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Bills Digest

No. 151 2000–01

Treasury Legislation Amendment (Application of
Criminal Code) Bill (No. 2) 2001

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Treasury Legislation Amendment (Application of Criminal
Code) Bill (No. 2) 2001

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25 June 2001

Contents

Purpose	1
Background	1
Application of Chapter 2	2
Strict liability	2
Absolute liability	3
Defences	3
Removing and replacing inappropriate fault elements	4
Non-Code fault elements	4
Ancillary offences	4
Main Provisions	5
Schedule 1— <i>Superannuation (Resolution of Complaints) Act 1993</i>	5
Schedule 2— <i>Trade Practices Act 1974</i>	6
Schedule 3— <i>Taxation Administration Act 1953</i>	7
Schedule 4—Amendments of other taxation legislation	11

Part 1— <i>Development Allowance Authority Act 1992</i>	11
Part 2— <i>Diesel and Alternative Fuels Grants Scheme Act 1999</i>	11
Part 3— <i>Distillation Act 1901</i>	11
Part 4— <i>Excise Act 1901</i>	12
Part 5— <i>Fringe Benefits Tax Assessment Act 1986</i>	13
Part 6— <i>Income Tax Assessment Act 1936</i>	14
Part 7— <i>Income Tax Assessment Act 1997</i>	14
Part 8— <i>Petroleum Resource Rent Tax Assessment Act 1987</i>	15
Part 9— <i>Product Grants and Benefits Administration Act 2000</i>	15
Part 10— <i>Spirits Act 1906</i>	16
Part 11— <i>Superannuation Guarantee (Administration) Act 1992</i>	16
Part 12— <i>Taxation (Interest on Overpayments and Early Payments) Act 1983</i>	16
Part 13— <i>Tobacco Charges Assessment Act 1955</i>	17
Part 14— <i>Wool Tax (Administration) Act 1964</i>	17
Concluding Comments	18
Strict Liability Offences	18
Endnotes	19

Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 2) 2001

Date Introduced: 5 April 2001

House: House of Representatives

Portfolio: Treasury

Commencement: 15 December 2001 apart from item 3 of Schedule 2 which will commence immediately after the commencement of the *Treasury Legislation Amendment (Application of the Criminal Code) Act (No. 1) 2001*.

Purpose

The Bill amends legislation administered by the Treasury 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*.

Background¹

For an account of the background to the *Criminal Code* and a brief description of Chapter 2 of the Code, see the Bills Digest for the Environment and Heritage Legislation Amendment (Application of Criminal Code) Bill 2000 (*Bills Digest No.92, 2000-2001*).

Chapter 2 of the *Criminal Code* contains principles of criminal responsibility. Since 1995 there has been a staggered program of applying those principles to Commonwealth criminal laws. Chapter 2 applies to all offences against the Code. From 1 January 1997 it applied to all new Commonwealth offences. From 15 December 2001² it will apply to pre-existing Commonwealth offences. In order to meet this deadline, the Commonwealth has been reviewing pre-existing offence provisions with a view to harmonising them with Chapter 2, modifying the application of Chapter 2 where necessary or clarifying how Chapter 2 will apply.

Since mid-2000 the Government has introduced a number of Bills which apply Chapter 2 to legislation in a range of portfolios. Examples are the Foreign Affairs and Trade Legislation Amendment (Application of Criminal Code) Bill 2001, the Environment and Heritage Legislation Amendment (Application of Criminal Code) Bill 2000, and the

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Veterans' Affairs Legislation Amendment (Application of Criminal Code) Bill 2000. These Bills have all been passed by the Parliament and have received Royal Assent.

The Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 2) 2001 (the Bill) is the second in a series of three Bills to cover legislation administered by Treasury. The first Bill, the Treasury Legislation Amendment (Application of Criminal Code) Bill 2000, made amendments to the *Financial Sector Shareholdings Act 1998*, *Foreign Acquisitions and Takeovers Act 1975*, *Insurance Act 1973*, *Life Insurance Act 1995*, *Prices Surveillance Act 1983*, *Productivity Commission Act 1998*, *Retirement Savings Accounts Act 1997*, *Superannuation Industry (Supervision) Act 1993* and aspects of the *Trade Practices Act 1974*. That Bill has since been enacted. The Bill under consideration in this Digest proposes amendments to a range of taxation legislation, the *Superannuation (Resolution of Complaints Act) 1993* and aspects of the *Trade Practices Act 1974*. The Government proposes to introduce a third Treasury Bill in the winter sittings, to make amendments to the *Corporations Law* and the *Australian Securities and Investments Commission Act 1989*.³

Some major areas covered by the Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 2) 2001 are described below.

Application of Chapter 2

The current amendments apply Chapter 2 to offence provisions in legislation administered by Treasury. However, in some cases, the application of Chapter 2 is modified. For example, where a statute contains its own scheme relating to corporate criminal responsibility this is retained and Chapter 2 principles of corporate criminal responsibility are expressly excluded. This is in keeping with policy expressed when the Criminal Code Bill 1994 was introduced. At that time, the responsible Minister said, 'Part 2.5 [of the Criminal Code] concerns general principles suitable for ordinary offences. It will be the basis of liability if no other basis is provided.'⁴

Strict liability

A strict liability offence is one where the prosecution does not have to prove any fault elements. However, at common law a defendant has a defence of honest and reasonable mistake about the existence of facts, which if true, would have made his or her act innocent.⁵

At common law there is a presumption that every offence contains a mental element. Working from this basis, Chapter 2 of the *Criminal Code* requires offences of strict liability to be expressly identified as such.⁶ Failure to do so means that fault elements are applied to all the physical elements in the offence. Chapter 2 also recognises that an offence may be comprised of physical elements to which fault attaches and physical elements to which fault does not apply. Once again, a statute must identify any particular

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physical elements to which fault elements do not apply.⁷ The Bill therefore identifies strict liability offences and instances where strict liability applies to particular physical elements of other offences.

The *Criminal Code* will apply a defence of mistake of fact to strict liability offences⁸ and to particular physical elements which are identified as attracting strict liability in other offences.⁹ However, the Code does not prevent other defences being available.¹⁰ The Bill therefore identifies additional defences to strict liability offences in some instances. For example, the Bill relocates and recreates defences of reasonable excuse where they presently exist in offences identified as strict liability offences.

Absolute liability

An absolute liability offence is one where the prosecution does not have to prove any fault elements and where no defence of honest and reasonable mistake of fact is available. 'Guilt is established by proof of the objective elements of the offence'.¹¹

The *Criminal Code* provides that an offence, which is an absolute liability offence, must be identified as such¹², as must any particular physical elements which are intended to attract absolute liability in other offences.¹³ While mistake of fact is not available as a defence¹⁴, the *Criminal Code* recognises that other defences may be provided in particular statutes.

The Bill identifies one absolute liability offence and also identifies particular physical elements in some offences as elements which attract absolute liability.

Defences

The Bill recreates and relocates some defences and removes redundant defences.

Defences to criminal offences are usually external to the physical and fault elements of offences and to offences themselves.¹⁵ Possibly for this reason, and to clearly identify defences as defences and not as elements of offences which have to be proved or disproved by the prosecution, the amendments relocate defences from provisions which set out the physical elements of an offence into their own separate subsections. Examples are defences of reasonable excuse.

The *Criminal Code*¹⁶ will supply a general defence of lawful authority for all offences against Commonwealth law. As a result, the Bill also amends a number of statutes to remove references to a defence of 'lawful excuse'.

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Removing and replacing inappropriate fault elements

Criminal offences are composed of fault elements¹⁷ and physical elements. In general, ‘fault elements describe or define ... the state of mind of the accused in relation to the offence which must be proven for guilt to attach’.¹⁸ The physical elements of an offence are conduct, the circumstances around conduct, or the result of conduct.

Chapter 2 defines the fault elements of ‘intention’, ‘knowledge’, ‘recklessness’ and ‘negligence’.¹⁹ It also provides default fault elements. Default fault elements will apply where a statute does not specify a fault element for a particular physical element of an offence. The default fault elements provided by the *Criminal Code* are ‘intention’ in the case of conduct and ‘recklessness’ in the case of circumstances or results.²⁰

The Bill amends a number of offence provisions so that their constituent fault and physical elements correspond with the scheme supplied by the *Criminal Code*. For example, amendments ensure that the fault element of recklessness does not apply to the physical element of conduct in an offence. In the process of applying appropriate fault elements, some of the amendments also restructure offence provisions so that their constituent physical elements are clearly identified and the Code’s default fault elements can be applied to them.

Non-Code fault elements

Many offence provisions in Commonwealth statutes do not specify fault elements. In other cases, a variety of expressions may be used including ‘a purpose intended to be’, ‘wilfully’, and ‘for the purpose of’. The meaning of many of these expressions is uncertain.

The *Criminal Code* uses four fault elements. These are intention, knowledge, recklessness and negligence.²¹ The Code does not prevent other fault elements being used in a particular statutory offence provision.²² However, the Bill replaces non-Code fault elements with Code fault elements such as ‘intention’. The amendments are designed to retain the present meaning of particular offences while removing the need for a future court to feel obligated to distinguish between Code fault elements and non-Code fault elements when in fact there may be no difference in meaning between the two.

Ancillary offences

Many Commonwealth statutes contain references to provisions in the *Crimes Act 1914* which deal with ancillary offences such as attempts to commit offences, incitement and conspiracy. These Crimes Act provisions are being disapplied and will be replaced by equivalent provisions in the *Criminal Code*. The Bill thus contains amendments removing references to the Crimes Act and replacing them with references to the *Criminal Code*.

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Additionally, some Commonwealth statutes contain provisions creating ancillary offences. These provisions will no longer be necessary once the *Criminal Code* is applied as it contains ancillary offence provisions. The Bill therefore removes ancillary offence provisions from statutes administered by Treasury.

Main Provisions

Schedule 1—*Superannuation (Resolution of Complaints) Act 1993*

Item 1 amends the *Superannuation (Resolution of Complaints) Act 1993* (SRC Act) by inserting **new section 4AA** which applies Chapter 2 of the *Criminal Code* (other than principles of corporate criminal responsibility) to all offences against the Act. Corporate criminal responsibility is dealt with in section 66 of the SRC Act.

Under subsection 24AA(5) of the SRC Act it is an offence for superannuation providers to intentionally refuse or fail to provide documents to the Superannuation Complaints Tribunal that are considered by the superannuation provider to be relevant to the complaint. **Item 2** removes the term 'intentionally'. As the Explanatory Memorandum explains, the *Criminal Code* specifies that the default element in respect of proscribed conduct is intention and therefore the word 'intentionally' is no longer necessary for this particular offence.

Subsection 25(5) provides that it is an offence for a person, without reasonable excuse, to refuse to or fail to comply with a requirement to provide information to the Complaints Tribunal. **Item 3** repeals and replaces the subsection in order to separate the conduct elements of 'refusal to comply' and 'failure to comply' into two separate offences. The default fault element under the *Criminal Code* for a 'refusal to comply' will be intention. The 'failure to comply' is expressly stated to be an offence of strict liability (**new subsection 25(7)**). This means that the prosecution does not have to prove fault elements in relation to the physical elements of the offence. However, the defendant can use a defence of mistake of fact. **Item 3** also recreates and relocates the defence of reasonable excuse to these offences in **new subsection 25(8)** so that it is not interpreted as an element of the offence.

Existing subsection 63(2) of the SRC Act provides that a person must not make a record of or disclose any information acquired in connection with a complaint other than for the purposes of the Act. **Item 6** inserts **new subsection 63(2A)** stating that this is an offence of strict liability. Additionally, **item 6** recreates and relocates the defence (ie that the disclosure was for the purposes of the Act) so that it is not interpreted as an element of the offence. A note to **new subsection 63(2B)** confirms that the defendant bears an evidential burden in relation this defence.

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Existing subsection 63(3B) requires that a Tribunal member must not 'intentionally or recklessly' disclose personal information to a complaint-handling body unless the individual has consented in writing to the disclosure. **Item 7** removes the words 'intentionally or recklessly'. The amendments remove the fault element of recklessness from the physical element of conduct in the offence. In keeping with the *Criminal Code*, the default fault element of intention will apply to conduct (ie the act of disclosure), while the default fault element of recklessness will apply to the physical element of circumstance in the offence. **Item 4** makes similar amendments to subsection 38(6).

Item 8 makes amendments which are consequential on the application of Chapter 2. They remove references 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 2001* commences.²³

Schedule 2—*Trade Practices Act 1974*

Item 1 amends the *Trade Practices Act 1974* by inserting **new section 6AA** which applies Chapter 2 of the *Criminal Code* to all offences against the Act. **New subsection 6AA(2)** qualifies this rule to the extent that principles of corporate criminal responsibility (ie Part 2.5 of the Code) will not apply to offences against Part IIIA, VC or XIC or Division 7 of Part XIB. Corporate criminal responsibility is dealt with in other sections of the Trade Practices Act.

Under subsection 75AY(4) it is an offence for a person to intentionally or recklessly provide false or misleading information to the ACCC in respect of requests for information regarding its role in monitoring prices. **Item 2** removes the words 'intentionally or recklessly'. As the provision is presently worded, recklessness appears to apply to the physical element of conduct in the offence. Under the *Criminal Code*, intention is the fault element for conduct. The removal of the word 'recklessly' from the provision harmonises it with the *Criminal Code*. Although the word 'intentionally' is also omitted it will apply by default to the elements of conduct in the offence by operation of the *Criminal Code*. Recklessness will apply to physical elements of circumstance in the offence. **Items 9–15** remove the words 'intentionally or recklessly' from a number of other offence provisions in the Trade Practices Act.

Existing section 152DG prohibits a person appearing before the ACCC from knowingly giving false or misleading evidence. **Item 22** removes the word 'knowingly'. Under Chapter 2 of the *Criminal Code* knowledge is not applied to the physical element of conduct. Removal of the word 'knowingly' 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' the *Criminal Code's* default fault elements apply to each

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physical element of the offence. These default fault elements are intention in the case of conduct, and recklessness in the case of circumstance or result.

Existing sections 151BI and 151BS of the Trade Practices Act create offences relating to supplying false or misleading information. **Items 6 and 7** repeal these sections on the basis that they will be replaced by section 137.1 of the *Criminal Code* that deals with the giving of false or misleading information.

A number of amendments – see, for example **items 17–20, 27, 29, 30, 31, 33, 34** remove the defence of ‘reasonable excuse’ from the offence provisions and recreate it in separate subsections. The reason for doing so is to ensure that the words are interpreted as words of defence and not as an element of the particular offence (which would have to be disproved in the negative by the prosecution). The new provisions include an explanatory note indicating that the defendant bears an evidential burden in proving the defence.

For example section 155 empowers the ACCC, in connection with its enforcement of the Act generally, to require the production of information and documents. Subsection 155(5) establishes offences where a person refuses or fails to comply with this requirement. **Items 23 and 24** recreate and relocate the defence, (ie that the person is not capable of complying) in a **new subsection 155(5A)**. This is to ensure that the defence is not interpreted as an element of the offence (which would have to be disproved in the negative by the prosecution) The new provision includes an explanatory note indicating that the defendant bears an evidential burden in proving the defence.

Items 25, 28, 32, 36, 37 and 38 make technical amendments to several sections to replace 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, the new penalties generally represent an increase of 10 per cent over the current maximum penalties.

Schedule 3—*Taxation Administration Act 1953*

Item 2 amends the *Taxation Administration Act 1953* (TA Act) by inserting **new section 2A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act. However some provisions specifically exclude or adjust the operation of Part 2.5 and Part 2.4 of the *Criminal Code*.²⁴

Section 2 of the TA Act is a definition section. **Item 1** inserts a definition of ‘engage in conduct’ to clarify that conduct includes both acts and omissions.

Items 28, 30, 51, 94, 102, 104–106 identify certain offences as strict liability offences. For example subsection 8D(1) provides that it is an offence for a person, unless incapable, to refuse to answer questions or to produce relevant documents when attending before the Taxation Commissioner. **New subsection 8D(1A)** states that this is a strict liability offence. In a strict liability offence, the prosecution does not have to prove fault elements. However, the defendant has a defence of mistake of fact as result of the application of the

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Criminal Code. In this strict liability offence, the defendant has an additional defence of being incapable of answering questions. **Item 28** relocates this defence to **new subsection 8D(1B)** and adds a note stating that the defendant bears an evidential burden in proving it. According to the Explanatory Memorandum the New South Wales Court of Appeal decision in *Griffin & Elliott v Marsh* 94 ATC 4354 established that the offence in Section 8D is a strict liability offence. The Explanatory Memorandum also suggests that the remaining offences are identified as strict liability offences because of the language of the provisions, the fact that they are summary offences, they have relatively small penalties, and many would be difficult to enforce if fault elements applied.²⁵

Items 3–5, 8, 11–12, 14–15, 25–30, 63–67, 69–71, 84–91 amend a number of provisions in the TA Act in order to separate the defences or exceptions to the offence from the actual offence. For example section 3C of the TA Act deals with secrecy. Existing subsection 3C(2) provides that an officer or former officer must not make a record of or disclose any information regarding another person other than for the purposes of the Act or in the performance of the officer's duties. **Items 3 and 4** recreate and relocate the defences (ie that the disclosure was for the purposes of the Act or in the performance of the officer's duties) so that they are not interpreted as an element of the offence (which would have to be disproved in the negative by the prosecution). A note to **new subsection 3C(2A)** confirms that the defendant bears an evidential burden in relation these defences.

Similarly, existing subsection 3D(15) deals with offences by employees and former employees of the Police Force in relation to divulging or communicating information. **Item 5** recreates and relocates the defences to these offences (for example that the disclosure was for the purposes of the employee's work) so that they are not interpreted as elements of the offence. A note confirms that the defendant bears an evidential burden in relation these defences.

Items 9, 10, 13, 35, 39, 41, 43–45, 47, 48, 58, 61, 67 and 93 make consequential amendments to take account of these rewritten and renumbered provisions.

Items 18–23, 32, 33, 37, 76, 77 and 80 make amendments which are consequential to the application of Chapter 2 of the *Criminal Code*. They remove references 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 relevant provisions of the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* commence.²⁶

Section 8P creates an offence of knowingly making false or misleading statements to a taxation officer and section 8N creates an offence of recklessly making false or misleading statements to a taxation officer. **Items 49 and 50** repeal these sections and reword the offences in **new section 8N** in an attempt to harmonise them with the *Criminal Code*. The word 'knowingly' is removed and the new provision more clearly defines the physical element of conduct (ie making a statement) and the physical element of circumstance (ie

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the statement was false or misleading). According to the *Criminal Code* the fault element of intention will apply to conduct and the fault element of recklessness will apply to circumstance. **Items 17, 31, 34, 36, 52–54, 57 and 60** make consequential amendments in order to remove references to section 8P from the TA Act. Additionally, **items 17, 54, 57, 59, 60, 62, 73 and 79** make amendments to insert references to Division 136 or 137 of the *Criminal Code*. These Divisions create offences for making false and misleading statements in applications and documents and may be used as an alternative to prosecuting under section 8N of the TA Act.

Subsection 8C(1) establishes offences where a person, who is capable of complying, refuses or fails to comply with certain requirements under taxation law. **Items 25 and 26** recreates and relocates the defence, (ie that the person is not capable of complying) in a **new subsection 8C(1B)**. This is to ensure that the defence is not interpreted as an element of the offence (which would have to be disproved in the negative by the prosecution). The new provision includes an explanatory note indicating that the defendant bears an evidential burden in proving this defence. Additionally **item 26** inserts **new subsection 8C(1A)** stating that the offences in subsection 8C(1) are absolute liability offences. According to the Explanatory Memorandum this provision was held to be an offence of absolute liability by the Supreme Court of South Australian in *Ambrose v Edmonds-Wilson* (1988) 19 ATR 1217. Under the *Criminal Code* provisions that create an offence of absolute liability must expressly state that they are absolute liability offences.

Subsection 6.2(2) of the *Criminal Code* provides that if absolute liability applies to a particular physical element of an offence, then no fault elements apply to that physical element. The defence of mistake of fact (available in cases of strict liability) is not available. However, this does not prevent other defences being made available.²⁷ In relation to subsection 8C(1), the defence of a person not being capable of complying is available.

Item 38 repeals and rewords existing subsection 8K(1) which deals with offences of making false or misleading statements or omissions to a taxation officer. The new provision separates statements and omissions and deals with them differently. Under **new subsection 8K(1)** a person is guilty of an offence if the person makes a statement to a taxation officer and the statement is false or misleading. The new wording more clearly identifies the physical element of conduct (ie the making of the statement) and the physical element of circumstance (that the statement was false or misleading). Additionally **new subsection 8K(1A)** states that absolute liability applies to the circumstance that the statement is false or misleading. While a defence of mistake of fact is normally not available where absolute liability applies, the *Criminal Code* does not prevent other defences from being available. In this case, subsection 8K(2) provides a defence to this offence if the person proves that he did not know or could not reasonably be expected to know the statement was false or misleading. The prosecution must still prove the fault element of intention in relation to the physical element of conduct in the offence (ie the making of the statement). Under **new subsection 8K(1B)** a person is guilty of an offence if that person makes a statement to a taxation officer and the person omits

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any matter or thing from the statement and the statement is misleading because of the omission. **New subsection 8(1C)** provides that absolute liability applies to two physical elements of this offence. Firstly, the conduct that the person omits and secondly, the circumstance that the statement is misleading. Again, subsection 8K(2) provides a defence to this offence if the person proves that he did not know or could not reasonably be expected to know the statement was false or misleading.

The Explanatory Memorandum suggests that the amendments to section 8K harmonise the current law with the Criminal Code and do not create a new offence.²⁸

Item 42 makes similar amendments to section 8L which deals with record keeping offences.

It is an offence under section 8Q of the TA Act for a person to recklessly or knowingly keep incorrect accounting records. **Item 8** re-structures and re-words the constituent elements of the offence contained in section 8Q so that the physical elements of conduct, result and circumstances are specified. **New paragraph 8Q(1)(a)** contains the physical element of circumstance — that the person is required to keep accounts or records, **new paragraph 8Q(1)(b)** contains a physical element of conduct — that the person keeps the records and **new paragraph 8Q(1)(c)** contains the physical element of result — that the accounts do not correctly record the matters to which they relate. **Item 8** also removes the phrase 'recklessly or knowingly'. This is because the *Criminal Code* does not recognise the fault elements of recklessly and knowingly in relation to conduct. 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. However **new subsection 8Q(3)** creates an exception to these default rules and specifies that strict liability will apply to the circumstance, that the person is required to keep accounts or records.

Under section 8XA it is an offence for a person to knowingly take action to obtain information about another person's affairs from records held by the Taxation Commissioner. **Item 68** omits the words 'knowingly take action for the purpose of' and replaces them with the words 'take action with the intention'. In the offence as it stands, the fault element of knowledge applies to physical elements which involve conduct. Under the *Criminal Code*, the fault element of intention applies to conduct while knowledge applies to circumstances or results. Therefore, to harmonise the provision with the *Criminal Code*, **item 68** rewords it to read that it is an offence to 'intentionally' take action to obtain information about another person's affairs.

At the end of a number of subsections a note is to be added to clarify that the defendant bears a legal burden of proof in relation to the defences in these subsections. A legal burden of proof is normally apparent from the wording used. For example in subsection 8K(2) discussed above²⁹, the use of the phrase 'if the person proves' indicates the defendant has a legal burden. 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 46, 72 and 96—101** make similar amendments.

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Schedule 4—Amendments of other taxation legislation

Part 1—*Development Allowance Authority Act 1992*

Item 1 amends the Development Allowance Authority Act (DAA Act) by inserting **new section 2A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

Under existing subsection 114(1) of the DAA Act it is an offence for a person to disclose commercial-in-confidence information except under certain conditions. **Item 2** recreates and relocates the defences (for example that the disclosure was for the performance of duty) so that they are not interpreted as part of the offence. A note to **new subsection 114(1A)** confirms that the defendant bears an evidential burden in relation these defences (**item 2**).

Part 2—*Diesel and Alternative Fuels Grants Scheme Act 1999*

The Diesel and Alternative Fuels Grants Scheme Act (DAFGS Act) post-dates the passage of the Criminal Code Act. Section 57 of the DAFGS Act already provides that Chapter 2 of the *Criminal Code* applies to all offences under the Act.

Section 21 deals with the offence of making false and misleading statements in respect of fuel grant entitlements. A note to this section states that recklessly making a false statement can be an offence against section 8N of the *Taxation Administration Act 1953*, and knowingly making a false statement can be an offence against section 8P of that Act. **Item 3** makes a consequential amendment to remove the reference to section 8P of the Taxation Administration Act. This is because section 8P is to be repealed by **item 50, Schedule 3** of the Bill.³⁰ **Items 3–5** make similar amendments to section 22, subsection 42(2) and paragraph 52(2)(d). Additionally **items 5 and 6** make amendments to insert references to Division 136 or 137 of the *Criminal Code*. These Divisions create offences for false and misleading statements in applications and documents and may be used as an alternative to prosecuting under section 8N of the Taxation Administration Act.

Part 3—*Distillation Act 1901*

Item 7 amends the Distillation Act by inserting **new section 9A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

Item 9 inserts **new subsection 11(4)** stating that the offence of using an illicit still is a strict liability offence. Consequently the prosecution does not have to prove fault elements but the defendant has a defence of mistake of fact.

Section 54 creates offences relating to distilling and fortifying wine and spirits. **Item 10** repeals this section and rewords it to create two separate offences—one related to distilling spirits and the other to fortifying wine. Additionally **item 10** removes the phrase 'for the purpose of' and replaces it with the phrase 'to achieve the result of' in **new subsection**

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54(2). The Explanatory Memorandum states that the replacement phrases remove ambiguity and clarifies the fault element in the offence.³¹

Item 11 omits the words ‘without lawful excuse’ from offences against section 74 of the Distillation Act. Under subsection 74(5) it is an offence for a person to be found without lawful excuse in any place where distillation is being illegally carried on. The *Criminal Code* will contain a general defence of lawful authority following its amendment by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*. This defence will apply to all offences against Commonwealth law and thus make redundant the ‘without lawful excuse’ element presently found in subsection 74(5).

Part 4—Excise Act 1901

Item 12 applies Chapter 2 of the *Criminal Code* to all offences against the Excise Act. However, the application of Chapter 2 is modified in the case of ‘Excise Prosecutions’.³² In particular, Part 2.6 (dealing with burden and standard of proof) will not apply to Excise Prosecutions. Excise Prosecutions are sometimes dealt with as civil not criminal matters so the application of this Part of the *Criminal Code* is not appropriate and prosecutions will be ‘... left to the existing law’.³³ Nor will Part 2.5 be applied to Excise Prosecutions because the Excise Act already has its own regime for corporate criminal responsibility.

Items 13–18 and 28–30 insert new provisions into the Excise Act to identify certain offences as strict liability offences. An example is **new subsection 51(2)** which identifies the offence by a licensed manufacturer of failing to comply with directions from the Collector of Customs as a strict liability offence. In a strict liability offence, the prosecution does not have to prove fault elements. However, the defendant has a defence of mistake of fact as a result of the application of the *Criminal Code*. According to the Explanatory Memorandum these offences are identified as strict liability offences because they all have small penalties, none is punishable by imprisonment, many are regulatory offences and because of the particular language and wording used in describing the offences.³⁴ **Items 28–29** remove notes stating that certain offences are strict liability offences. According to the *Criminal Code* a strict liability offence must be identified as such in a provision, rather than a note.

Items 21–30 make numerous amendments to section 120, an offence provision of the Excise Act. In particular under paragraph 120(1)(vc) it is an offence for a person who is not entitled, to knowingly or recklessly obtain or retain diesel fuel rebate under section 78A. **Item 21** repeals and replaces the paragraph by removing the word ‘knowingly’ and clarifying that the fault element of intention applies to the conduct of obtaining the rebate and the fault element of recklessness applies to the physical element of circumstance—the fact that the person is not entitled to the rebate.

Similarly under paragraph 120(1)(vd) it is an offence for a person who is not entitled, to knowingly or recklessly obtain or retain diesel fuel rebate under section 164 of the Customs Act. **Item 22** repeals and replaces the paragraph by removing the word ‘knowingly’ and clarifying that the fault element of intention applies to the conduct of

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obtaining the rebate and the fault element of recklessness applies to the physical element of circumstance—the fact that the person is not entitled to the rebate.

Items 24 and 25 apply absolute liability to the physical element of circumstance in **new paragraphs 120(1)(vc) and 120(1)(vd)**—the lack of entitlement to rebates under sections 78A and 164 respectively. Absolute liability means that the prosecution does not have to prove a fault element for a particular physical element of an offence. Thus in this case, the prosecution does not have to prove that the defendant turned his or her mind to the letter of the law in sections 78A and 164.

Items 26 and 27 make amendments to subsections 120(4A) and 120(5) to clarify which fault elements apply to the relevant physical element of the offences. The fault element of intention applies to the conduct of entering clean fuel for home consumption as designated fuel and the fault element of recklessness applies to the circumstance that it is clean fuel. **Items 20 and 31** make similar amendments to clarify fault elements in section 118 and paragraph 124(1)(c) respectively.

Section 144 of the Excise Act deals with averments (ie an allegation or a complaint). **Item 32** repeals and replaces subsection 144(4) to comply with section 13.6 of the *Criminal Code*. **New subsection 144(4)** provides that the prosecution must not use an averment to allege intention or any other fault element or must not use an averment if the offence is punishable by imprisonment or is indictable.

Part 5—Fringe Benefits Tax Assessment Act 1986

Item 33 amends the Fringe Benefits Tax Assessment Act (FBTA Act) by inserting **new section 2A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

Existing section 70D of the FBTA Act requires a tax agent to pass on to a taxpayer a copy of a notice of assessment. Contravention of this obligation incurs a penalty of 30 penalty units. **Item 36** inserts **new subsection 70D(2)** stating that this is a strict liability offence. Accordingly, the prosecution does not have to prove fault elements. However, the defendant has a defence of mistake of fact as a result of the application of the *Criminal Code*. **Item 39** makes a similar amendment to section 122.

Subsection 121(2A) makes it an offence for a tax agent, to allow a person to prepare a tax return on his behalf except when under the tax agent's supervision. **Item 38** recreates and relocates the defence [ie that the return was prepared under the agent's supervision] so that it is not interpreted as an element of the offence. A note to **new subsection 121(2A)** confirms that the defendant bears an evidential burden in relation to this defence. **Items 34 and 35** make similar amendments to subsection 5(3), a secrecy provision of the FBTA Act.

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Part 6—Income Tax Assessment Act 1936

Item 41 amends the *Income Tax Assessment Act 1936* (ITA Act 1936) by inserting **new section 7B** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

Items 60, 63, 64, 72–74, 76, 79, 80, 85–88 identify certain offences as strict liability offences. An example of a strict liability offence is subsection 102AAZG(2) which makes it an offence for a taxpayer who pays tax on a trust, to fail to keep records relating to the trust. In a strict liability offence, the prosecution does not have to prove fault elements. However, the defendant has a defence of mistake of fact as a result of the application of the *Criminal Code*. According to the Explanatory Memorandum these offences are identified as strict liability offences because they all have small penalties, none is punishable by imprisonment, many of them are regulatory in nature, and many would be difficult to enforce if fault elements applied.³⁵

Items 42–44, 46–51, 56–59, 77, 78, 89 and 90 amend a number of provisions in the ITA Act 1936 in order to separate the defences or exceptions to the offence from the actual offence. For example existing subsection 16(2) provides that a officer must not, other than in performance of duty, make a record of or disclose personal information. **Item 43** recreates and relocates the defence (ie that the disclosure was in performance of duty) so that it is not interpreted as an element of the offence. A note to **new subsection 16(2A)** confirms that the defendant bears an evidential burden in relation this defence. **Items 45, and 52–55** make consequential amendments to take account of these written and renumbered provisions.

Items 67, 68, 70 and 71 make amendments which are consequential on the application of Chapter 2 of the *Criminal Code*. They remove references 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 Schedule 51 of the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* commences.³⁶

Items 65, 66, 69 and 91 make consequential amendments to remove references to section 8P of the *Taxation Administration Act 1953*. **Items 65 and 69** also insert references to Division 136 and 137 of the *Criminal Code*. The rationale for these amendments is discussed above at page 11 under the heading *Part 2—Diesel and Alternative Fuels Grants Scheme Act 1999*.

Part 7—Income Tax Assessment Act 1997

Item 101 amends the *Income Tax Assessment Act 1997* (ITA Act 97) by inserting **new section 905–5** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

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Items 92–96 identify certain offences as strict liability offences. For example, subsection 121-20(5) requires a person to reconstruct appropriate records for capital gains tax purposes. Contravention of this requirement incurs a penalty of 30 penalty units. **New subsection 120-20(6)** identifies this as a strict liability offence. In a strict liability offence, the prosecution does not have to prove fault elements. However, the defendant has a defence of mistake of fact as a result of the application of the *Criminal Code*.

Section 387-205 provides for an offence where the previous owner of a horticultural plant fails, without reasonable excuse, to comply with a notice to provide certain information to the current owner. **Items 97 and 98** recreate and relocate the defence of reasonable excuse so that it is not interpreted as an element of the offence. A note to **new subsection 387-205(2A)** confirms that the defendant bears an evidential burden in relation this defence. **Items 99 and 100** make similar amendments.

Part 8—Petroleum Resource Rent Tax Assessment Act 1987

Item 102 amends the Petroleum Resource Rent Tax Assessment Act (PRRTA Act) by inserting **new section 1A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

Section 45B relates to offences of failing to provide transfer notices that deal with company transfers of exploration expenditure. **Item 108** inserts subsection 45A(5B) which identifies section 45B as a strict liability offence. This means the prosecution does not have to prove fault elements. A defendant will have two defences to such an offence — a defence of mistake of fact³⁷ and a defence of reasonable excuse (**item 107**). Additionally, **items 109–110** recreate and relocate the defence of reasonable excuse so that it is not interpreted as an element of the offence. **Items 111-113** also identify certain offences as offences of strict liability.

Existing subsection 17(3) of the PRRTA Act provides that a person must not, other than for the purposes of the Act or in performance of duty, make a record of or disclose personal information. **Item 104** recreates and relocates the defence (ie that the disclosure was for the purposes of the Act or in performance of duty) so that it is not interpreted as an element of the offence. A note to **new subsection 17(3A)** confirms that the defendant bears an evidential burden in relation this defence. Similarly **items 106–107** relocate the defence of reasonable excuse to **new subsection 45A(5A)**.

Part 9—Product Grants and Benefits Administration Act 2000

The *Product Grants and Benefits Administration Act 2000* (PGBA Act) post-dates the passage of the *Criminal Code* Act. Section 54 of the PGBA Act already provides that Chapter 2 of the *Criminal Code* applies to all offences under the Act.

Items 116–118 make consequential amendments to remove references to section 8P of the *Taxation Administration Act 1953*. The rationale for these amendments is discussed above

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at page 11 under the heading Part 2—*Diesel and Alternative Fuels Grants Scheme Act 1999*.

Part 10—*Spirits Act 1906*

Item 119 amends the Spirits Act by inserting **new section 5** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

Under paragraph 15(1)(b) of the Spirits Act it is an offence for a person to refine or distil methylated spirits other than as allowed by regulations. **Items 120 and 121** recreate and relocate the defence (ie that the refining or distillation was allowed by regulations) so that it is not interpreted as an element of the offence. A note to **new subsection 15(2)** confirms that the defendant bears an evidential burden in relation this defence.

Under subsection 16(1) it is an offence for a person to sell or possess illicit methylated spirits. Subsection 16(2) provides a defence if the defendant did not knowingly sell or possess the illicit spirits. **Item 122** inserts a note to clarify that the defendant bears a legal burden in proving the defence. There is a minor discrepancy with the Explanatory Memorandum which indicates this is an evidential burden.³⁸

Part 11—*Superannuation Guarantee (Administration) Act 1992*

Item 123 amends the Superannuation Guarantee (Administration) Act (SGA Act) by inserting **new section 5C** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

It is an offence under subsection 79(6) for an employer, without reasonable excuse, to fail to keep records as required according to section 79 of the SGA Act. **Item 128** specifies that this is a strict liability offence. A defendant will have two defences to such an offence. A defence of mistake of fact (available as a result of the application of the *Criminal Code*) and a defence of reasonable excuse. Additionally, **items 126–127** recreate and relocate the defence of reasonable excuse so that it is not interpreted as an element of the offence.

Item 124 makes a similar amendment. It repeals and rewords subsection 45(2) in order to recreate and relocate the defence of reasonable excuse to the offence of divulging confidential information. The note to **new subsection 45(2A)** confirms that the defendant bears an evidential burden in relation to this defence.

Part 12—*Taxation (Interest on Overpayments and Early Payments) Act 1983*

Item 129 amends the Taxation (Interest on Overpayments and Early Payments) Act (TIOEP Act) by inserting **new section 3B** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

Existing subsection 8(2) of the TIOEP Act provides that a person must not, other than for the purposes of the Act or in performance of duty, make a record of or disclose confidential information. **Item 131** recreates and relocates the defence (ie that the

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disclosure was for the purposes of the Act or in performance of duty) so that it is not interpreted as an element of the offence. A note to **new subsection 8(2A)** confirms that the defendant bears an evidential burden in relation this defence.

Part 13—Tobacco Charges Assessment Act 1955

Item 132 amends the Tobacco Charges Assessment Act (TCA Act) by inserting **new section 7A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

Under existing subsection 10(2) of the TCA Act it is an offence for an officer to divulge personal information other than in the performance of duty. **Items 133 and 134** recreate and relocate the defence (ie that the disclosure was in the performance of duty) so that it is not interpreted as an element of the offence. A note to **new subsection 10(2A)** confirms that the defendant bears an evidential burden in relation this defence (**item 135**).

Item 136 inserts **new subsection 40(2B)**. It specifies that the offence under subsection 40(2A) of failing to appoint a public officer within a certain period is a strict liability offence. In a strict liability offence, the prosecution does not have to prove fault elements. However, the defendant has a defence of mistake of fact as a result of the application of the *Criminal Code*.

Part 14—Wool Tax (Administration) Act 1964

Item 137 amends the Wool Tax (Administration) Act (WTA Act) by inserting **new section 7A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

Items 141–149, 153, 155, 156, 159, 161 and 162 identify certain offences as strict liability offences. An example is subsection 13(1) which makes it an offence for a wool-broker to sell wool without being registered to do so. In a strict liability offence, the prosecution does not have to prove fault elements. However, the defendant has a defence of mistake of fact as a result of the application of the *Criminal Code*. Additionally, in the case of some strict liability offences, the amendments recreate additional defences. Examples are defences of permission and consent (**items 153, 155 and 158**). According to the Explanatory Memorandum these offences are identified as strict liability offences because they all have small penalties, none is punishable by imprisonment, many of them deal with the regulation of the wool tax scheme, and many would be difficult to enforce if fault elements applied.³⁹

Items 138–139, 150–155 and 157–158 amend a number of provisions in the WTA Act to ensure that the defences and the applicable burden of proof imposed on the defendant are stated clearly. The provisions in question currently contain offences and defences in the same section or subsection. For example existing subsection 8(2) provides that an officer must not, other than in the performance of his duty, make a record of or disclose any personal information acquired by reason of his employment. **Items 138–139** recreate and relocate the defence (ie that the disclosure was for the performance of his duty) so that it is

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not interpreted as an element of the offence. A note to **new subsection 8(2A)** confirms that the defendant bears an evidential burden in relation this defence.

Concluding Comments

Strict Liability Offences

The Bill makes numerous amendments stating that certain offences are to be interpreted as strict liability offences. The Senate Standing Committee for the Scrutiny of Bills (the Committee') has drawn the Senate's attention to these types of provisions in other Bills that form part of the Criminal Code harmonisation project and has asked the relevant Ministers to confirm that they create no new offences of strict liability.⁴⁰

As discussed above, a strict liability offence is one without a fault element, however a defence of mistake of fact is available.⁴¹

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 the Explanatory Memorandum points to the reasons why the offence has been interpreted as one of strict liability. The Explanatory Memorandum suggests that these offences all have small penalties, none is punishable by imprisonment, many are regulatory offences and the particular language and wording used in describing the offences indicates strict liability.⁴² In one case the Explanatory Memorandum also suggests that the particular offence has been interpreted by the courts as a strict liability offence⁴³.

The Committee has also drawn the Senate's attention to amendments which specified that particular physical elements of offences attracted absolute liability.

The tests adopted by courts to decide whether to rebut a presumption that an offence contains fault elements may be useful here. Courts examine such things as 'the words of the statute creating the offence, the subject matter with which it deals and whether the enforcement of the statute would be assisted if it imposed strict liability. [They] will, if possible, avoid the result that no mental state is an element of the offence'.⁴⁴

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Endnotes

- 1 Much of the Background is extracted from the [Bills Digest](#) for the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000 (*Bills Digest No 96, 2000-2001*).
- 2 The original timetable was that Chapter 2 would apply to pre-existing 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.
- 3 Second Reading Speech, Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 2) 2001, *Parliamentary Debates (Hansard)*, House of Representatives, 5 April 2001, p. 26526.
- 4 Second Reading Speech, Criminal Code Bill 1994, *Parliamentary Debates (Hansard)*, Senate, 30 June 1994, p. 2381.
- 5 *Halsbury's Laws of Australia*, 130–7950.
- 6 Subsection 6.1(1).
- 7 Subsection 6.1(2).
- 8 Paragraph 6.1(1)(b).
- 9 Paragraph 6.1(2)(b).
- 10 Subsection 6.1(3).
- 11 Halsburys, op.cit, 130-7965.
- 12 Subsection 6.2(1).
- 13 Subsection 6.2(2).
- 14 Paragraphs 6.2(1)(b) and 6.2(20)(b).
- 15 Matthew Goode, 'The Modern Criminal Code Project', *Australian Law Librarian*, 5(4), December 1997, pp. 267–76 at p. 267.
- 16 As amended by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*.
- 17 Except in the case of strict or absolute liability offences.
- 18 Goode, op.cit, p. 268.
- 19 Sections 5.2, 5.3, 5.4 and 5.5.
- 20 Section 5.6.
- 21 Subsection 5.1(1).
- 22 Subsection 5.1(2).
- 23 ie 24 May 2001.
- 24 Part 2.5 of the *Criminal Code* deals with corporate criminal responsibility. **Item 82**, Schedule 3, excludes Part 2.5. Part 2.4 of the *Criminal Code* deals with extensions of criminal

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responsibility. **Items 96-101** add notes to some subsections to clarify that certain defences do not apply in relation to offences under Part 2.4 of the *Criminal Code*.

25 *Explanatory Memorandum*, p. 16

26 15 December 2001.

27 Subsection 6.2(3).

28 *Explanatory Memorandum*, pp. 16–17.

29 Pages 10–11 of the Digest.

30 See p. 9 of this Digest.

31 *Explanatory Memorandum*, p. 27

32 An ‘Excise Prosecution’ is defined in section 133 of the Excise Act as proceedings by the CEO for the recovery of penalties under any Excise Act; for the recovery of pecuniary penalties under the *Customs Act 1901* for contraventions relating to diesel fuel rebate Customs provisions; or for the condemnation of goods seized as forfeited.

33 *Explanatory Memorandum*, p. 43.

34 *ibid.*, p. 28.

35 *ibid.*, p. 32.

36 15 December 2001.

37 This defence is available as a result of the application of the *Criminal Code*.

38 *Explanatory Memorandum*, p. 38.

39 *ibid.*, p. 42.

40 For example see the Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, no. 1 of 2001, p. 21.

41 A more detailed explanation of strict liability is found above at pp. 2–3.

42 *Explanatory Memorandum*, p. 28.

43 Section 8D of the TA Act. See page 8 of this Digest.

44 Review of Commonwealth Criminal Law, *op.cit.*, p. 27. Note also that the *Explanatory Memorandum* states that subsection 8C(1) of the TA Act has been interpreted by the Supreme Court of South Australia as an absolute liability offence provision. See above at p. 10.

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