

Bills Digest  
No. 90 2000–01

Communications and the Arts Legislation  
Amendment (Application of Criminal Code) Bill  
2000

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INFORMATION AND RESEARCH SERVICES

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No. 90 2000–01

Communications and the Arts Legislation Amendment  
(Application of Criminal Code) Bill 2000

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Law and Bills Digest Group  
19 February 2001

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# Communications and the Arts Legislation Amendment (Application of Criminal Code) Bill 2000

**Date Introduced:** 7 December 2000

**House:** House of Representatives

**Portfolio:** Communications, Information Technology and the Arts

**Commencement:** The latest of the following times:

- 28 days after Royal Assent
- 28 days after Royal Assent of the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*
- On commencement of item 15 of Schedule 1 of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*

A number of provisions in the Bill seek to amend other Acts that are in the process of change. The commencement of these provisions is tied to the possible amendment or repeal of these Acts.

## Purpose

The Bill amends legislation administered by the Communications, Information Technology and the Arts portfolio in an attempt to harmonise certain criminal offence provisions in those statutes with the general principles of criminal responsibility set out in Chapter 2 of the Commonwealth Criminal Code.

## Background

This Bill is part of the Government's program in which it is reviewing the offence provisions in Commonwealth legislation in the light of the principles of criminal responsibility contained in Chapter 2 of the Commonwealth's Criminal Code.

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## Background to the Model Criminal Code Project

The Model Criminal Code Project was commenced in the early 1990s. In part it was a response to the Review of Commonwealth Criminal Law undertaken by the former Chief Justice of the High Court, Sir Harry Gibbs. It also reflected the fact that reviews of State and Territory criminal law were taking place in a number of Australian jurisdictions. In June 1990, the Standing Committee of Attorneys-General agreed to put the question of the development of a uniform criminal code on its agenda.

The Model Criminal Code Project has two aspects. The first is to develop model State and Territory criminal law (which can be adapted for Commonwealth purposes). The second is the development of other model law projects. These include model forensic procedures legislation.

Chapters of the Model Code are drafted by the Model Criminal Code Officers Committee<sup>1</sup> (MCCOC) in discussion paper and final (report) form. A report is generally compiled after public consultation and examination by the Standing Committee of Attorneys-General.

The first major Model Criminal Code chapter developed by MCCOC and approved by the Standing Committee of Attorneys-General was Chapter 2 (Principles of Criminal Responsibility). This chapter formed the basis of the *Criminal Code Act 1995*. Chapter 2 can be regarded as the foundational chapter for Commonwealth criminal law. It was intended to revise, codify and simplify principles of criminal responsibility for Commonwealth criminal law purposes.

### *Criminal Code Act 1995*

The Commonwealth Criminal Code (the Code) is contained in the Schedule to the *Criminal Code Act 1995*. Chapter 2 of the Code sets out the general principles of criminal responsibility. The following outline provides a summary of features of the Code that are relevant to the Bill.

#### **Criminal responsibility as set out in the Criminal Code**

Principles of criminal responsibility are divided into physical elements and fault elements. The physical elements of an offence are matters such as conduct or the result of conduct. Fault elements relate to a person's state of mind eg intention, knowledge, recklessness and negligence. For each physical element of an offence, the prosecution must prove that the defendant had the requisite fault element.

The Code defines the physical elements of an offence to be the conduct, circumstances in which it occurs or the consequences of conduct.<sup>2</sup> An omission to act can be a physical element if there is appropriate statutory provision or if it is the result of a breach of duty to act<sup>3</sup>. Each offence must contain at least one of these physical elements, but any combination of physical elements may be present in an offence provision.

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For every physical element of an offence, the prosecution must also prove a corresponding fault element. The Code does not prevent an offence from specifying an alternative fault element, but the Code indicates that the default fault element will apply in the absence of a specified fault element. The Code establishes four default fault elements: intention, knowledge, recklessness and negligence in descending order of culpability. Where the physical element of an offence consists of conduct, intention is the fault element. However, if the physical element is a circumstance or a result of conduct the minimum fault element is recklessness.<sup>4</sup>

### **Offences without a fault element**

At common law, a guilty mind is usually a necessary element in an offence. However, an increasing number of statutory offences have evolved which dispense with proof of intent. Such offences are usually designated regulatory offences and deal with public health, public safety, hygiene, weights and measures etc. Where a defence of honest and reasonable mistake of fact is available, these offences are called strict liability offences. Where proof of intent is dispensed with entirely ie there is no defence of mistake of fact available, the offences are designated as absolute liability offences. The terminology of strict and absolute liability offences has not always been used consistently. Division 6 of the Code is designed to clarify the law.

### **Proof of criminal responsibility**

It is the duty of the prosecution to prove the guilt of the accused person.<sup>5</sup> If something is asserted by the prosecution then the prosecution must supply supporting evidence which meets the required standard of proof. This is called the legal burden of proof and generally rests on the prosecution. An evidential burden relates to the duty to present evidence that will be able to be considered by the jury.

The prosecution bears the legal burden of proving every element of an offence. The legal burden means 'in relation to a matter, the burden of proving the existence of that matter'.<sup>6</sup> The prosecution bears the legal burden of proof beyond reasonable doubt, unless the law creating the offence provides otherwise.

Where a burden of proof is placed on a defendant it is an evidential burden only.<sup>7</sup> The evidential burden can be discharged by the defendant pointing to evidence suggesting there was a reasonable possibility that a matter existed or did not exist<sup>8</sup>. The defendant will only have a legal burden of proof if the law creating the offence so provides. When a legal burden is placed on the defendant it must be discharged on the balance of probabilities.<sup>9</sup>

### **Corporate criminal responsibility.**

Part 2.5 of the Criminal Code deals with the issue of corporate criminal responsibility. It sets a basic standard of responsibility for bodies corporate in relation to general offences. According to the Second Reading Speech in 1995 the Code introduces the concept that

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criminal responsibility should attach to bodies corporate where the corporate culture encourages situations which lead to the commission of offences. The provisions make companies accountable for their general managerial responsibilities and policy. It provides that negligence may be proven by failure to provide adequate communication within the body corporate.<sup>10</sup>

However the then Minister for Justice, the Honourable Duncan Kerr, in introducing the Criminal Code Bill 1995 stressed in his Second Reading Speech that the Code should allow continuation of the status quo in situations where the Criminal Code could effectively water down or change the nature of the particular corporate offence.

In speaking about this part I must stress that it is still open to the legislature to employ reverse onus of proof provisions or strict liability for offences where the normal rules of criminal responsibility are considered inappropriate.

At the federal level this will need to occur in a number of important areas where corporations are the main players, such as environmental protection, where the potential harm of committing the offence may be enormous and the breach difficult to detect before the damage is done. For example, the government is not planning to water down the requirements of section 65 of the Ozone Protection Act 1989 in regard to the matters covered by that Act. Part 2.5 concerns general principles suitable for ordinary offences. It will be the basis of liability if no other basis is provided.<sup>11</sup>

## Timetable for implementation of Chapter 2 of the Criminal Code

Chapter 2 of the Criminal Code has a staggered timetable for implementation. It applied to all new Commonwealth criminal offences from 1 January 1997. It applies to pre-existing Commonwealth offences from 15 December 2001. In this regard, there has been some slippage in the Commonwealth's original timetable. When the Criminal Code Act was passed in 1995, it was intended that Chapter 2 would apply to pre-existing Commonwealth offences from 16 March 2000. However, this deadline could not be met and so the *Criminal Code Amendment (Application) Act 2000* was passed to extend the application date to 15 December 2001.

## Reviewing pre-existing Commonwealth statutes containing offence provisions

Since 1995, the Commonwealth has been examining pre-existing offences on its statute books to determine how they should be modified to harmonise with Chapter 2 and whether in particular cases Chapter 2 should apply. For example, if there is no express mention in a pre-existing offence provision that an offence is one of strict or absolute liability, then certain fault elements will apply to that offence once Chapter 2 is applied. In those cases although it may have always been intended that a particular offence is one of strict or absolute liability then unless the offence provision is appropriately amended, a prosecutor

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would have to prove a fault element or elements where previously no such proof was required.

In the middle of 2000, the Treasury Legislation Amendment (Application of Criminal Code) Bill 2000 was introduced into the Parliament as part of this process.<sup>12</sup> This Bill amends the criminal offence provisions in certain legislation administered by Treasury so that when Chapter 2 of the Criminal Code applies to those statutes (on 15 December 2001) no untoward or unintended consequences occur.

More recently, a number of other portfolio bills have been introduced into the Parliament as part of the same process. These Bills include the Communications and the Arts Legislation Amendment (Application of Criminal Code) Bill 2000 (this Bill), the Environment and Heritage Legislation Amendment (Application of Criminal Code) Bill 2000, the Veterans Affairs Amendment (Application of Criminal Code) Bill 2000, the Foreign Affairs and Trade Legislation (Application of Criminal Code) Bill 200 and the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000. In each case, the Bills amend legislation administered by particular portfolios so that Chapter 2 can apply from 15 December 2000. As stated earlier, this Bill is part of the same process in relation to the relevant Acts within the Communications, Information Technology and the Arts portfolio.

## Main Provisions

### Schedule 1 - Amendment of Acts

#### *Archives Act 1983*

**Item 1** inserts into subsection 3(1) of the Archives Act a definition of 'engage in conduct' which is to apply to the whole Act. In keeping with section 4.1 of the Criminal Code conduct involves both doing an act and omitting to perform an act.

Section 24 of the Archives Act currently contains an offence to do with the destruction and disposal of Commonwealth records. **Item 3** repeals and replaces subsection 24(1) in order to reword the offence according to the requirements of the Criminal Code.

**New subsection 24(1)** clarifies that the destruction, disposal, transfer, damage or alteration of a Commonwealth record is a physical element of result of the defendant's conduct. Under section 5.6 of the Code the prosecution would need to prove the defendant was reckless with respect to causing the destruction or disposal. Recklessness is a lower level of culpability than intention. Note that the Code assumes this default fault element of recklessness and hence the provision is drafted without reference to recklessness.

**New subsection 24(1A)** specifies that strict liability applies to the physical element of circumstance of this offence, that the record is a Commonwealth record.<sup>13</sup> Under the Code

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if there is no express mention in a pre-existing offence provision that an offence is one of strict liability, then certain fault elements will automatically apply to that offence. In this case, ie the circumstance of the material being a Commonwealth record, although it may have always been intended that this element of the offence is one of strict liability, without the offence provision being appropriately amended, a prosecutor would have to prove a fault element of recklessness where previously no such proof was required.

**Items 4-6** make similar amendments to subsections 26(1), 56(3) and 61(3) respectively.

### ***Australian Communications Authority Act 1997***

Under section 55 of the Australian Communications Authority Act it is an offence for a person to intentionally or recklessly use protected names and symbols.<sup>14</sup> **Item 9** removes the words 'intentionally or recklessly' from the section. As the offence includes a physical element of conduct then according to section 5.6 of the Code the prosecution must prove the fault element of intention. Note however that repeal of the specific fault element of recklessly from the offence does not prevent the Code supplying the default fault element of recklessly to a physical element of circumstance or result (for example, that the name or symbol is a protected name or symbol).<sup>15</sup>

**Items 8 and 10** clarify that it is a defence to this offence if the defendant has the written permission of the Australian Communications Authority and that the defendant bears an evidential burden in relying on this defence.<sup>16</sup>

### ***Australian Film Commission Act 1975***

Under Section 10 of this Act the Australian Film Commission may require theatres to exhibit a specific proportion of Australian short films. Contravention of this requirement incurs a penalty of \$200 (subsection 10(4)). **Item 12** repeals and rewords subsection 10(5) to clarify that it is a defence to this offence if the defendant has a reasonable excuse relating to the availability of Australian short films and that the defendant bears an evidential burden in relying on this defence. As the Explanatory Memorandum points out under current subsection 10(5) the defendant bears a legal burden which is contrary to the policy behind the Criminal Code that a defendant bears only an evidential burden in relation to defences.<sup>17</sup> **Item 12** also inserts **proposed subsection 10(5A)** to confirm that this is an offence of strict liability. Under 6.1 and 6.2 of the Code the provision must actually state that the offence is one of strict liability otherwise the prosecution would need to prove the requisite fault elements.

### ***Australian Postal Corporation Act 1989***

Subsection 90H(2) of the Australian Postal Corporation Act deals with offences to do with employees who knowingly or recklessly use or disclose protected information. **Item 14** removes the words 'knowingly or recklessly' from subsection 90H(2)) to comply with section 5.6 of the Code. Under the Code the default fault element of intention will apply to the conduct element of this offence. The fault elements of 'knowingly or recklessly' can

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only be applied to physical elements of circumstance or result. As the Explanatory Memorandum suggests repeal of a specific fault element of recklessly from this offence does not prevent the Criminal Code supplying the default fault element of recklessly to a physical element of circumstance or result.<sup>18</sup>

**Items 15-17** make similar amendments to subsections 90LB(2), 90LE(2) and 90N(2).

### ***Broadcasting Services Act 1992***

Section 66 of the Broadcasting Services Act is a general offence provision relating to Divisions 2-5 of Part 5 of the Act. **Item 19** inserts **proposed subsection 66(1A)** to confirm that in relation to the offences committed under Divisions 2-5 the prosecution need not prove that the defendant knew the particular legal provision that he or she breached. This is in keeping with section 9.3 of the Criminal Code.

Under section 121FH of the Broadcasting Services Act a person, whom the Australian Broadcasting Authority (ABA) believes is providing an international broadcasting service without a licence, is guilty of an offence if the person intentionally fails to comply with a notice from the ABA directing the person to cease providing that service. **Item 20** repeals and rewords subsection 121FH(2) so that the person would be guilty of an offence if he or she engages in conduct that does not comply with the notice. This rewording indicates that the non-compliance with a notice is a physical element of result of the defendant's conduct to which the default fault element of recklessness will apply. Note that under the current provision the fault element is intention which is a higher level of culpability. As the Explanatory Memorandum suggests it could be extremely difficult for the prosecution to prove the defendant has specific intention to breach a particular condition of the notice. The defendant could merely intend to breach the conditions generally whilst being reckless as to the particular condition breached.<sup>19</sup> **Proposed subsection 121FH(4)** contains a definition of 'engage in conduct' which is to apply to this section (**item 21**). In keeping with section 4.1 of the Criminal Code conduct involves both doing an act and omitting to perform an act.

**Items 22-25, 32-36** make similar amendments to sections 121FJ, 121FLF and clauses 82 and 83 of Schedule 5.

Section 139 of the Broadcasting Services Act contains a number of offences relating to the breach of condition of licences. **Item 26** repeals and replaces section 139 in order to reword the offences in terminology consistent with the Criminal Code. For example under **proposed subsection 139(1)** a commercial television broadcasting licensee is guilty of an offence if he or she engages in conduct that results in a breach of a condition of the licence. This rewording indicates that the contravention of the condition of the licence is part of the physical element of result to which the default fault element of recklessness will apply. The rationale for this rewording is similar to that in **item 20**. **Proposed subsection 139(7)** contains a definition of 'engage in conduct' which is to apply to this section. In keeping with section 4.1 of the Criminal Code conduct involves both doing an act and omitting to perform an act.

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Section 202 deals with the offence of failing to give evidence. **Items 28-31** reword section 202 to clarify that it is a defence to this offence if the defendant has a reasonable excuse for not giving evidence and that the defendant bears an evidential burden in relying on this defence.<sup>20</sup>

### ***Film Licensed Investment Company Act 1998***

**Item 39** repeals section 35 of the Film Licensed Investment Company Act. This section is no longer necessary as it is similar to the general false and misleading provisions of the new Part 7.4 provisions of the Criminal Code. These were inserted by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* and come into effect on 25 May 2001.<sup>21</sup>

### ***Protection of Movable Cultural Heritage Act 1986***

Under subsection 9(3) of the Protection of Movable Cultural Heritage Act a person who knowingly exports or attempts to export an Australian protected object or who knowingly contravenes or attempts to contravene a condition of a permit or certificate is guilty of an offence. **Item 42** repeals subsection 9(3) and replaces it with two separate offences in **new subsections 9(3) and 9(3A)**. The offences are also reworded to harmonise with the Criminal Code so that under **proposed subsection 9(3)** a person is guilty of an offence if he or she exports or attempts to export a protected object and this conduct is not in accordance with a permit or certificate. This rewording indicates that the contravention of the condition of the permit is part of the physical element of result to which the default fault element of recklessness will apply. Similarly under **proposed subsection 9(3A)** a person is guilty of an offence if that person engages in conduct and that conduct contravenes a condition of a permit or certificate relating to an Australian protected object. This rewording indicates that the contravention of the condition of the permit is part of the physical element of result to which the default fault element of recklessness will apply. Note that **proposed subsections 9(3) and 9(3A)** also remove the word 'knowingly'. Under the Code the fault element of 'knowingly' can only be applied to physical elements of circumstance and result. It does not apply to a physical element consisting of conduct. It does not apply to a physical element consisting of conduct.

**Proposed subsection 9(7)** contains a definition of 'engage in conduct' which is to apply to section 9 (**item 43**). In keeping with section 4.1 of the Criminal Code conduct involves both doing an act and omitting to perform an act.

Subsection 29(3) provides that a person who ceases to be an inspector must not fail to return his or her identity card. **Item 44** inserts **proposed subsection 29(4)** to confirm that the offence in subsection 29(3) is one of strict liability. Under 6.1 and 6.2 of the Code the provision must actually state that the offence is one of strict liability otherwise the prosecution would need to prove the requisite fault elements.

Subsection 39(2) provides that a person must not without reasonable excuse, fail to produce a permit or certificate on request to an inspector who suspects on reasonable

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grounds that the person intends to export or has exported an Australian protected object. **Items 44 and 46** reword subsection 39(2) and insert **new subsection 39(3)** to clarify that it is a defence to this offence if the defendant has a reasonable excuse for possession and that the defendant bears an evidential burden in relying on this defence. This is in keeping with subsection 13.3(6) of the Criminal Code that a defendant bears only an evidential burden in relation to defences. **Item 46** also inserts **new subsection 39(4)** to confirm that this is an offence of strict liability.<sup>22</sup>

**Item 47** repeals section 42. This section is no longer necessary as it is similar to the general false and misleading provisions of the new Part 7.4 provisions of the Criminal Code. These were inserted by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* and come into effect on 25 May 2001.<sup>23</sup>

### ***Radiocommunications Act 1992***

Under section 46 of the Radiocommunications Act a person must not, without reasonable excuse, knowingly or recklessly operate a radiocommunications device otherwise than as authorised by a specified licence. **Item 51** removes the words 'without reasonable excuse, knowingly or recklessly' from this section. As a physical element of the offence is conduct then under section 5.6 of the Code the prosecution must prove the fault element of intention and the words 'knowingly or recklessly' would have no application. The fault elements of knowingly or recklessly can only be applied to physical elements of circumstance or result. **Item 52** inserts **new subsection 46(2)** which rewords the defence of reasonable excuse to more clearly indicate that the defence is not part of the elements of the offence.

Section 47 of the Radiocommunications Act deals with the offence of unlawful possession of radiocommunications devices. **Items 53 and 54** reword section 47 to clarify that it is a defence to this offence if the defendant has a reasonable excuse for possession and that the defendant bears an evidential burden in relying on this defence. This is in keeping with subsection 13.3(6) of the Criminal Code that a defendant bears only an evidential burden in relation to defences. **Items 58, 60-66, 69-74, 76, 77-82, 84, 85, 87 and 91-98** make similar amendments.

Under section 113 of the Radiocommunications Act a person must not, without reasonable excuse, knowingly or recklessly contravene a condition of an apparatus licence. **Items 55 and 56** repeal and reword section 113 so that a person who holds an apparatus licence and engages in conduct that contravenes the condition of the licence is guilty of an offence. A defence of reasonable excuse is available and the defendant bears an evidential burden in relying on this defence (**new subsection 113(2)**). The offence has been reworded so that the contravention of the conditions of the licence is part of the physical element of result thus attracting the default fault element of recklessness. The section also includes a definition of 'engage in conduct' stating that conduct includes both acts and omissions. **Items 67, 78, 83 and 87-90** make similar amendments.

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Under section 117 of the Radiocommunications Act licensees are required keep records of authorisations of apparatus licences. Contravention of this requirement incurs a penalty of 20 penalty units. **Item 56** inserts **proposed subsection 117(2)** to confirm that this is an offence of strict liability. Under sections 6.1 and 6.2 of the Code the provision must actually state that the offence is one of strict liability otherwise the prosecution would need to prove the requisite fault elements. **Items 56, 57, 60, 74, 92, 94, 96, 98 and 99** make similar amendments. As stated earlier in this Digest, a strict liability offence is one without a fault element, however a defence of mistake of fact is available.

Under subsection 188A(2) of the Radiocommunications Act it is an offence for a person to intentionally or recklessly use protected symbols. **Item 75** removes the words 'intentionally or recklessly' from the section. As the offence is one containing the physical element of conduct then under section 5.6 of the Code the prosecution must prove the fault element of intention. The wording in current subsection 188A(2) appears to apply an alternative fault element of recklessness to the physical element of conduct.

### ***Telecommunications Act 1997***

Under section 42 of the Telecommunications Act a network unit must not intentionally or recklessly supply a carriage service to the public without a carrier licence or declaration. **Item 105** removes the words 'intentionally or recklessly' from subsection 42(5). As the offence is one containing a physical element of conduct then under section 5.6 of the Code the prosecution must prove the fault element of intention. The wording in current section 42(5) implies an alternative fault element of recklessness to the physical element of conduct. **Items 106-111, 122-125, 127, 144 and 146** make similar amendments.

Section 399 of the Telecommunications Act contains an offence of intentionally or recklessly contravening a condition of a connection permit. **Item 112** repeals and rewords this section so that a person who holds a licence and engages in conduct that contravenes a condition of that licence is guilty of an offence. In line with section 5.6 of the Criminal Code **proposed section 399** has been reworded so that the contravention of a condition of the licence is part of the physical element of result thus attracting the default fault element of recklessness. The words 'intentionally or recklessly' are no longer necessary and imply an alternative fault element of intention to the physical element of result. **Proposed section 399** also includes a definition of 'engage in conduct' stating that conduct includes both acts and omissions. **Items 121, 126, 128-131 and 142** make similar amendments.

Under section 411 of the Telecommunications Act a person must not, without reasonable excuse, intentionally or recklessly breach specified standards relating to connection of customer equipment or cabling. **Item 113** removes the words 'without reasonable excuse, knowingly or recklessly' from this section. As the offence is one containing a physical element of conduct then under section 5.6 of the Code the prosecution must prove the fault element of intention. The words 'intentionally or recklessly' are no longer necessary and imply an alternative fault element of recklessness to the physical element of conduct. **Item 114** inserts **proposed subsection 411(2A)** to clarify that it is a defence to this offence if

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the defendant has a reasonable excuse for breach of the standards and that the defendant bears an evidential burden in relying on this defence. This is in keeping with subsection 13.3(6) of the Criminal Code that a defendant bears only an evidential burden in relation to defences.

Under section 534 of the Telecommunications Act a former inspector must not without reasonable excuse, intentionally or recklessly fail to return his or her identity card to the ACA. **Item 147** removes the words 'without reasonable excuse, knowingly or recklessly' from this section. **Item 148** inserts **new subsections 534(4) and 534(5)** which state that the offence in subsection 534(2) is one of strict liability and that a defence of reasonable excuse is available.

It is of note that this amendment alters the current provision which could not currently be interpreted as a strict liability offence because it applies fault elements of 'intentionally or recklessly' to the offence. According to the Explanatory Memorandum it is desirable that this offence be one of strict liability because of the relatively low penalty attached to the offence (ie 5 penalty units), because there is a defence of reasonable excuse, and for the policy reasons that an identity card must be returned as soon as the cardholder stops being an inspector, so that false representations cannot be made under the scope of the person's powers and authority. In addition the Explanatory Memorandum notes that this offence is similar to offence provisions in other portfolio legislation, which are specified to be strict liability offences.<sup>24</sup> **Items 153 and 154** make similar amendments to section 548 of the Telecommunications Act.

Under section 493 of the Telecommunications Act a person must not, without reasonable excuse, intentionally or recklessly publish evidence from hearings that the Australian Communications Authority has ordered to be confidential. In keeping with 5.6 of the Criminal Code **item 133** repeals and rephrases section 493 so that the contravention of such an ACA order is a physical element of result thus attracting the default fault element of recklessness. The words 'intentionally or recklessly' are no longer necessary and imply alternative fault element of intention to the physical element of result. **Item 133** also inserts **new subsection 493(5)** to clarify that it is a defence to this offence if the defendant has a reasonable excuse for publishing the evidence and that the defendant bears an evidential burden in relying on this defence.<sup>25</sup> **Items 134-139, 156, 159** make similar amendments.

**Item 162** repeals Part 33 of the Telecommunications Act which consists of section 577 (a simplified outline) and section 578. Section 578 is no longer necessary as it is similar to the general false and misleading provisions of the new Part 7.4 provisions of the Criminal Code. These were inserted by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* and come into effect on 25 May 2001. **Item 145** repeals section 526 for the same reason.

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***Telecommunications (Consumer Protection and Service Standards) Act 1999***

**Item 163** inserts **new section 7A** into the Telecommunications (Consumer Protection and Service Standards) Act. It confirms that Chapter 2 of the Criminal Code (except Part 2.5 dealing with corporate criminal responsibility) applies to this Act.<sup>26</sup>

***Telstra Corporation Act 1991***

Under section 8AC of the Telstra Corporation Act, Telstra must not knowingly or recklessly contravene its responsibility to ensure that the Commonwealth retains majority ownership of Telstra. In keeping with section 5.6 of the Criminal Code **item 167** repeals and rewords subsection 8AC(2) so that the contravention of such a requirement is a physical element of result of the defendant's conduct thus attracting the default fault element of recklessness. **Item 167** also inserts **new subsection 8AC(3)** which defines 'engage in conduct' to mean both doing an act and omitting to perform an act. **Item 168** makes similar amendments to section 8BI

Under section 8BO of the Telstra Corporation Act a person must not intentionally or recklessly make incorrect records. **Item 169** removes the words 'intentionally or recklessly' from the section. As the offence is one containing a physical element of conduct then under section 5.6 of the Code the prosecution must prove the fault element of intention. The wording in current section 8BO appears to apply an alternative fault element of recklessness to the physical element of conduct.

**Item 170** repeals section 8BP of the Telstra Corporation Act This section is no longer necessary as it is similar to the general false and misleading provisions of the new Part 7.4 provisions of the Criminal Code. These were inserted by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* and come into effect on 25 May 2001.<sup>27</sup>

**General amendments**

The Bill also adds to each of the above statutes an explanatory provision stating that Chapter 2 of the Criminal Code applies to all offences against the Act. This rule is qualified to the extent that in some cases Part 2.5 of the Criminal Code dealing with corporate criminal responsibility does not apply to part or whole of the Act.<sup>28</sup>

The Bill also makes technical amendments to the above statutes to replace where necessary monetary penalties for offences with the penalty unit standard specified in the *Crimes Act 1914*. As the current value of a penalty unit is \$110,<sup>29</sup> the new penalties generally represent an increase of 10% over the current maximum penalties.

**Warning:**

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## Concluding Comments

### Strict Liability Offences

The Bill makes several amendments stating that certain offences are to be interpreted as strict liability offences.<sup>30</sup> The Senate Standing Committee for the Scrutiny of Bills ('the Committee') has drawn the Senate's attention to these provisions and has asked the Minister to confirm that the Bill creates no new offences of strict liability.<sup>31</sup>

As discussed above, a strict liability offence is one without a fault element, however a defence of mistake of fact is available.<sup>32</sup>

In response to the Committee's concern it should be noted that under the Code if there is no express mention in a pre-existing offence provision that an offence is one of strict liability, then certain fault elements will automatically apply to that offence. Although it may have always been intended that an offence is one of strict liability, without the offence provision being appropriately amended, a prosecutor would have to prove a fault element such as recklessness or intention where previously no such proof was required.

In the context of the Committee's concern it should also be noted that in all cases the Explanatory Memorandum points to the reasons why the offence has been interpreted as one of strict liability. These reasons include the relatively low penalty attached to the offence<sup>33</sup>, the fact that a defence of reasonable excuse is provided in the provision<sup>34</sup>, the fact that the offence does not involve dishonesty affecting the offender's reputation<sup>35</sup>, or policy reasons. Policy reasons include such things as the difficulty the prosecution would have in proving the fault element of intention or recklessness<sup>36</sup>, or the need to ensure the return of an officer's identity card as soon as possible so that false representations cannot be made under the scope of the person's powers and authority.<sup>37</sup>

Furthermore the Explanatory Memorandum also states in each case that the new provisions should not alter the way a court would interpret the offence and that if the amendment were not made then, after the application of the Criminal Code, the offence would no longer be interpreted in the same way as it could currently be interpreted.<sup>38</sup>

It would appear that the Bill does contain two new offences of strict liability. In particular the Bill amends sections 534 and 548 of the Telecommunications Act so that offences which currently involve the fault elements of intention or recklessness will be changed to offences of strict liability. A fuller discussion of these provisions is found above at page 11 however suffice it to say that the Explanatory Memorandum acknowledges the changes and provides some justification for them.<sup>39</sup>

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## Endnotes

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- 1 Most States and Territories participate in MCCOC. MCCOC consists of senior officers from most Australian jurisdictions with responsibility for advising their Attorney-General on criminal law matters.
- 2 Criminal Code, section 4.1.
- 3 *Ibid*, section 4.3.
- 4 *Ibid*, section 5.6.
- 5 This is the 'golden thread' of English criminal law referred to in *Woolmington v. DPP* (1935) AC 462.
- 6 Criminal Code, subsection 13.1(3).
- 7 *Ibid*, subsection 13.3(1).
- 8 *Ibid*, subsection 13.3(6).
- 9 *Ibid*, sections 13.4 and 13.5.
- 10 Second Reading Speech, Criminal Code Bill 1995, *Parliamentary Debates (Hansard)*, House of Representatives, 1 March 1995, p. 1331.
- 11 *Ibid*.
- 12 *Bills Digest*, no. 4, 2000–01.
- 13 A strict liability offence is one without a fault element, however a defence of mistake of fact is available.
- 14 A protected name is the 'Australian Communications Authority' or 'ACA' and a protected symbol is an official symbol of the ACA.
- 15 *Explanatory Memorandum*, p. 9.
- 16 See p. 3 of this Digest for an explanation of evidential burden.
- 17 Criminal Code, section 13.3.
- 18 *Explanatory Memorandum*, p. 11.
- 19 *Explanatory Memorandum*, p. 15.
- 20 This is in keeping with subsection 13.3(6) of the Criminal Code that a defendant bears only an evidential burden in relation to defences.
- 21 The Gibbs Committee recommended that the offences relating to false and misleading statements be replaced with a single set of provisions, based largely on revisions or extensions of the existing general provisions. It pointed to the fact that most of the specific provisions relating to false and misleading statements only differed in relation to penalties and could be covered by a more general provision.
- 22 A strict liability offence is one without a fault element, however a defence of mistake of fact is available.

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- 23 See endnote 21.
- 24 *Explanatory Memorandum*, p. 56.
- 25 This is in keeping with subsection 13.3(6) of the Criminal Code that a defendant bears only an evidential burden in relation to defences.
- 26 See pp. 3–4 of the background for a fuller explanation of corporate criminal responsibility.
- 27 See endnote 21.
- 28 See the background section of this Digest at pp. 3–4 for an explanation of the rationale for this exception.
- 29 Section 4AA of the *Crimes Act 1914*.
- 30 Schedule 1, items 4, 12, 38, 44, 46, 56, 57, 60, 74, 92, 94, 94, 96, 98, 99, 148 and 154.
- 31 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, no. 1 of 2001, pp. 8–9.
- 32 A more detailed explanation of strict liability is found above at pp. 3- 4.
- 33 For example see item 12, p. 10 of the *Explanatory Memorandum*.
- 34 *Ibid.*
- 35 *Ibid.*
- 36 For example item 38, p. 18 of the *Explanatory Memorandum*.
- 37 For example item 92, p. 37 of the *Explanatory Memorandum*.
- 38 For example *Explanatory Memorandum* p. 10.
- 39 *Explanatory Memorandum*, pp. 56–58.

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