

FSR GPS: ASIC Breach Reporting

How to assess criminal offence provisions

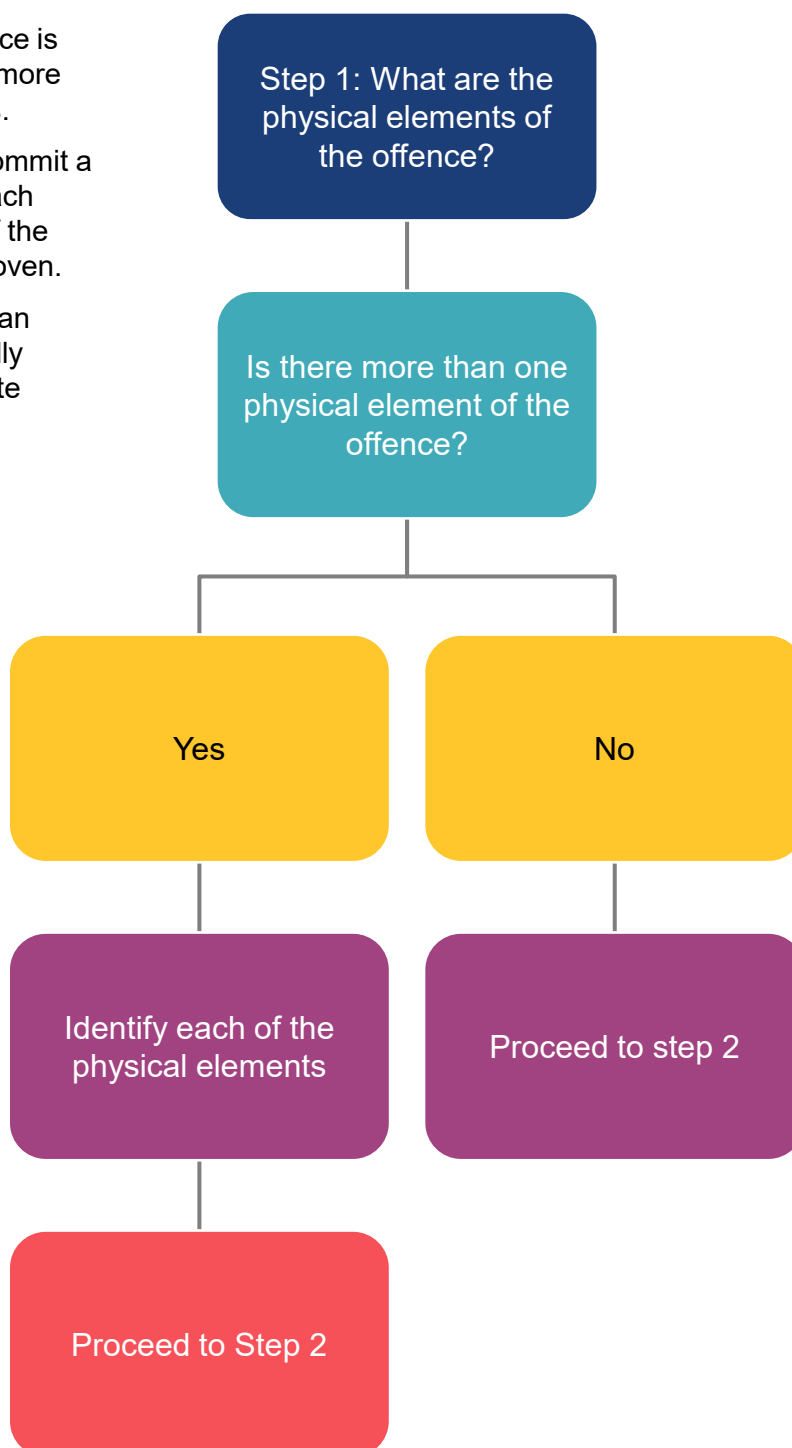
The below decision tree outlines how to assess criminal offences in the context of ASIC's breach-reporting regime. Before non-compliance can amount to the commission of an offence that may need to be breach reported to ASIC, it is necessary that all the physical and fault elements of the offence can be proven (unless the offence is one of strict or absolute liability).

In this edition of the FSR GPS, we have set out a decision tree to assist with undertaking assessments of criminal offence provisions for breach reporting purposes.

Step 1

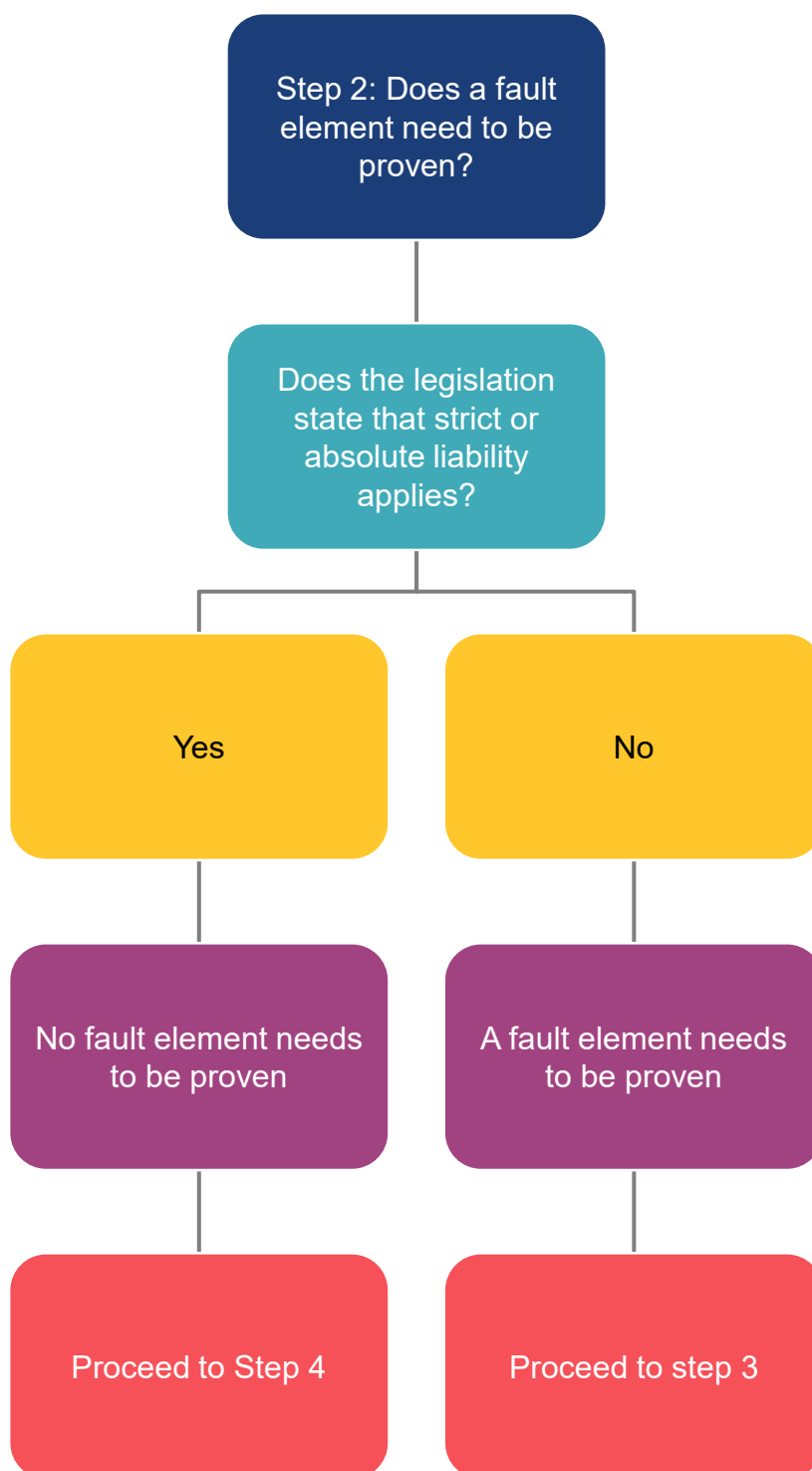
What physical elements need to be proven?

- Each criminal offence is made up of one or more **physical elements**.
- For a licensee to commit a criminal offence, each physical element of the offence must be proven.
- Each paragraph of an obligation will usually constitute a separate physical element.



Step 2

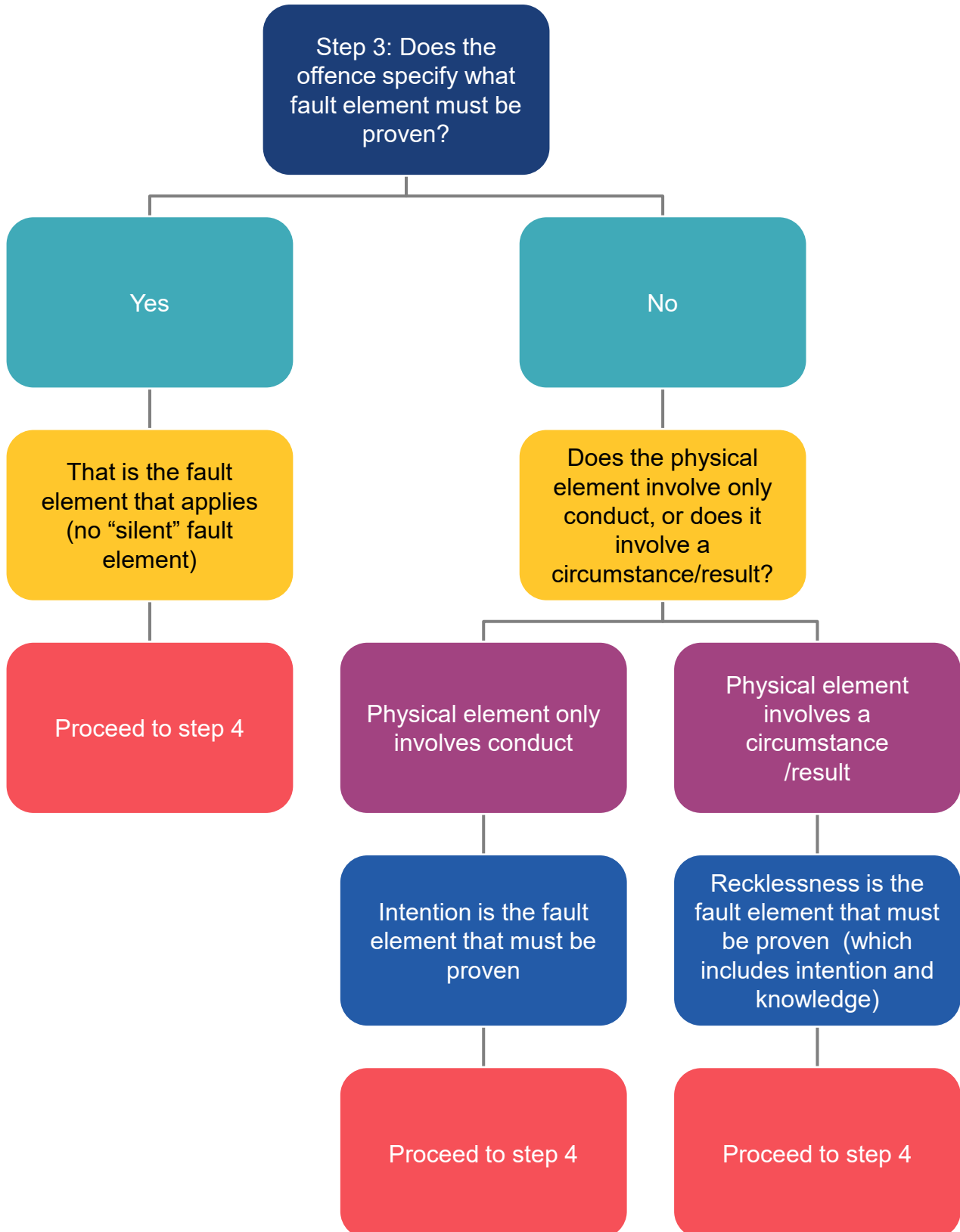
Does a fault element need to be proven?



- If the legislation does not expressly state that strict liability or absolute liability applies, then the default position is that a fault element needs to be proven for the physical element.
- Where the legislation expressly states that strict liability or absolute liability applies to the physical element of the offence, no fault element needs to be proven.

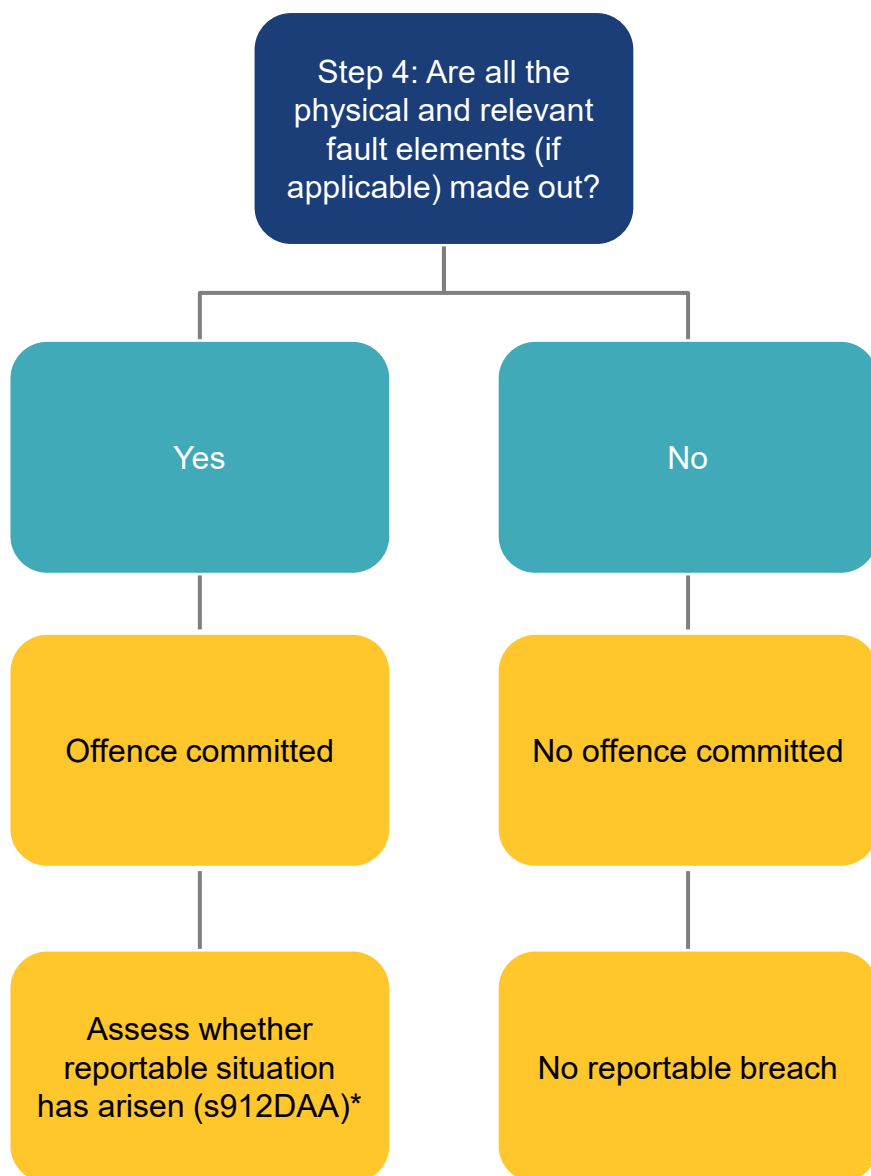
Step 3

Is there a “silent” fault element that must exist for an offence to occur?



Step 4

Are all the physical *and* fault elements made out?



* In general, a breach constituted by an offence will be deemed **significant** and therefore reportable if the offence is punishable on conviction by a penalty that may include imprisonment for a maximum of (i) if the offence involves dishonesty, 3 months or more; or (ii) in any other case, 12 months or more.