerned bound together by a domestic or private tie or by an aspect of their public life?⁹⁵

14.77 The Australian Digital Alliance submitted to this ALRC Inquiry that

[t]he absence of any *mens rea* or necessity to have caused financial harm means that any person who plays a short burst of footage from their phone or laptop in a public place faces potential criminal liability.⁹⁶

14.78 Based on the reasoning in *Australasian Performing Right Association Ltd v Commonwealth Bank*,⁹⁷ it appears that this scenario may constitute conduct breaching s 132AO. For instance, if the person plays a short burst of footage in Martin Place during lunch time, the persons gathered at Martin Place are not bound together by a domestic tie. Martin Place likely falls within the definition of a place of public entertainment, and the conduct described by the Australian Digital Alliance does not appear to fall within the categories of conduct in divs 3 and 4 of pt III of the *Copyright Act*.

Family law

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

14.80 It submitted that

[p]roceedings under the family law legislation govern the property of litigants and their family relationships. The imposition of penalties in that context is serious.

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

95 *Australasian Performing Right Association Ltd v Commonwealth Bank of Australia* (1992) 111 ALR 157, [55].

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

97 *Australasian Performing Right Association Ltd v Commonwealth Bank of Australia* (1992) 111 ALR 157.

Further, an offence in a family law context usually will occur whilst other litigation is pending and can impact upon it.⁹⁸

14.81 The ALRC notes that the specific instances of strict liability identified by the Law Council of Australia reflect a broader trend in statutes across the body of Commonwealth laws to impose strict liability in relation to the provision of information to regulatory or governing bodies. The Scrutiny of Bills Committee has accepted difficulties in proving intent as a possible rationale for imposing strict liability.⁹⁹ For example, in considering the Financial Sector Legislation Amendment Bill (No. 1) 2000 (Cth), the relevant Minister argued

it would be difficult to successfully prosecute alleged breaches of regulatory offences which involve an act of omission [such as a failure to advise of a significant event] ... as evidence of mental elements such as intention or recklessness is almost impossible to obtain in the absence of admissions or independent evidence ... the [Director of Public Prosecutions] has advised that for regulatory offences relating to the lodgement of documents or the provision of documentary information, it would be more appropriate if the legislation imposed a strict liability.¹⁰⁰

Justifications for imposing strict and absolute liability

14.82 The imposition of strict or absolute liability is a departure from a fundamental protection of the criminal law. The Strict and Absolute Liability Report concluded that the imposition of strict liability may be justified:

- where it is difficult to prosecute fault provisions;
- to overcome ‘knowledge of law’ issues, where a physical element incorporates a reference to a legislative provision;
- where it is necessary to protect the general revenue; or
- to ensure the integrity of a regulatory regime (eg, public health, the environment, financial or corporate regulation).¹⁰¹

14.83 Additionally, the following general principles apply in relation to the imposition of strict liability. The Strict and Absolute Liability Report stated that the following factors should be considered in imposing strict liability:

- It should only be imposed after careful consideration of all available options, and where there is general public support and acceptance of the measure and the penalty.

98 Law Council of Australia, *Submission 75*.

99 Senate Standing Committee for the Scrutiny of Bills, above n 12, 285.

100 Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 2000* (28 June 2000), 246.

101 Senate Standing Committee for the Scrutiny of Bills, above n 12, 284.

- It should not be imposed for mere administrative convenience, or based on a rigid formula. It is insufficient to rely on broad uncertain criteria (such as general public good or community interest), or solely on reduced resource requirements. Strict liability should only be imposed based on specific criteria/rationales.
- It should not be imposed, where schemes are so complex and detailed that breaches are virtually guaranteed, or where parties must by necessity rely on information from third parties.
- It should not be imposed, where it is accompanied by an excessive or unreasonable increase in agency powers of control, search, monitoring and questioning.
- It should only apply for offences where the penalty does not include imprisonment, and where there is a cap of 60 penalty units for monetary penalties.
- It should be accompanied by program specific defences which account for reasonable contraventions. These should be in addition to the defences in the *Criminal Code*.¹⁰²

14.84 On the question of absolute liability, the Strict and Absolute Liability Report states that the imposition of absolute liability should be ‘rare and limited to jurisdictional or similar elements of offences’.¹⁰³ Additionally, it stated that it ‘may be acceptable [to impose absolute liability] where an element is essentially a precondition of an offence and the state of mind of the offender is not relevant’.¹⁰⁴

14.85 The Human Rights Committee considers strict and absolute liability offences through the lens of the ICCPR. Strict and absolute liability is considered in the context of concerns which may arise about the presumption of innocence under art 14(2) of the ICCPR.

14.86 The Human Rights Committee noted that the imposition of strict or absolute liability will not violate art 14(2) where it pursues a legitimate aim, and is reasonable and proportionate to that aim.¹⁰⁵ Strict liability offences drafted in accordance with the principles set out in the Strict and Absolute Liability Report and the Guide to Framing Commonwealth Offences¹⁰⁶ are likely to satisfy the proportionality test set out above.¹⁰⁷ In relation to absolute liability, the Human Rights Committee has stated that

102 Ibid 283–6.

103 Ibid 285.

104 Ibid.

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

106 Attorney-General’s Department, above n 2.

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

imposing absolute liability on jurisdictional elements is unlikely to raise human rights concerns.¹⁰⁸

Conclusions

14.87 A wide range of Commonwealth laws across a number of different contexts may be seen as encroaching upon the presumption that evil intent or recklessness must be proved in imposing criminal liability. A significant number of these may be justified.

14.88 It is accepted that strict liability may generally be imposed to protect public health, safety and the environment. It may also be accepted for regulatory offences. The general principle is that strict liability may be imposed where a person is placed on notice to guard against the possibility of inadvertent contravention.

14.89 Absolute liability may generally be accepted when applied to technical or jurisdictional elements of an offence. It may be accepted where there are legitimate grounds for penalising a person who has made a reasonable mistake of fact.

14.90 Extensive guidance is available to policymakers in considering whether the application of strict or absolute liability is justified. The Guide to Framing Commonwealth Offences¹⁰⁹ and Drafting Directions¹¹⁰ both provide specific guidance on the imposition of strict and absolute liability, which reflects comments made by the Scrutiny of Bills Committee both in the Strict and Absolute Liability Report, and as part of its ongoing review of bills. Additionally, policymakers are encouraged to seek assistance from relevant sections of the Attorney-General's Department in drafting strict or absolute liability offences.

14.91 However, some areas of particular concern have been identified, as evidenced by parliamentary committee materials, submissions and other commentary. These aspects of Commonwealth law might be reviewed to ensure that these laws do not unjustifiably encroach upon the presumption that intent or knowledge must be proved in imposing criminal liability:

- counter-terrorism and national security legislation dealing with:
 - financial transactions related to freezable assets—ss 20 and 21 of the Charter of the United Nations Act 1945 (Cth);
 - associating with a terrorist organisation—ss 102.5 and 102.8 of the Criminal Code);

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

109 Attorney-General's Department, above n 2.

110 Office of Parliamentary Counsel, *Drafting Directions*.

- the disclosure of operational information concerning a warrant issued under s 35D of the Australian Security Intelligence Organisation Act 1979 (Cth)—s 34ZS; and
- a person's presence in a declared area—s 119.2 of the *Criminal Code*
- directors duties relating to insolvent trading in the *Corporations Act*;
- reporting requirements under the *Customs Act*; and
- commercial scale infringement in the *Copyright Act*.

14.92 The Strict and Absolute Liability Report also recommended that '[t]he Attorney-General's Department should coordinate a new project to ensure that existing strict and absolute liability provisions are amended where appropriate to provide a consistent and uniform standard of safeguards'.¹¹¹

14.93 The government did not accept this recommendation for a number of reasons, including that the *Criminal Code* harmonisation project has achieved a significant degree of certainty and consistency in the application of strict and absolute liability.¹¹²

14.94 However, the trend in legislation brought before the Parliament to harmonise provisions with the *Criminal Code* is that it does not consider the policy merits of imposing strict or absolute liability. These amendments simply seek to ensure that existing strict or absolute liability offences continue to operate as such, despite the introduction of the *Criminal Code* by expressly stating that the relevant offences are strict or absolute liability offences.¹¹³

111 Senate Standing Committee for the Scrutiny of Bills, above n 12, 289.

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

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

