

Bills Digest
No. 92 2000–01

Environment and Heritage Legislation
Amendment (Application of Criminal Code) Bill
2000

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INFORMATION AND RESEARCH SERVICES

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No. 92 2000–01

Environment and Heritage Legislation Amendment
(Application of Criminal Code) Bill 2000

Jennifer Norberry
Law and Bills Digest Group
21 February 2001

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Environment and Heritage Legislation Amendment (Application of Criminal Code) Bill 2000

Date Introduced: 6 December 2000

House: Senate

Portfolio: Environment and Heritage

Commencement: Most of the Act commences on the latest of following three dates: 28 days after the Act receives Royal Assent; 28 days after Royal Assent is given to the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*; or the day on which Item 15 of Schedule 1 to the *Criminal Code Amendment (Theft, Fraud, Bribery & Related Offences) Act 2000* commences.¹

Purpose

To revise criminal offences in legislation administered by the Department of Environment and Heritage in the light of principles of criminal responsibility contained in Chapter 2 of the *Criminal Code Act 1995* (the *Criminal Code*).

Background

The Gibbs Review of Commonwealth Criminal Law

The Gibbs Committee was established on 11 February 1987 by then Attorney-General, Hon. Lionel Bowen MP. Among its terms of reference was the need for 'provisions relating to criminal responsibility to be contained in a future Act consolidating the criminal laws of the Commonwealth.'² The Committee's *Interim Report on Principles of Criminal Responsibility and Other Matters* commented that the methods then used to adopt principles of criminal responsibility for Commonwealth offences had led to 'obscurity and inconsistency'.³ In relation to offences under the *Crimes Act 1914* (Cwlth), common law principles of criminal responsibility applied. However, the greatest number of Commonwealth criminal offences are contained in other statutes. In relation to these offences, the effect of the *Judiciary Act 1903* was that a court exercising federal jurisdiction under a Commonwealth criminal law other than the Crimes Act determined questions of criminal responsibility according to the law of the particular State or

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Territory. In other words, a court sitting in a common law jurisdiction such as New South Wales applied common law principles, whereas a court sitting in a Griffith Code jurisdiction such as Queensland applied Code principles. The Gibbs Committee recommended that a Commonwealth law should be enacted to codify all relevant principles of criminal responsibility in order:

... to achieve uniformity of principle throughout Australia in Commonwealth criminal trials and ... make the relevant principles more readily accessible and, it is hoped, more clear and certain.⁴

The Model Criminal Code Project

The Model Criminal Code Project commenced in the early 1990s. In part it was a response to the Review of Commonwealth Criminal Law undertaken by the Gibbs Committee. 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 Committee⁵ (MCCOC) in discussion paper and final (report) form.⁶ A report is generally compiled after public consultation and examination by the Standing Committee of Attorneys-General.

The first significant 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 forms the substantive part of the *Criminal Code Act 1995*. Chapter 2 can be regarded as the foundational chapter for Commonwealth criminal law. Its purpose is to revise, codify and simplify principles of criminal responsibility for Commonwealth criminal law purposes.

With the passage of the *Criminal Code* an interim and transitional period effectively commenced. The principles of criminal responsibility contained in Chapter 2 generally adopt a common law approach to criminal responsibility which is based on subjective fault elements. Thus, as an interim measure, the Commonwealth Parliament passed the *Crimes Amendment Act 1995* pending the application of the *Criminal Code* to pre-existing Commonwealth offences. The *Crimes Amendment Act 1995* provides that common law principles of criminal liability apply to all Commonwealth offences. The reasons for passing the *Crimes Amendment Act 1995* were two-fold. First, it was intended to remedy the anomalous situation mentioned earlier in which principles of criminal responsibility for Commonwealth offences were either determined by the common law (if they were

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offences under the *Crimes Act 1914*) or by the law of the State or Territory in which proceedings arose if the offence was created under another Commonwealth law. Second, it was enacted to ‘avoid a situation in where there would be three sets of principles in existence during the transitional period—the code principles, the Crimes Act use of the common law, and the application of state and territory law in relation to other offences.’⁷

The *Criminal Code* then allowed implementation of Chapter 2 principles of criminal responsibility to be a staggered process. First, Chapter 2 applied to all offences against the *Criminal Code*. Since 1995 the Commonwealth Parliament has passed a number of new *Criminal Code* chapters. These include the *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999*, the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* and the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*. Second, Chapter 2 applied to all new Commonwealth criminal offences from 1 January 1997. Third, it will apply 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 planned 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.

Criminal Code Act 1995 (Cwlth)

The *Criminal Code* began the process of codifying Commonwealth criminal law. It contains two chapters. Chapter 1 deals with codification. Chapter 2 deals with principles of criminal responsibility. Principles of criminal responsibility are divided into physical elements and fault elements. This terminology reflects the traditional division of criminal offences into ‘actus reus’⁸ and ‘mens rea’.⁹ The physical elements of an offence are matters such as conduct, the circumstance in which conduct occurs 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 (if proof of a fault element is required).

Chapter 2 supplies default fault elements which are applied to the various physical elements of offences. For example, the default fault element for a physical element of conduct is intention. However, this does not prevent a particular law which creates an offence from specifying that different fault elements will apply in particular cases or from using non-Code fault elements.¹⁰ It may also be the case that an offence contains no fault elements. Such an offence is termed an offence of strict liability or an offence of absolute liability. Chapter 2 provides that defences, including a defence of mistake of fact, are available for strict liability offences, whereas a defence of mistake of fact is not available in the case of an absolute liability offence. Chapter 2 also states that if it is intended that an offence is one of strict liability or absolute liability, then the law creating the offence must make an explicit statement to this effect.¹¹

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Other matters dealt with in Chapter 2 include extension of criminal responsibility, such as attempt, complicity and conspiracy, proof of criminal responsibility and principles of corporate criminal responsibility.

In relation to proof of criminal responsibility Chapter 2 provides that the prosecution bears a legal burden of proving every element of an offence.¹² A legal burden is defined as the burden of proving the existence of the matter. The standard of proof on the prosecution is 'beyond reasonable doubt'.¹³ Chapter 2 also provides that a defendant bears an evidential burden of proof unless a law expressly indicates that the defendant bears a legal burden.¹⁴ An evidential burden in relation to a matter is the burden of adducing evidence suggesting there is a reasonable possibility that the matter exists or does not exist.¹⁵

As stated above, Chapter 2 also contains principles of corporate criminal responsibility. The Minister's Second Reading Speech for the Criminal Code Bill 1994 stated:

Part 2.5 deals with the important issues of corporate criminal responsibility. It sets a basic standard of responsibility for bodies corporate in relation to general offences.

The code introduces the concept that 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.

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.¹⁶

Reviewing pre-existing Commonwealth statutes containing offence provisions

Since 1995, the Commonwealth has been examining all the offences on its statute books with a view to revising them so that they harmonise with Chapter 2, modifying the application of Chapter 2 in relation to particular offences or clarifying how Chapter 2 will 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 would have to prove of a fault element or elements where previously no such proof was required.

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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. This Act 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 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 a particular portfolio so that Chapter 2 can apply to each offence provision without untoward or unintended consequences from 15 December 2001.

Among other things, the amendments in this portfolio Bill re-structure and re-word offence provisions by identifying their constituent physical elements. In general, the default fault elements contained in the *Criminal Code* will then apply to each physical element. The amendments also remove fault elements which, under the *Criminal Code*, would be inappropriate for particular physical elements. Additionally, they exclude the application of the *Criminal Code* in respect of some fault elements and exclude the operation of the Code's principles of criminal responsibility where a particular statute has its own regime for corporate offences. Lastly, some amendments expressly modify the application of the *Criminal Code*—by identifying some offences as offences of strict liability and indicating when a defendant will be under a legal rather than evidential burden.

Main Provisions

Application of amendments

Clause 4 provides that the amendments apply to acts and omissions which occur or commence after the amendments themselves commence.

Amendments to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the Heritage Protection Act) creates a regime under which the Minister can protect significant Aboriginal and Torres Strait Islander sites and objects by issuing interim or permanent heritage protection declarations.

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Summary of proposed amendments

In brief, the amendments contained in the Bill apply Chapter 2 (other than those parts of the Code that deal with principles of corporate criminal responsibility) to offences under the Heritage Protection Act. They also re-word and re-structure offence provisions to specify their constituent physical elements. An effect of the amendments is that the default fault elements specified in the *Criminal Code* must be proved in relation to each physical element of an offence under the Heritage Protection Act.

Details of proposed amendments

Item 1 inserts **new section 6A** which applies Chapter 2 of the *Criminal Code* (other than those parts of the Code that deal with principles of corporate criminal responsibility) to the Heritage Protection Act. The Heritage Protection already contains a provision stipulating when a body corporate will be criminally liable for the acts of its servants and agents.¹⁷

Items 3 & 4 make amendments which are consequential on the application of Chapter 2. They remove references in the Heritage Protection Act to sections of the *Crimes Act 1914* which deal with ancillary offences and replace them with references to sections in the *Criminal Code* dealing with these matters. The Crimes Act provisions will be repealed and the relevant sections of the *Criminal Code* will commence when the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000* commences.¹⁸

Items 5, 6 & 7 re-structure and reword offence provisions in the Heritage Protection Act. These are offences of destroying or damaging notices identifying sites or objects that are subject to a declaration¹⁹, contravening a declaration made under the Act²⁰, defacing Aboriginal objects or places, and contravening a declaration that relates to a significant Aboriginal area or site.²¹

Subsection 21H(1) of the Heritage Protection Act can be used as an example of how the amendments re-word and re-structure the constituent physical elements of offence provisions. Existing subsection 21H(1) provides that:

A person who contravenes the terms of a declaration ... relating to an Aboriginal place is guilty of an offence ...'

Item 6 repeals existing section 21H and inserts **new section 21H. New subsection 21H(1)** specifies that a person is guilty of an offence if, firstly, the person engages in conduct and, secondly, the result is that the conduct contravenes a declaration relating to an Aboriginal place. In this way the offence is divided into its constituent physical elements of conduct and result. The amendments do not specify what fault elements apply to each of those physical elements. In the absence of such specification, the default fault elements contained in the *Criminal Code* apply. In the case of conduct, the default fault element is intention. In the case of result, it is recklessness.

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Amendments to the *Antarctic Marine Living Resources Conservation Act 1981*

The *Antarctic Marine Living Resources Conservation Act 1981* (the AMLRC Act) gives effect to the Convention on the Conservation of Antarctic Marine Living Resources. Under the AMLRC Act it is an offence to harvest or carry out research on Antarctic marine organisms without a Ministerial permit.²² The AMLRC Act also creates offences of contravening permit conditions²³ and failing to comply with a direction made by an inspector appointed under the Act.²⁴

Brief summary of proposed amendments

The amendments effected by the Bill do four major things. First, they apply Chapter 2 of the *Criminal Code* to all offences against the AMLRC Act. Second, they re-structure and re-word some offence provisions to specify their constituent physical elements. Third, they deal with defences. Fourth, they identify an offence of strict liability.

Details of proposed amendments

Item 12 inserts **new section 4A** which applies Chapter 2 of the *Criminal Code* to all offences against the AMLRC Act.

Amendments made by **items 13-17** affect section 8 of the AMLRC Act. Subsection 8(1) contains offences of harvesting Antarctic marine organisms and conducting research on Antarctic marine organisms. **Items 13 and 14** create two new subsections in section 8 which separate the offences of harvesting and research. While the amendments itemise the constituent physical elements of the harvesting offence, they do not do so in relation to the research offence.

Item 18 repeals and replaces section 10 of the AMLRC Act. At present, section 10 provides that:

Where a person contravenes a condition of a permit that is applicable to him, the person is guilty of an offence ...'

New section 10 states that a person is guilty of an offence if, firstly, a permit condition applies to that person; secondly, the person engages in conduct and, thirdly, the conduct contravenes the condition. In the absence of any modification, the default fault elements supplied by the *Criminal Code* apply to each of those physical elements. They are recklessness (in relation to circumstance and result) and intention (in relation to conduct).

Existing subsection 16(6) of the ALMRC Act provides that:

A person who, without reasonable excuse, fails to comply with a requirement made of him or her by an inspector under this section is guilty of an offence ...

Items 19 & 20 move the element of 'reasonable excuse' from subsection 16(6) to a new subsection [**new subsection 16(6)**]. The reason for relocating the 'reasonable excuse'

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defence is to ensure that it is interpreted as a defence and not as an element of the offence (which would have to be proved by the prosecution). **Item 20** states that a subsection 16(6) offence is one of strict liability. A strict liability offence is one where it is not necessary for the prosecution to prove fault, only that the defendant engaged in the relevant physical elements of the offence. The *Criminal Code* supplies a defence of mistake of fact to a strict liability offence. Additionally, as a result of the insertion of **new subsection 16(6A)**—also inserted by **item 20**—a defendant will also have a defence of reasonable excuse.²⁵

Amendments to the *Antarctic Treaty (Environment Protection) Act 1980*

The *Antarctic Treaty (Environment Protection) Act 1980* [the Antarctic Treaty (EP) Act] gives effect to Australia's obligations under a number of international instruments.²⁶ It provides for the protection of Antarctic marine animals and the preservation of areas of outstanding ecological and scientific significance.²⁷ The Act enables the Governor-General to issue proclamations declaring areas to be specially protected areas or sites of special scientific interest. The Minister may grant permits enabling certain activities to take place in those areas. These activities include killing and taking native birds and animals, collecting plants, entering specially protected areas or sites of scientific significance and using firearms or equipment that disturbs birds. The Act contains offence provisions relating to the environment, contravening permit conditions, conducting unauthorised activities, impersonating an inspector and failing to comply with the directions of an inspector.

Brief summary of proposed amendments

In brief, the Bill amends the Antarctic Treaty (EP) Act by applying Chapter 2 of the *Criminal Code* to offences under the Act, re-wording and re-structuring two offence provisions by itemising their constituent physical elements, identifying an offence of strict liability, changing a defendant's evidential burden in one offence, and altering the fault elements of some offences.

Details of proposed amendments

Item 22 amends the Antarctic Treaty Act by inserting **new section 6A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

Items 23, 24 & 34 identify offences of strict liability. **Items 23 & 24** affect subsection 17(7) of the Antarctic Treaty (EP) Act. Subsection 17(7) creates an offence of failing to comply with an inspector's requirement. **Item 24** inserts **new subsection 17(7A)** which states that an offence under subsection 17(7) is one of strict liability.²⁸ Amendments affecting subsection 17(7) also relocate the element of 'reasonable excuse' to a new subsection in order to ensure that it is not interpreted as part of the offence. A defendant will therefore have defences of mistake of fact and reasonable excuse in relation to this offence.²⁹ **Item 34** provides that an offence under subsection 21(1) is a strict liability

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offence. Subsection 21(1) creates an offence of failing to report certain activities to the Minister.

Items 25, 30 and 33 re-structure and re-word a number of offence provisions in order to clearly identify their constituent physical elements. **Item 33**, which repeals and replaces section 20 of the Antarctic Treaty (EP) Act can be used as an example. Existing section 20 provides that:

Where a provision of a condition of a permit is applicable to a person and the person contravenes that provision, he or she is guilty of an offence ...

New section 20 provides that a person is guilty of an offence if, firstly, a permit condition applies to them; secondly, they engage in conduct; and, thirdly, the conduct contravenes the condition. In this way, the physical elements of circumstance, conduct and result are clearly specified. In the absence of any statutory modification the default fault elements provided by Chapter 2 will apply to each of these physical elements.³⁰

Items 31, 35 and 36 amend the fault elements of three offence provisions. The provisions are paragraph 19(2)(e), subsection 21A(2) and paragraph 21A(3)(b). Existing paragraph 19(2)(e) prohibits a person from ‘knowingly or recklessly’ disturbing birds in the Antarctic. Existing subsection 21A(2) prohibits a person ‘knowingly or recklessly’ carrying on an activity in the Antarctic without a Ministerial authorisation. Existing paragraph 21A(3)(b) prohibits a person who has a Ministerial authorisation from ‘knowingly or recklessly’ failing to comply with a condition of that authorisation.

In each case, the amendments remove the words ‘knowingly or recklessly’. As presently worded the provisions suggest that the fault elements of knowledge and recklessness apply to the physical element of conduct in the offences. However, neither knowledge nor recklessness are applied by Chapter 2 of the *Criminal Code* to the physical element of conduct. Removal of the words ‘knowingly or recklessly’ is thus designed to harmonise the physical and fault elements in the offences with Chapter 2 of the *Criminal Code*. Following the removal of the words ‘knowingly or recklessly’, the *Criminal Code*’s default fault elements apply to each physical element of the offences. These default fault elements are intention in the case of conduct, and recklessness in the case of circumstance or result.³¹

Items 37 and 39 amend the Antarctic Treaty (EP) Act in relation a defendant’s burden of proof when he or she is charged with a section 21A offence.³² The amendments change the defendant’s burden of proof from a legal burden to an evidential burden.³³ This is in keeping with the *Criminal Code* which provides that a defendant will bear an evidential burden unless a statute expressly indicates otherwise.

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Amendments to the *Environmental Protection (Alligator Rivers Region) Act 1978*

The *Environmental Protection (Alligator Rivers Region) Act 1978* (the Alligator Rivers Act) establishes the office of Supervising Scientist to protect the Alligator Rivers Region of the Northern Territory from the effects of uranium mining and related activities.

Item 40 applies Chapter 2 of the *Criminal Code* to all offences against the Alligator Rivers Act.

Existing section 31 of the Alligator Rivers Act imposes secrecy obligations on the Supervising Scientist and his or her staff. Subsection 31(2) provides that it is an offence for the Supervising Scientist or his/her staff 'except in the performance of a function or duty under or in connexion with this Act' to disclose information acquired in an official capacity. **Items 41 & 42** re-locate these words to a new subsection. The amendments are designed to ensure that the excised elements must be interpreted as a defence and cannot be interpreted as an element of the offence (which would have to be proved by the prosecution). **Items 44 & 45** make similar changes to the offence provision in subsection 31(4) of the Alligator Rivers Act.

Amendments to the *Great Barrier Reef Marine Park Authority Act 1975*

The *Great Barrier Reef Marine Park Authority Act 1975* (the GBRMPA Act) establishes a Great Barrier Reef Marine Park and an Authority to provide advice and information to the Minister about the Marine Park, carry out research and manage the Marine Park. A number of offences relating to the Marine Park are found in the GBRMPA Act.

Brief summary of proposed amendments

In brief, the amendments in the Bill apply the principles of criminal responsibility found in Chapter 2 of the *Criminal Code* to offences under the GBRMPA Act, re-structure and re-word some offence provisions into their constituent physical elements, specify which offences are offences of strict liability, and make amendments relating to the fault elements of some offences.

Details of proposed amendments

Item 47 inserts **new section 4A** which applies Chapter 2 of the *Criminal Code* to all offences under the GBRMPA Act. Note 1, which is added by **item 47**, states that Chapter 2 principles of corporate criminal responsibility do not apply to the GBRMPA Act as a result of subsection 64(8) of the GBRMPA Act. Subsection 64(8) was inserted by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* and does not commence until 24 May 2001 (unless it is proclaimed earlier). The circumstances in which a body corporate will be liable for the conduct of its directors, servants and agents are set out in section 64 of the GBRMPA Act.

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Items 48, 49 and 50 re-structure and re-word three existing offences to specify their constituent physical elements. These are offences of contravening permit or authority conditions in a zoned area (section 38C), contravening permit or authority conditions in an unzoned area (section 38G), and discharging waste into the Marine Park in contravention of permit conditions [subsection 38J(2)]. As a result of the amendments, the default fault elements contained in the *Criminal Code* will apply to each physical element in those offences—subject to one modification. An example of re-wording is seen in changes effected by **item 50** which amends existing section 38J. **Item 50** also modifies the application of the *Criminal Code*'s default fault elements to an offence under section 38J.

At present, subsection 38J(2) provides that a person who has a conditional permission to discharge waste in the Marine Park commits an offence if he or she 'intentionally or negligently' contravenes those conditions. **Item 50** clarifies the constituent physical elements of the offence and their accompanying fault elements. It inserts **new subsection 38J(2)** which provides that a person is guilty of an offence if, first, a permission to discharge waste is subject to a condition; secondly, the condition applies to them; thirdly, they engage in conduct and, fourthly, the conduct contravenes the condition.

In relation to the first three physical elements, the default fault elements found in the *Criminal Code* apply. These are recklessness in relation to the two physical elements of circumstance, and intention in relation to the physical element of conduct. The last physical element in the offence is one of result. The default fault element for result in Chapter 2 is recklessness. **New subsection 38J(2A)** modifies the application of the *Criminal Code* by providing that the fault element for the physical element of result in the offence is negligence. 'Negligence' is defined in section 5.5 of the *Criminal Code*.

Item 51 amends the fault elements in offences under section 39Q. Section 39Q provides that:

A person must not intentionally or recklessly refuse, or intentionally or recklessly fail, when and as required under regulations made by the purposes of this Division to do so, to give any information or return to the [Great Barrier Reef Marine Park] Authority.

Item 51 omits the words 'intentionally or recklessly' wherever they occur in section 39Q. The amendment harmonises the provision with the *Criminal Code* by ensuring that the fault element of recklessness is not applied to the physical element of conduct in the offence. Under the *Criminal Code*, the default fault element in respect of proscribed conduct is intention.

Item 52 states that an offence under subsection 45(2) of the GBRMPA Act is one of strict liability. The Explanatory Memorandum comments that the offence in subsection 45(2) is likely to have been an offence of strict liability given the nature of the offence and the small penalty attaching to it (1 penalty unit).³⁴

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Items 54-61 re-structure offence provisions in subsection 45A(4), section 47A, and subsections 47B(2) and 48(5) of the GBRMPA Act.³⁵ In each case, the amendments excise the element of ‘without reasonable excuse’ from the offence provision and place it in a new subsection. The reason for the excision is to ensure that the words are not read as an element of the offence (which would have to be proved by the prosecution) but clearly identified as a defence.

Items 62 & 63 stipulate that offences under subsection 59B(1), 59C and 59D are offences of strict liability. These are offences of navigating a ship without a pilot in the Great Barrier Reef Region and entering an Australian port after navigating without a pilot in the Great Barrier Reef Region. The Explanatory Memorandum remarks:

Although the penalty for an offence of those provisions is 500 penalty units, it is considered necessary in order to protect and conserve the World Heritage values of the Great Barrier Reef.³⁶

The amendments also expressly provide that the defendant carries a legal burden in relation to the defences provided in subsections 59H(1) & 59H(2) (**items 64 & 65**). Subsections 59H(1) & (2) provide defences to offences against sections 59B, 59C & 59D. Failure to specify that a defendant bears a legal burden of proof would have meant that an evidential burden would have applied by operation of the *Criminal Code* (section 13.4).

Items 69 & 70 make changes that are consequential on the application of provisions in the *Criminal Code* relating to criminal responsibility in ancillary offences.

Amendments to the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*

The *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (the Hazardous Waste Act) implements the Basel Convention on Hazardous Wastes and establishes a regime to control the transportation, storage, export and import of hazardous wastes.

Brief summary of proposed amendments

In brief, the proposed amendments apply Chapter 2 of the *Criminal Code* (with the exception of the Code’s principles of corporate criminal responsibility) to the Hazardous Waste Act, alter some fault elements in offences, identify offences of strict liability, and relocate a number of defence provisions.

Details of proposed amendments

Items 73-76 remove references to provisions in the *Crimes Act 1914* which deal with ancillary offences and replace them with references to equivalent provisions in the *Criminal Code*. The Crimes Act provisions will be repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*.³⁷

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Item 77 inserts **new section 10A** into the Hazardous Waste Act. **New section 10A** applies Chapter 2 of the *Criminal Code* (other than the principles of corporate criminal responsibility) to all offences under the Hazardous Waste Act. The Hazardous Waste Act already contains a provision which stipulates when a body corporate will be liable for the conduct of its directors, servants and agents.³⁸

Items 78-84 amend the fault elements contained in offences under subsection 39(4), paragraph 39(6)(a), subsection 40(3), paragraph 40(5)(a), subsection 40A(3), paragraph 40A(5)(a) and subsection 41A(2). These offences relate to the importation and exportation of hazardous waste, the transiting of hazardous waste, and the transporting of hazardous waste through a transit country. At present, these offences are committed by a person who ‘knowingly, recklessly or negligently’ contravenes the law. The amendments replace the fault element of knowledge with that of intention—thus harmonising the offence provisions with the *Criminal Code* which provides that the fault element of knowledge does not apply to a physical element of conduct.

Subsection 43(3) of the Hazardous Waste Act provides that a person who ceases to be an inspector under the Act must return his or her identity card to the Minister as soon as practicable. **Item 85** amends section 43 to stipulate that an offence under subsection 43(3) is one of strict liability.

Items 86-95 excise the element of reasonable excuse from subsections 45(5), 48(3) and 52(3), and section 54 of the Hazardous Waste Act and place it in new subsections.³⁹ The existing subsections provide that a person must not, without a reasonable excuse fail to comply with various requirements of hazardous waste inspectors. The purpose of placing the defence of ‘reasonable excuse’ apart from offence provisions is to ensure it is not interpreted as being an element of the offence (which would have to be proved by the prosecution).

Amendments to the *Historic Shipwrecks Act 1976*

The *Historic Shipwrecks Act 1976* (the Shipwrecks Act) provides for the protection of historic shipwrecks and relics.

Item 96 repeals references in the Shipwrecks Act to provisions in the *Crimes Act 1914* which deal with ancillary offences. It replaces them with references to equivalent provisions in the *Criminal Code*. The Crimes Act provisions will be repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*.⁴⁰

Item 97 inserts **new section 4AA** into the Shipwrecks Act. **New section 4AA** provides that Chapter 2 of the *Criminal Code* applies to all offences under the Shipwrecks Act.

Items 98 and 99 re-structure and re-word the constituent physical elements of offences under subsections 13(1) and 15(5) of the Shipwrecks Act. These are offences of damaging, destroying or removing an historic shipwreck or relic without a permit [subsection 13(1)]

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and contravening a condition of a permit to explore for or recover shipwrecks and relics [subsection 15(5)]. **New subsection 13(1)** specifies the physical elements of conduct and result which constitute the offence. **New subsection 15(5)** stipulates the physical elements of circumstance, conduct and result which constitute this offence. Default fault elements under the *Criminal Code* then apply to each of these physical elements.

Paragraph 23(5)(a) of the Shipwrecks Act provides that a 'person shall not without reasonable excuse, fail to comply with a requirement made of the person by an inspector in the exercise of a power under this section'. Paragraph 23(7)(a) provides that a person who 'without reasonable excuse, hinders or obstructs an inspector in the exercise of a power under this section is guilty of an offence'. **Items 100-103** excise the words 'without reasonable excuse' contained in paragraphs 23(5)(a) and 23(7)(a) and place them in new paragraphs. The reason for doing so is to ensure that the words are not interpreted as part of the elements of the relevant offences (which would have to be proved by the prosecution).

Amendments to the *National Environment Protection Measures (Implementation) Act 1998*

The *National Environment Protection Measures (Implementation) Act 1998* (NEPM Act) enables the Commonwealth Minister to apply State and Territory laws implementing national environmental protection measures (NEPMs) to the activities of the Commonwealth and its authorities. A NEPM is a statutory instrument which contains national objectives for protecting or managing particular aspects of the environment. The NEPM Act also provides for the appointment of environmental auditors to carry out environmental audits for the purposes of Commonwealth implementation of NEPMs.

The NEPM Act post-dates the passage of the Criminal Code Act. Section 41 of the NEPM Act presently provides that Chapter 2 of the *Criminal Code* applies to all offences referred to in subsection 21(5) of the NEPM Act and to all offences against Parts 5 and 8. **Item 104** inserts **new section 6A** which provides that Chapter 2 of the *Criminal Code* will apply to all offences under the Act.

Item 105 repeals subsection 29(2) of the Act. Subsection 29(2) provides that it is an offence for the environmental auditor to provide a report which contains false or misleading statements. The Explanatory Memorandum explains that this provision will be supplanted by provisions contained in the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*. These provisions will commence on 24 May 2001 unless they are proclaimed to commence earlier.

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Amendments to the *Ozone Protection Act 1989*

The *Ozone Protection Act 1989* (the Ozone Protection Act) implements the Vienna Convention for the Protection of the Ozone Layer and the London and Montreal Protocols to that Convention by regulating the manufacture and use in Australia of ozone depleting substances, as well as controlling their importation into and export from Australia.

Brief summary of proposed amendments

The proposed amendments apply Chapter 2 of the *Criminal Code* (other than principles of corporate criminal responsibility) to all offences under the Ozone Protection Act, identify certain offences as offences of strict liability, re-structure and re-word some offence provisions to identify their constituent physical elements, and amend the fault elements in some offences to harmonise them with the *Criminal Code*.

Details of proposed amendments

Item 106 inserts **new section 6A** into the Ozone Protection Act. **New section 6A** applies Chapter 2 of the *Criminal Code* (other than principles of corporate criminal responsibility) to all offences against the Ozone Protection Act. Corporate criminal responsibility is dealt with in section 65 of the Ozone Protection Act.

Items 108, 110, 111-118 stipulate that certain offences under the Ozone Protection Act are offences of strict liability. These are offences of unlicensed manufacture, importation or exportation of substances such as HCFCs⁴¹, breaching the conditions of a licence to manufacture, importing or exporting HCFCs⁴², manufacturing or importing scheduled substances⁴³, importing products containing scheduled substances from a non-Protocol country⁴⁴, importing products manufactured from scheduled substances from a non-Protocol country⁴⁵, failing to provide the Minister with a report about the manufacture, import or export of a scheduled substance⁴⁶, and failing to return an identity card when a person ceases to be an inspector under the Ozone Protection Act.⁴⁷ Fault elements do not have to be proved when a strict liability offence is prosecuted but a defence of mistake of fact is available as a result of the application of Chapter 2.⁴⁸

It is an offence under subsection 60(1) to move goods that have been seized under the Ozone Protection Act. **Item 119** re-structures and re-words the constituent elements of the offence contained in subsection 60(1) so that the physical elements of conduct, result and circumstances are specified. As a result of the application of Chapter 2, the default fault element of intention applies to conduct and recklessness applies to circumstance and result. The amendments also separately spell out that it is a defence that the person is acting in accordance with a Ministerial direction. The purpose of this amendment is to ensure that the defence is not interpreted as part of the offence provisions. A defendant will bear an evidential burden of proof in relation to the defence.

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Items 120-123 amend the fault elements in offences under subsections 62(1), 62(2), 62(3) and 63 of the Ozone Protection Act. These are offences of ‘knowingly or recklessly’ making false statements or giving false information to the Minister or an inspector. The amendments effected by **items 120-123** delete the words ‘knowingly or recklessly’ in each provision so that, in keeping with Chapter 2, the fault element of knowledge does not apply to the physical element of conduct in the offences. **Item 123** also adds **new subsection (5)** to section 62 of the Ozone Protection Act so that in relation to the physical element of circumstance in the offences, the fault elements will be knowledge and recklessness.

Items 124 and 125 amend section 63 of the Ozone Protection Act. Section 63 creates an offence of ‘wilfully’ obstructing an inspector.⁴⁹ The amendments remove the word ‘wilfully’ and replace it with the word ‘intentionally’. ‘Wilful’ is not an expression that is used in Chapter 2 of the *Criminal Code*. The Explanatory Memorandum remarks that ‘intentional’ is an equivalent expression. While the *Criminal Code* does not prevent the use of non-Code fault elements (such as ‘wilfully’), its retention might lead to a future court decision distinguishing ‘wilfully’ from ‘intentionally’ when interpreting the provision.

Amendments to the *Sea Installations Act 1987*

The purpose of the *Sea Installations Act 1987* (Sea Installations Act) is to ensure that certain sea installations are operated safely and in a manner that protects the environment. Generally speaking, sea installations are structures or vessels that float or are in physical contact with the sea-bed.⁵⁰ The Sea Installations Act covers off-shore installations associated with environmental activities. It does not cover those off-shore installations which are involved in petroleum and minerals exploration and exploitation.⁵¹

Item 129 inserts **new section 13A** into the Sea Installations Act. **New section 13A** applies Chapter 2 to all offences under the Sea Installations Act—except for those Code provisions which relate to corporate criminal responsibility. The Sea Installations Act already contains a provision dealing with matters of corporate criminal responsibility.⁵²

Items 130-133, 135 and 137 identify a number of offences under the Sea Installations Act as offences of strict liability or as containing elements of strict liability. This means that the prosecution does not have to prove a fault element in relation to all or some of the physical elements of the offences. However, the defendant can use a defence of mistake of fact. Examples of the offences identified as offences of strict liability are the installation of a sea installation without a permit⁵³, and using a sea installation without a permit.⁵⁴

Item 136 repeals and replaces existing section 58 of the Sea Installations Act. In doing so, it itemises the physical elements of the offence of contravening permit conditions as elements of circumstance, conduct and result. The default fault elements of intention (in relation to conduct) and recklessness (in relation to the other physical elements) which are supplied by the *Criminal Code* will apply to these physical elements.

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Item 138 replaces references to provisions in the *Crimes Act 1914* which deal with ancillary offences with references to equivalent provisions in the *Criminal Code*. The Crimes Act provisions will be repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*—once it is enacted.⁵⁵

Amendments to the *Wildlife Protection (Regulation of Exports and Imports) Act 1982*

The objects of the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* (the Wildlife Protection Act) are to protect native marine-based and terrestrial fauna and flora and comply with Australia's obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The Act regulates the importation and exportation of certain plants, animals and goods and provides for offences and penalties for unauthorised imports and exports.

The amendments effected by **item 146** remove references to provisions in the *Crimes Act 1914* which deal with ancillary offences and replace them with references to equivalent provisions in the *Criminal Code*. Provisions in the Crimes Act dealing with ancillary offences will be repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*—once it is enacted.⁵⁶

Item 147 inserts **new section 7A** into the. **New section 7A** applies Chapter 2 of the *Criminal Code* to all offences under the Wildlife Protection Act.

Section 21 of the Wildlife Protection Act prohibits a person from 'intentionally or recklessly' exporting certain wildlife specimens except in accordance with a permit or authority. Section 22 prohibits a person from 'intentionally or recklessly' importing certain wildlife specimens except in accordance with a permit or authority. **Items 148, 149, 150, and 151** re-word the offence provisions in sections 21 and 22 of the Wildlife Protection Act by removing the words 'otherwise than in accordance with a permit or an authority, intentionally or recklessly' and relocating them in separate provisions. As a result, two things follow. First, the default fault element of intention supplied by the *Criminal Code* will apply to the physical element of conduct in the offences. Second, it should be clear that the words of excuse are not elements of the offences (which would have to be proved by the prosecution).

Items 152-155, 164 and 177 repeal and replace the offence provisions in section 48 and subsections 50(4), 51(4), 51E(2), and sections 51N & 71A. The amendments re-structure and re-word those provisions by stipulating their physical elements. An example is **item 153** which repeals and replaces subsection 50(4). As it is presently worded, subsection 50(4) provides that it is an offence for the holder of a live animal importation permit or authority to 'intentionally contravene a condition to which the permit or authority is subject ...' **New subsection 50(4)** provides that a person is guilty of an offence if, firstly, they hold a permit or authority; secondly, they engage in conduct; and thirdly, they contravene a condition of the permit or authority. In this way, the amendments identify the constituent physical elements of the offence as circumstance, conduct and result. The

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default fault elements supplied by the *Criminal Code* will apply to each of those physical elements.

Under section 53 of the Wildlife Protection Act it is an offence to be in possession of illegally imported wildlife specimens. **Items 159-161** expressly state that a defendant bears a legal burden of proof in relation to the matters of defence found in subsections 53(1B), (2) & (3) of the Wildlife Protection Act. It is necessary to do this in order to displace the evidential burden which would otherwise be applied by the *Criminal Code*.

Under subsection 61(3) of the Wildlife Protection Act it is an offence for a person who ceases to be an inspector under the Act to fail to return their identity card as soon as practicable. The penalty is one penalty unit (\$110). **Item 167** stipulates that an offence under subsection 61(3) of the Wildlife Protection Act is an offence of strict liability. As a result of the application of the *Criminal Code*, a defence of mistake of fact is available for this offence. Additionally, **new subsection 61(5)** provides a defence of reasonable excuse.

Concluding Comments

In its first report for 2001⁵⁷, the Senate Standing Committee for the Scrutiny of Bills commented on the Environment and Heritage Legislation Amendment (Application of Criminal Code) Bill 2000. It particularly commented on amendments which identified certain offences as strict liability offences. It noted that the Explanatory Memorandum states that 'these amendments are intended to ensure that when Chapter Two of the Criminal Code Act 1995 is applied to pre-existing portfolio offence provisions, from 15 December 2001, those provisions will continue to operate in the same manner as they operated previously'. The Committee sought confirmation from the Minister that the Bill creates no new offences of strict liability.

The Committee was particularly concerned about the civil liberties implications of making offences strict liability offences. However, it may be, in particular cases, that the public interest in environment protection indicates that an offence or elements of an offence should attract strict liability. It might also be the case that a penalty provision—for example, a penalty of one penalty unit (\$110) indicates that an offence would be a strict liability offence. In some cases, it may not be appropriate to attach a fault element to a particular physical element and doing so would make a successful prosecution impossible. Or it may be that the interpretation of a particular provision is unclear or judicially unsettled and that a policy decision must then be made about whether fault elements will apply to that offence.

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Endnotes

- 1 The reason that the Act commences on the latest of the three dates specified is that certain provisions depend on the commencement of other legislation. Examples are **items 3 & 4** which affect the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. These amendments are predicated on the commencement of the *Law and Justice Legislation (Application of Criminal Code) Act 2000*—once enacted. **Item 105**, which amends the *National Environmental Protection Measures (Implementation) Act 1998* is predicated on the commencement of the *Criminal Code Amendment (Theft, Fraud, Bribery & Related Offences) Act 2000*.
- 2 Review of Commonwealth Criminal Law (Gibbs Committee), *Interim Report. Principles of Criminal Responsibility*, AGPS, Canberra, July 1990, p.9.
- 3 *ibid.*
- 4 *ibid.*, p. 14.
- 5 Most States and Territories have participated in MCCOC. MCCOC consists of senior officers from most Australian jurisdictions with responsibility for advising their Attorney-General on criminal law matters.
- 6 Final reports include General Principles of Criminal Responsibility, Theft, Fraud, Bribery & Related Offences; Property Damage and Computer Offences; Non-Fatal Offences Against the Person; Sexual Offences; Serious Drug Offences; Administration of Justice; Public Order Offences and Slavery & Sexual Servitude.
- 7 Second Reading Speech, *Parliamentary Debates (Hansard)*, Senate, Crimes Amendment Bill 1994, 30 June 1994, p. 2377.
- 8 Latin: a guilty act.
- 9 Latin: a guilty mind.
- 10 Subsection 5.1(2).
- 11 Sections 6.1 & 6.2.
- 12 Subsection 13.1(1).
- 13 Subsection 13.2(1).
- 14 Subsections 13.3(1) & 13.3(4).
- 15 Subsection 13.3(6).
- 16 Second Reading Speech, *Parliamentary Debates (Hansard)*, Crimes Amendment Bill 1994, Senate, 30 June 1994, p. 2377.
- 17 Section 25.
- 18 The Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000 was before the Parliament at the date of writing.
- 19 Section 21G.

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- 20 Section 21H.
- 21 Section 22.
- 22 Section 8.
- 23 Section 10.
- 24 Subsection 16(6).
- 25 Subsection 6.2(3) of the *Criminal Code* provides that the existence of strict liability does not mean that other defences are not available.
- 26 Article IX of the Antarctic Treaty, the Convention for the Conservation of Antarctic Seals and the Antarctic Treaty's Protocol on Environmental Protection.
- 27 Deacons Graham James, *Guide to Environmental Legislation in Australia and New Zealand, Report No.31*, 5th ed, 1997.
- 28 As a result of the application of Chapter 2, failure to indicate that an offence is one of strict liability means that fault elements apply to the offence.
- 29 As a result of paragraph 6.1(1)(b) of the *Criminal Code* and **new subsection 17(7B)**.
- 30 These fault elements are recklessness in respect of circumstance and result, and intention in respect of conduct.
- 31 Although the default fault element of recklessness will apply to the proscribed conduct in the offences, it will still be possible to prove that fault element by proving knowledge (or intention) as well as by proving recklessness—see subsection 5.4(4), *Criminal Code*.
- 32 For example, under subsection 21A(4) it is a defence for the defendant to show that the activity was carried out in an emergency to save a person's life.
- 33 For the distinction between a defendant's legal and evidential burden see page 4 of this Digest.
- 34 Page 18.
- 35 Existing subsection 45A(4) provides that a person must not 'without reasonable excuse', fail to comply with an inspector's direction. Existing section 47A provides that if a vessel seized under the GBRMPA Act is conditionally released to a person, that person must not 'without reasonable excuse' fail to comply with the condition. Existing subsection 47B(2) provides that a person must not 'without reasonable excuse' fail to deliver a vessel as required by an inspector. Existing subsection 48(5) provides that a person must not 'without reasonable excuse' intentionally or negligently fail to comply with an inspector's order under subsection 48(2).
- 36 Page 21.
- 37 The Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000 was before the Parliament at the date of writing.
- 38 Section 59.
- 39 These new subsections are subsections 45(5A), 48(3A), 52(3A), 53(3) & 54(2).

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- 40 The Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000 was before the Parliament at the time of writing.
- 41 Section 13.
- 42 Subsection 18(7).
- 43 Subsection 38(2).
- 44 Subsections 44(1) and 44(5).
- 45 Subsections 45(1) and 45(3A).
- 46 Subsection 46(2).
- 47 Subsection 50(1).
- 48 Additionally, in the case of an offence under subsection 46(2), a defence of reasonable excuse will apply—see **new subsection 46(2B)**.
- 49 Section 63.
- 50 See *Butterworths Encyclopaedic Australian Legal Dictionary*.
- 51 These installations are covered by the *Petroleum (Submerged Lands) Act 1967* and the *Offshore Minerals Act 1994*.
- 52 Section 66.
- 53 Subsection 14(1).
- 54 Subsection 15(1).
- 55 The Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000 was before the Parliament at the time of writing.
- 56 The Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000 was before the Parliament at the time of writing.
- 57 *Alert Digest, No.1 of 2001*, 7 February 2001.

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