# 9. Retrospective Laws

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## A common law principle

9.1 One element of the rule of law is that laws are capable of being known in advance so that people subject to those laws can exercise choice and order their affairs accordingly. It follows that laws should not retrospectively change legal rights and obligations, or create offences with retrospective application. The principle that a person should not be prosecuted for conduct that was not an offence at the time the conduct was committed is sometimes known as *nulla crimen, nulla poena sine lege*, or 'no punishment without law'.[1]

9.2 This chapter discusses the reasons for the objection to retrospective laws and identifies some protections against statutory encroachment. It also identifies some laws with retrospective operation and considers how these encroachments have been justified.

1 Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2010).

9.3 In *Retroactivity and the Common Law*, Ben Juratowich writes:

> Retroactive creation of a criminal offence is a particularly acute example of infraction by the state of individual liberty ... Holding a person criminally liable for doing what it was lawful to do at the time that he did it, is usually obviously wrong. The retroactive removal of an actual freedom coupled with the gravity of consequences that may accompany a breach of the criminal law mean that retroactive imposition of a criminal liability is rarely justified.[2]

9.4 The common law on the subject of retrospective law making was influenced by Roman law. It may also be reflected in cl 39 of the *Magna Carta*, which prohibited the imprisonment or persecution of a person 'except by the lawful judgement of his peers and by the law of the land'.[3]

9.5 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*:

> Here 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]

9.6 Retrospective laws are commonly considered inconsistent with the rule of law. In his book on 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.[6]

## Certainty and predictability

9.7 Retrospective laws make the law less certain and reliable.[7] A person who makes a decision based on what the law is, may be disadvantaged if the law is changed retrospectively. It is said to be unjust because it disappoints 'justified expectations'.[8]

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2 *Magna Carta 1297* cl 39. See further Ben Juratowich, *Retroactivity and the Common Law* (University of Oxford, 2007) 52. The terms 'retrospective' and 'retroactive' are sometimes used interchangeably. The High Court has noted a distinction between a statute which provides that at a past date the law should be taken to have been that which it then was not (sometimes called 'retroactive'), and a statute which now creates further particular rights and liabilities with respect to past matters or transactions: *Chang v Laidley Shire Council* (2007) 234 CLR 1 [111]; [2007] HCA 37, and *AEU v Fair Work Australia* (2012) 246 CLR 117 [94]. In each case the High Court relied on *Coleman v Shell Co of Australia Ltd* 45 SR NSW 27.

3 Ben Juratowitch, *Retroactivity and the Common Law* (Bloomsbury Publishing, 2008) 28. Juratowitch notes however, that this clause is more concerned with placing limits on the exercise of *executive* power.

4 Thomas Hobbes, *Leviathan* (Oxford University Press 1996, 1651) 207.

5 William Blackstone, *Commentaries on the Laws of England* (15th ed, 1809) vol 1, 46.

6 Tom Bingham, *The Rule of Law* (Penguin UK, 2011).

7 Lord Diplock said: 'acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal

9.8 In *Director of Public Prosecutions (Cth) v Keating*, the Australian High Court 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] The Court quoted *Bennion on Statutory Interpretation*:

> A person cannot rely on ignorance of the law and is required to obey the law. It follows that he or she should be able to trust the law and that it should be predictable. A law that is altered retrospectively cannot be predicted. If the alteration is substantive it is therefore likely to be unjust. It is presumed that Parliament does not intend to act unjustly.[11]

9.9 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.[12]

## Efficacy

9.10 Concerns about the efficacy of retrospective laws are closely related to concerns about uncertainty. 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 or deter behaviour. As the Law Council of Australia 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.[13]

9.11 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;

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consequences that will flow from it': *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591.

8 HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 276. ('retrospective law-making is unjust because it 'disappoints the justified expectations of those who, in acting, having relied on the assumption that the legal consequences of their acts will be determined by the known state of the law established at the time of their acts').

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

10 Ibid [48] (French CJ, Hayne, Crennan, Kiefel, Bell, Keane JJ).

11 Ibid [48] (French CJ, Hayne, Crennan, Kiefel, Bell And Keane JJ).

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

13 Law Council of Australia, *Submission 75*.

(d) corporate taxpayers to make informed dividend policy decisions; and

(e) listed companies to produce timely financial statements that accurately reflect their tax expense.[14]

9.12 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.[15]

9.13 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 which will occur after the law has commenced but which are the result of arrangements entered into before the law commenced.[16]

# Protections from statutory encroachment

## Australian Constitution

9.14 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.[17] 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.[18]

9.15 The *Constitution* also permits retrospective laws that affect rights in issue in pending litigation.[19]

9.16 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 *Polyukovich*.[20] In that case, McHugh J said that '*Kidman* was correctly decided'[21] and that

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14 The Tax Institute, *Submission 68*.

15 Law Council of Australia, *Submission 75*.

16 Ibid.

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

18 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.

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

20 *Polyukhovich v Commonwealth* (1991) 172 CLR 501. See also *Millner v Raith* (1942) 66 CLR 1.

21 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 721 [30] (McHugh J).

> 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.[22]

9.17 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. Chapter III of the *Constitution* requires a separation of power between the legislature and the courts. A bill of attainder is a statute that finds 'a specific person or specific person is guilty of an offence constituted by past conduct and impos[es] punishment in respect of that offence'.[23] 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.[24] 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.[25]

9.18 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.[26]

9.19 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.[27] Again, the concern is not the retrospective nature of the law, but its interference with the judicial process.[28]

## Principle of legality

9.20 The principle of legality provides some protection from retrospective laws.[29] When interpreting a statute, courts will presume that Parliament did not intend to create offences with retrospective application, unless this intention was made unambiguously clear.[30] For example, in *Maxwell v Murphy*, Dixon CJ said:

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22 Ibid 718 [23] (McHugh J).
23 Ibid [30].
24 Ibid 539, 649, 686, 721.
25 Suri Ratnapala, 'Reason and Reach of the Objection to Ex Post Facto Law' [2007] *The Indian Journal of Constitutional Law* 140.
26 Ibid 539, 649, 686, 721.
27 *Liyanage v The Queen* [1967] AC 259; approved in *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96.
28 *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96.
29 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.
30 See also, *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ); *WBM v Chief Commissioner of Police* [2012] VSCA 159 (30 July 2012) [67] (Warren CJ with whom Hansen JA expressed general agreement at [133].

> 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.[31]

9.21 However, this presumption does not apply to procedural (as opposed to substantive) changes to the application of the law. Dixon CJ went on to say:

> given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are enforced or their enjoyment is to be secured by judicial remedy is not within the application of the presumption. Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed.[32]

## International law

9.22 There are prohibitions on retrospective criminal laws in international law. Article 15 of the *International Covenant on Civil and Political Rights* (ICCPR), expressing a rule of customary international law,[33] provides:

> 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.

9.23 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[34] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[35]

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31 *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ). See also *Rodway v The Queen* (1990) 169 CLR 515, 518 ( (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ). In that case, the Justices stated, 'the rule at common law is that a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction. It is said that statutes dealing with procedure are an exception to the rule and that they should be given a retrospective operation'.

32 *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].

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

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

35 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

### Bills of rights

9.24 In other countries, bills of rights or human rights statutes provide some protection from retrospective laws. There are prohibitions on the creation of offences that apply retrospectively in the United States,[36] the United Kingdom,[37] Canada[38] and New Zealand.[39] 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.[40]

9.25 The right not to be charged with a retrospective offence is also protected in the Victorian and ACT human rights statutes.[41]

## Laws with retrospective operation

9.26 Commonwealth laws with retrospective operation have been identified in a range of contexts including in criminal laws, taxation laws and migration laws. These laws are summarised below. Some of the justifications that have been advanced for laws that have retrospective operation, and public criticisms of laws on that basis, are also discussed.[42]

### Criminal laws

9.27 The Guide to Framing Commonwealth Offences states that 'an offence should be given retrospective effect only in rare circumstances and with strong justification'. Further, if legislation is amended with retrospective effect, this should generally be 'accompanied by a caveat that no retrospective criminal liability is thereby created'.[43]

9.28 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'.[44]

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36 *United States Constitution* art I § 9, 10. ('No Bill of Attainder or ex post facto Law shall be passed': § 9).
37 *Human Rights Act 1998* (UK) ) c 42, sch 1 pt I, art 7.
38 *Canada Act 1982 c 11* s 11(g).
39 *Bill of Rights Act 1990* (NZ) s 26(1).
40 *Canada Act 1982 c 11* s 11(g).
41 *Charter of Human Rights and Responsibilities 2006* (Vic) s 27; *Human Rights Act 2004* (ACT) s 25.
42 As discussed in Ch 1, international law principles of proportionality inform the scrutiny processes of the Parliamentary Joint Committee.
43 Attorney-General's Department, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (2011) 15.
44 Ibid.

### *War crimes*

9.29 Perhaps the most well-known retrospective criminal law is the *War Crimes Act 1945* (Cth), which was amended by the *War Crimes (Amendment) Act 1988* (Cth). The amending act created an offence of committing a war crime in Europe between 1 September 1939 and 8 May 1945.[45] A person who is an Australian citizen or resident at the time of charge may be liable for the offence.[46]

9.30 At the time of the Second World War, there was no Australian legislation which criminalised such acts committed by Australians in Europe.[47]

9.31 The constitutional validity of s 9 of the *War Crimes Act* was challenged on two grounds, including that the section 'attempts to enact that past conduct shall constitute a criminal offence, is an invalid attempt to usurp the judicial power of the Commonwealth'.[48] The validity of the provision was upheld in *Polyukhovich*. In that case, 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.[49]

9.32 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 principles of law recognised by the community of nations'.[50] 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'.[51]

### *Hoaxes using the postal service*

9.33 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 retrospective operation from 16 October 2001.

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45 *War Crimes Act 1945* (Cth) ss 5, 9.

46 Ibid s 11.

47 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, [1].

48 Ibid [3].

49 Ibid [18].

50 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.

51 Attorney-General's Department, above n 43, 15.

9.34 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.[52] These had resulted in an announcement by the Prime Minister on 16 October 2001 that new anti-hoax legislation would be introduced if the Coalition was returned to Government.

9.35 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'.[53] 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.[54] 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.[55]

### *Offences against Australians overseas*

9.36 Sections 115.1 to 115.4 of the *Criminal Code* provide that any person may be prosecuted in Australia for murder or manslaughter of, or causing serious harm to, an Australian citizen or resident outside Australia.

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

9.38 The Attorney-General's Department advised the 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'.[56]

9.39 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

52 Explanatory Memorandum, Criminal Code Amendment (Anti-Hoax and Other Measures) Act (Cth) 2002.
53 Ibid.
54 Ibid.
55 Ibid.
56 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.

> perceived as criminal, but the conduct is criminalised to achieve a particular outcome.[57]

### *Proceeds of crime*

9.40 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 of crime proceedings, including unexplained wealth proceedings, may involve consideration of offences that were committed, or are suspected to have been committed, at any time in the past.[58]

9.41 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.

9.42 As these statutes apply in relation to offences and convictions regardless of whether they occurred before or after the commencement of the legislation, they can be seen as operating retrospectively. That is, the legislation imposes penalties in the form of forfeiture and recovery of assets that were not applicable at the time when a criminal offence was committed.

9.43 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'.[59]

9.44 For example, in determining 'unexplained wealth amounts' under the *Proceeds of Crime Act*,[60] 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.[61]

9.45 In addition, while human rights jurisprudence views asset confiscation as a penalty capable of engaging the prohibition on retrospective criminal laws, orders under proceeds of crime legislation are 'civil asset confiscation orders that cannot

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57 Explanatory Memorandum, Criminal Code Amendment (Offences Against Australians) Act 2002 (Cth).

58 Proceeds of crime legislation is also discussed in Ch 7.

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

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

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

create any criminal liability, do not result in any finding of criminal guilt and do not expose people to any criminal sanctions'.[62]

9.46 The Parliamentary Joint 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.[63] In this context, it stated that a 'punitive and deterrent goal'—as intended by unexplained wealth proceedings—is generally seen as something that would lead to characterisation of a measure as 'criminal'.

9.47 The Human Rights Committee has also expressed concern about proceeds of crime legislation to the extent that provisions that have retrospective application involve 'detriment to any person'.[64]

## Taxation laws

9.48 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 any negative impact that arises from the retrospective application.

9.49 There is wide acceptance that amendments to taxation law may apply retrospectively where the Government has announced, by press release, its intention to introduce legislation, with the legislation providing for commencement dated to the time of the announcement. 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.

9.50 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.[65]

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62 Ibid.

63 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.

64 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fifth Report of 2014*, (May 2014) 193.

65 See Australian Taxation Office, 'Law Administration Practice Statements' (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'.

9.51 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.[66]

9.52 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).

9.53 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'.[67]

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

- 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.68

9.55 Retrospective taxation measures have included provisions creating criminal offences in relation to entering arrangements to avoid regulation of 'bottom of the harbour' tax schemes.[69]

9.56 In general, however, taxation provisions with retrospective operation concern liability for tax. Four recent examples are outlined below.

### *Tax offset for films*

9.57 Sch 1 of the *Tax and Superannuation Laws Amendment (2013 Measures No. 2) Act 2013* (Cth) altered the definition of 'documentary' in s 376-25 of the *Income Tax*

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66 Australian Taxation Office, *Practice Statement Law Administration PS LA 2011/27*,(2011). This statement addresses '[m]atters the Commissioner considers when determining whether the ATO view of the law should only be applied prospectively'.

67 Australian Government Department of the Treasury, 'Report on Aspects of Income Tax Self Assessment' (2004) 70.

68 Ibid [7.3].

69 *Crimes (Taxation Offences) Act 1980* (Cth) ss 5, 8, 13.

*Assessment Act 1997* (Cth) to limit the types of films eligible for tax offsets. 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'.

9.58 This amendment followed the 'Lush House' decision in the Administrative Appeals Tribunal.[70] The amendments were consistent with the guidelines previously used in offset applications prior to the tribunal decision and were seen as restoring an original understanding of the term 'documentary' in the taxation context.

### *Dividend washing*

9.59 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'. It was assented to on 30 June 2014 with application to distributions made on or after 1 July 2013.

9.60 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 limit 'the tax benefits that are available in respect of certain financial transactions without any wider impact'.[71]

9.61 While retrospective legislation may disadvantage individual taxpayers, this might 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.[72]

9.62 The Tax Institute agreed that dividend washing 'threatens the integrity of the dividend imputation system'.[73]

### *Tax avoidance*

9.63 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.

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70 *EME Productions No 1 Pty Ltd and Screen Australia* [2011] AATA 439.

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

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

73 Tax Institute, Submission to ATO Consultation, *Protecting the Corporate Tax Base from Erosion and Loopholes: Preventing Dividend Washing*.

9.64 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.

9.65 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.[74]

### *Transfer pricing*

9.66 An important example of retrospectivity in taxation law arose in relation to amendments to Australia's transfer pricing rules. 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. The opportunity to shift profits is most prevalent between related parties who conduct their affairs on a transnational basis.[75]

9.67 The *Tax Laws Amendment (Cross-Border Transfer Pricing) Act (No. 1) 2012* (Cth), enacted on 8 September 2012, made amendments to the *Income Tax Assessment Act 1997* (Cth), with retrospective operation to apply to income years starting on or after 1 July 2004.

9.68 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.

9.69 In brief, in 1982, transfer pricing rules were introduced into Australian tax law in div 13 of the *Income Tax Assessment Act 1997* (Cth). Each of Australia's tax treaties also contains articles that deal with transfer pricing, which are used as a basis for transfer pricing adjustments.

9.70 In June 2011, the Full Federal Court considered its first substantive transfer pricing case in *Commissioner of Taxation v SNF (Australia) Pty Ltd*.[76] The case was argued only on the basis of div 13 and the Court did not have to decide whether the Commissioner could apply the relevant treaty rules as an alternate basis for transfer pricing adjustments. However, the decision was said to highlight that div 13 'may not adequately reflect the contributions of the Australian operations to multinational groups, and as such in some cases treaty transfer pricing rules may produce a more robust outcome'.[77]

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74 Explanatory Memorandum, Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013.

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

76 *Commissioner of Taxation v SNF (Australia) Pty Ltd* [2011] FCAFC 74.

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

9.71 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, applying from 1 July 2004.[78]

9.72 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'.[79] 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.[80]

9.73 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.[81]

9.74 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.[82]

9.75 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.[83] Any disadvantage to taxpayers needs to be balanced against concerns about protection of

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78 The 2004 income year commenced immediately after the Parliament's most recent amendment to the income tax laws in 2003, which 'again evidenced the Parliament's understanding that tax treaties could be used as a separate basis for making transfer pricing adjustments': Ibid.

79 Ibid.

80 Ibid.

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

82 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?* <www.corrs.com.au/thinking/insights>.

83 Parliament of Australia, Bills Digest No. 91 2012–13, Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 (Cth) 22.

public revenue and the extent to which major multinational companies are contributing tax in Australia—a matter of concern to Australian governments.[84]

### *Concerns about retrospective taxation laws*

9.76 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.[85]

9.77 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'.[86] Similar concerns were expressed in the Institute's submission to this ALRC Inquiry.[87]

9.78 The Australian Institute of Company Directors (AICD) expressed concerns about provisions enacted by the *Tax Laws Amendment (2012 Measures No. 2) Act 2012* (Cth),[88] which amended the *Taxation Administration Act 1953* (Cth). It observed that these provisions 'make new directors personally liable for the actions of the company', in relation to unpaid superannuation guarantee amounts and PAYG withholding amounts, 'even when the person was not a director at the time of the company's breach'.[89]

9.79 The AICD explained that these measures extended the law to make new directors liable for amounts that are overdue at the date of their appointment and which the company does not pay within 30 days of that appointment. It stated:

> We are of the view that these types of provisions offend a fundamental tenet of the rule of law. In these circumstances, regardless of whether the amount remains outstanding when a new director is appointed, the fact is, the breach occurred at a time when the new director had no actual or legal ability to influence the conduct of the corporation.[90]

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84 See, eg, Will Ockenden, *Apple Pays $193m Tax in Australia on $27b Revenue as Federal Government Vows to Capture Lost Taxes* <www.abc.net.au/news/2014-03-06/tax-expert-explains-how-apple-pays-193m-tax-on-27b-revenue>.

85 Tax Institute, *2012–13 Federal Budget Submission*, 2012 covering letter.

86 Ibid.

87 The Tax Institute, *Submission 68*.

88 *Tax Laws Amendment (2012 Measures No. 2) Act 2012* (Cth) sch 1, pt 1, div 2.

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

90 Ibid.

9.80 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).[91]

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

## Migration laws

9.82 Laws with retrospective operation are not uncommon in migration law. As noted in Chapter 1, the enjoyment of common law rights and freedoms is not confined to Australian citizens, and a non-citizen is entitled to the same protection of the law as a citizen.[92] 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. Some examples are discussed below.

### *Migration Act s 45AA: unauthorised maritime arrivals*

9.83 *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.[93] 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* to convert all protection visas into temporary protection visas.[94] The amendment changes rights and obligations retrospectively 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.[95]

9.84 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

91 The Tax Institute, *Submission 68*.
92 *Bradley v The Commonwealth* 1128 CLR 557, [26].
93 Section 45AA(8)(b) expressly excludes the operation of s 7(2) of the *Acts Interpretation Act 1901* (Cth).
94 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.
95 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*.

to be in need of protection … will be eligible only for grant of temporary protection visas'.[96]

9.85 Stakeholders commented critically on the effect of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act* on protection visa applications.[97] 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 ...[98]

9.86 The 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.[99]

9.87 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.[100] 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.[101]

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

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

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

98 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.

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

100 Refugee Advice and Casework Centre, *Submission 30*.

101 Human Rights Law Centre, *Submission 39*.

> rolling temporary protection visas, which in our view, may give rise to a breaches of fundamental rights, including the right to freedom of movement.[102]

### *Migration Act s 228B: people smuggling offences*

9.89 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.[103]

9.90 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'.

9.91 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 retrospective 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.

9.92 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.[104]

9.93 A number of agencies and individuals raised concerns before the Senate Legal and Constitutional Affairs Committee about the retrospective nature of this provision.[105] 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.[106] Another submission to the Senate 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'.[107] Adam Fletcher noted:

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102 ANU Migration Law Program, *Submission 59*.

103 *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.

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

105 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.

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

107 Thomas Bland et Al, Submission to Senate Legal and Constitutional Affairs Committee on the Deterring People Smuggling Bill 2011, 2011.

> 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.[108]

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

9.94 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.

9.95 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.

9.96 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'.[109]

9.97 The Law Council submitted that these retrospective 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.[110]

## Other laws

### *Social security law*

9.98 Section 66A of the *Social Security (Administration) Act 1999* (Cth) imposes a duty on social security claimants to inform the Department of a change of circumstances which might affect payments. The section was inserted on 4 August 2011, and was described as having commenced on 20 March 2000. 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:

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108 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.

109 Explanatory Memorandum, Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 (Cth).

110 Law Council of Australia, *Submission 75*.

> 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.[111]

### *Native title law*

9.99 The *Native Title Act 1993* (Cth) may be characterised as having retrospective operation in that, as well as providing for determinations of native title, it provides for the validation of past acts that extinguished native title. It was passed in 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.[112] The *Native Title Act* addressed the relationship between the newly articulated native title rights and existing land tenures. It 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.[113]

### *Validating decisions and powers*

9.100 In a range of contexts legislation with retrospective operation may be enacted to validate decisions that have been made, or powers exercised, by government agencies, the validity of which is in doubt for 'technical' reasons. Such legislation may be seen as retrospectively changing legal rights and obligations. These statutes are sometimes known as 'declaratory statutes' and the presumption against retrospectivity does not apply.[114]

9.101 An example is the *Australian Education Amendment Act 2014* (Cth). Schedule 2 of this legislation concerned Commonwealth school funding entitlements. The provisions commenced retrospectively in order to 'correct errors and omissions that have become apparent since the introduction of the Act' and to 'ensure significant errors in relation to the calculation of Commonwealth funding entitlements for certain approved authorities are corrected'.[115]

9.102 Another 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'.[116]

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111 *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459, [47] (footnote omitted).

112 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

113 *Native Title Act 1993* (Cth) div 2A.

114 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 374.

115 Explanatory Memorandum, Australian Education Amendment Act 2014 (Cth). The original Act required funding to be worked out by reference to the 'old per student amount', and the amending Act ensured that funding was worked out by reference to the 'old *Commonwealth* per student amount'.

116 Explanatory Memorandum, Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 (Cth).

9.103 An Act which overrides an earlier judicial interpretation of a statute is not simply declaratory.[117] In this case the presumption against retrospectivity will apply, but may be rebutted by plain words in the statute. For example, the *Environment Legislation Amendment Act 2013* (Cth) retrospectively validated decisions that were made under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the 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 have regard to approved conservation advice.[118] The Explanatory Memorandum 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'.[119]

### *Powers to make subordinate legislation*

9.104 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.[120] 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 duties of excise 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 regulations, concerning the operation of the scheme;
- *Petroleum Excise (Prices) Act 1987* (Cth) s 4(1C), concerning excise on condensate;

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117 *Panochini v Jude* (2000) 2 Qd R 322, [14]. See further Thomson Reuters, *The Laws of Australia*, (at 15 April 2013) 25 Interpretation and Use of Legal Sources, '25.1 Statutory Interpretation' [25.1.2230].

118 *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 (17 July 2013).

119 Explanatory Memorandum, Environment Legislation Amendment Bill 2013 (Cth).

120 *Legislative Instruments Act 2003* (Cth) s 12.

- *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.

9.105 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*

9.106 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'.[121] 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.[122] 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'.[123]

9.107 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'.[124]

9.108 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.[125] In *PGA v The Queen*, Heydon J commented that to 'the extent that they may be changed retrospectively, uncertainty is inherent in common law rules'.[126]

9.109 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

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121 *Corporations Act 2001* (Cth) s1041A.
122 *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135.
123 J Gans, *Submission 02*.
124 Law Council of Australia, *Submission 75*.
125 Hugh Tomlinson, Richard Clayton and Victoria Butler-Cole, *The Law of Human Rights* (University Press, 2009) 822.
126 *PGA v The Queen* (2012) 245 CLR 355, [126].

uncertain and require statutory interpretation. This chapter focuses on Commonwealth laws with declared retrospective operation, rather than those which may require clarification.

# Justifications for encroachments

9.110 Are retrospective laws necessarily unjust? In *George Hudson Limited v Australian Timber Workers' Union*, Isaacs J said that '[u]pon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation'.[127] He then 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.[128]

9.111 After quoting this passage, Pearce and Geddes write that while 'a legislative instrument may take away some rights it may confer others and the overall aggregate justice may indicate that retrospectivity was intended'.[129] It may also suggest that the retrospective law was justified. But are there more specific principles that might help determine whether a retrospective law is justified?

## Legitimate reasons for retrospective laws

9.112 Creating retrospective *criminal* offences may be more difficult to justify than other retrospective laws. Article 4 of the ICCPR provides that some rights may be derogated from in 'times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed'—but this expressly excludes art 15, which concerns the creation of retrospective criminal offences. Article 15(2) itself contains one specific limitation, in that:

> 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.

9.113 For example, retrospective provisions criminalising war crimes (as in *Polyukhovich*, discussed earlier) might fall within the permissible limitation in art 15(2), if drafted appropriately.

9.114 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',

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127 Isaacs J was quoting from *Maxwell on Statutes*, 6th ed.

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

129 Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (Lexis Nexis Butterworths, 8th ed, 2014) [10.8].

retrospective liability may be justified.[130] Laws regarding marital rape are a state or territory responsibility and are not explored in this Inquiry.

9.115 The RACS agreed that in 'extreme circumstances, retrospective laws may be justified in order to prevent particularly grave injustices'.[131]

9.116 A review of the literature has revealed that retrospective laws in the civil arena have not been as energetically condemned as have those in the criminal sphere. Justifications offered for retrospective laws in the civil arena, as noted above, include that:

- the law operates retrospectively only from the date upon which it was announced by the Government that it intended to legislate, thereby ameliorating some of the problems with retrospective laws;
- the retrospective law operates to restore the understanding of the law that existed before a court decision unsettled that understanding (sometimes known as 'declaratory statutes');
- the retrospective law operates to address the consequences of a court decision that unsettled previous understandings of the law;
- the retrospective law operates to validate decisions that have been subsequently found to be invalid, in the interests of certainty; and
- the law addresses tax avoidance behaviour that was not foreseen and that poses a significant threat to revenue.

9.117 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.

# Conclusions

9.118 A wide range of Commonwealth laws have been enacted with retrospective operation, including criminal, taxation and migration laws. However, retrospective criminal offences are rare and the areas of most recent controversy and comment concern taxation and migration laws.

9.119 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

130 Australian Lawyers for Human Rights, *Submission 43*.
131 Refugee Advice and Casework Centre, *Submission 30*.

took place before the relevant legislation commences'.[132] 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.

9.120 Taxation laws that provide for lengthy periods of retrospectivity might be reviewed to ensure that these laws do not unjustifiably change legal rights and obligations.

9.121 There are concerns that the retrospective operation of some of Australia's migration laws has not been sufficiently justified, including changes to the protection visa regime, the people smuggling offences and the character test. Some of the changes have very significant consequences for the people affected, and it is not clear that retrospective operation is necessary to achieve the objectives of the legislation. However, these laws have been subject to inquiries by the Senate Standing Committee on Legal and Constitutional Affairs in 2011 and 2014. The ALRC is interested in comment as to whether these laws should be subject to further review.

132 Parliament of Australia, Bills Digest No. 91 2012–13, Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 (Cth) 22.