



A guide to Commonwealth criminal charges

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Date: Tuesday August 16, 2022

While criminal charges in Queensland mostly arise from state legislation, Commonwealth offences are becoming increasingly common and can attract serious penalties.

As Australia is a federation with multiple levels of government, there are separate laws in each state and territory related to criminal charges. There are also laws and criminal offences created by Federal Parliament which apply throughout all of Australia. The offences that fall within the responsibility of Federal Parliament are Commonwealth criminal charges.

Commonwealth criminal charges are administered in State courts

If you are charged with a Commonwealth offence, your matter will not be heard in the Federal Court. This is because State courts have the jurisdiction to hear criminal matters, including Commonwealth criminal matters. Therefore, your matter will proceed through the court process of the State in which you were charged.

For example, if you are charged in Queensland with a Commonwealth offence that is to be dealt with on indictment, your matter will proceed through the committal process in the Magistrates Court of Queensland and then an indictment will be presented in the District or Supreme Court of Queensland. If the matter proceeds to trial, a jury trial will occur, as would be the case if the matter involved a State criminal charge.

State laws regarding procedure and evidence generally apply in Commonwealth prosecutions. This means that proceedings for Commonwealth charges proceed through the courts in the manner that the State determines, which is usually the same process adopted for State-based criminal charges.

The investigation and prosecution of Commonwealth charges differ from State-based charges

While the courts which deal with both State and Commonwealth criminal offences are the same, there are significant differences in the investigation and prosecution stages for State and Commonwealth offences. This includes the following:

1. The investigatory bodies involved – for example, state matters usually involve the Queensland Police Service, whereas [Commonwealth matters often involve ASIC](#), the Australian Federal Police, and/or the [Australian Taxation Office](#).
2. The prosecuting agency – with State matters, this will likely be either Police Prosecutions (a division of the Queensland Police service) or the Office of the Director of Public Prosecutions. In Commonwealth matters, it will likely be the Commonwealth Director of Public Prosecutions.
3. Criminal responsibility – more information regarding this is included below.
4. The sentencing regime – you can read more about the Commonwealth sentencing regime in [our Commonwealth Sentencing article](#).

Criminal responsibility for Commonwealth offences; physical elements and fault elements

With Commonwealth offences, as a general rule, an offence consists of 'physical elements' and 'fault elements'. You may also hear of these concepts as the *actus reus* and *mens rea*.

These are the essential ingredients of liability for an offence and generally must be proven by the prosecution to establish an accused's guilt for an offence.

With Commonwealth offences, this can be a complicated issue. As a starting point, unless expressly stated otherwise, each physical element has an attached fault element. The fault element will often be clear from the wording of the offence provision, however, on occasions, this is not the case. If the fault element is not specified in the offence, the fault element is stipulated by the relevant legislation.

In order to determine the fault element, the type of physical element must be considered. A physical element may be:

1. Conduct – the accused's act, omission or state of affairs;
2. A result of conduct; or
3. A circumstance in which conduct, or a result of conduct, occurs.

Fault elements under the Commonwealth Criminal Code may be either:

1. Intention: This generally means that the accused meant to engage in that conduct, meant to bring about the result, or believed that the circumstance existed or would exist.

2. Knowledge: This generally means that the accused had knowledge of a circumstance or a result.
3. Recklessness: This generally means that the accused was reckless with respect to a result or circumstance.
4. Negligence: This means that the accused's conduct fell so far short of the standard of care that a reasonable person would exercise in the circumstances, in circumstances where there was such high risk that the physical element existed, that the conduct is deserving of criminal punishment.

The level of culpability may be quite different depending on the applicable fault element. For example, intention is usually the fault element which involves the highest degree of culpability, and therefore attracts the most severe penalties.

Get help from a criminal lawyer

Due to the complexity of the legislation that governs criminal responsibility for Commonwealth offences, determining the relevant elements of an offence can itself be a difficult task. This is where the expertise of a criminal lawyer with specific experience in Commonwealth matters is vital.

If you are charged with a Commonwealth offence, we recommend you contact an experienced criminal lawyer with expertise in acting for accused persons in Commonwealth offences.

This article is co-authored by Callan Lloyd, Director Gilshenan &Luton and Eleanor Lynch, (soon to be) Barrister at law (former Associate at Gilshenan &Luton).

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