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No. 20 2001–02

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Amendment (Application of Criminal Code) Bill
2001

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

Bills Digest
No. 20 2001-02

Agriculture, Fisheries and Forestry Legislation Amendment
(Application of Criminal Code) Bill 2001

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Law and Bills Digest Group
20 August 2001

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Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Bill 2001

Date Introduced: 27 June 2001

House: House of Representatives

Portfolio: Agriculture, Fisheries and Forestry

Commencement: On the 28th day after the day on which Act receives Royal Assent.

Purpose

To revise criminal offence provisions in legislation administered by agencies within the Agriculture, Fisheries and Forestry portfolio, to harmonise them with the principles of criminal responsibility as set out 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.'¹ 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'.² 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 Territory. In other words, a court sitting in a common law jurisdiction such as New South

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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.³

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 Committee⁴ (MCCOC) in discussion paper and final (report) form.⁵ 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 offences under the *Crimes Act 1914*) or by the law of the State or Territory in which

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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.'⁶

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'⁷ and 'mens rea'.⁸ 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.⁹ 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.¹⁰

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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.¹¹ 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'.¹² 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.¹³ 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.¹⁴

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.¹⁵

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 a fault element or elements where previously no such proof was required.

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In addition to the present Bill, a number of other portfolio bills have been introduced into the Parliament as part of the same process. A number of these have already been enacted.¹⁶ Those which remain before the Parliament (at the time of writing) include the *Finance and Administration Legislation Amendment (Application of Criminal Code) Bill (No. 1) 2001*, *Migration Legislation Amendment (Application of Criminal Code) Bill 2001*, *Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 2) 2001*, *Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 3) 2001*, and the *Reconciliation and Aboriginal and Torres Strait Islander Affairs Legislation Amendment (Application of Criminal Code) Bill 2001*. 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.

Summary of amendments proposed by the Bill

Among other things, the amendments in this portfolio Bill propose the following types of changes:

- Applying the *Criminal Code* to all offence provisions to certain legislation within the Agriculture, Fisheries and Forestry portfolio
- However, a number of amendments proposed exclude the operation of the Code's principles of criminal responsibility where a particular statute has its own regime for corporate offences
- Deleting references in these Acts to certain *Crimes Act 1914* general offence provisions (sections 7, 7A and 86) which duplicate provisions of the *Criminal Code*
- Identifying existing offences as offences of strict liability or identifying specified physical elements of offences as strict liability elements where appropriate
- Re-organising and reconstructing offence provisions by identifying their constituent physical elements in order to clarify defences. 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, and
- Repealing certain offence provisions that duplicate general provisions in the *Criminal Code*.
- 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.

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Main Provisions

Application of amendments

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

Amendments to the *Agricultural and Veterinary Chemical Products (Collection of Interim Levy) Act 1994*

The Agricultural and Veterinary Chemical Products (Collection of Interim Levy) Act 1994 (Interim Levy Act) provides for the assessment and collection of levies imposed on agricultural and veterinary chemicals. It forms part of a package of Acts that collectively provide 'interim' cost recovery arrangements for the National Registration Scheme for Agricultural and Veterinary Chemicals - a uniform scheme for the evaluation, registration and control of agricultural and veterinary chemicals in Australia. The operation of this registration scheme is governed by the provisions of the *Agricultural and Veterinary Chemicals (Administration) Act 1992* and administered by the National Registration Authority for Agricultural and Veterinary Chemicals ('NRA'). The NRA is the agency responsible for the assessment and registration of agricultural and veterinary chemical products prior to sale and their regulation up to and including the point of retail sale.

When the NRA was established in June 1993, it was largely funded by the Commonwealth. In line with government policy targets, full cost recovery was achieved in the 1995–96 financial year. The costs of running the NRA's National Registration Scheme are recovered through fees and levies paid by the agvet chemicals industry. The NRA recovers most of its costs through collecting: application fees; annual registration renewal fees; and levies on disposals of registered products. 'Disposals' refers to Australian products sold, used or given away in Australia by the manufacturer; and imported products sold, used or given away in Australia by the importer.

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 Interim Levy Act. Second, they replace references to certain Crimes Act provisions. Third, they clarify the defence of reasonable excuse presently contained in some sections of the Act. Fourth, they identify a number of offences as offences of strict liability.

Details of proposed amendments

Item 1 amends the Interim Levy Act by removing references in the *Interim Levy Act* to sections of the *Crimes Act 1914* which deal with ancillary offences and replacing them with references to sections in the *Criminal Code* dealing with these matters. The Crimes

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Act provisions will ultimately be repealed on 15 December 2001. The relevant sections of the *Criminal Code* commenced operation in May 2001 with the commencement of the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001*.¹⁷

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

Items 3-10 re-structure offence provisions in order to clarify their associated defence of 'reasonable excuse'. At present there is a risk that the provision could be interpreted as an element of the offence, which would have to be proved by the prosecution. The relocation of the element of 'reasonable excuse' is necessary to ensure that it is clear that reasonable excuse is a defence.

The relevant offence provisions are contained in subsections 12(2), 17(2), 18(4) and 21(3) of the *Interim Levy Act*. 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 4, 6, 8, 10, 11 insert new subsections which specify that particular offences are offences 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.¹⁸

Item 4 inserts **new subsection 12(2B)** which states that a subsection 12(2) offence is an offence of strict liability. This is an offence of failing to comply with a requirement of the NRA to calculate the total leviable value in respect of leviable disposals of a chemical product for a year and the amount of levy payable, and to notify the NRA of the results and basis of the calculations.

Item 6 inserts **new subsection 17(4)** which states that a subsection 17(2) offence is an offence of strict liability. This is an offence of failing to comply with a requirement from the NRA for information regarding the disposal (ie., sale or use) of a leviable product. In particular it is an offence in these circumstances to refuse or fail to provide information relating to the importation, manufacture or disposal of a product, necessary to determine the total annual leviable value for that product.

Item 8 inserts **new subsection 18(6)** which states that a subsection 18(4) offence is an offence of strict liability. This is an offence of a retired inspector failing to return an identity card.

Item 10 inserts **new subsection 21(5)** which states that a subsection 21(3) offence is an offence of strict liability. This is an offence of refusing or failing to comply with a requirement to give information or produce documents requested by an inspector.

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Item 11 inserts **new subsection 34(2)** which states that a subsection 34(1) offence is an offence of strict liability. This is an offence of failure to keep and/or retain records relating to the importation, manufacture or disposal of a leviable product.

Amendments to the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994*

This Act provides for the assessment and collection of levies imposed on agricultural and veterinary chemicals.

It forms part of a package of six Acts that collectively provide cost recovery arrangements for the National Registration Scheme for Agricultural and Veterinary Chemicals - a uniform scheme for the evaluation, registration and control of agricultural and veterinary chemicals in Australia.

The NRA imposes levies on disposals of registered agvet chemical products through three Acts: *Agricultural and Veterinary Chemical Products Levy Imposition (General) Act 1994*, *Agricultural and Veterinary Chemical Products Levy Imposition (Excise) Act 1994*, and *Agricultural and Veterinary Chemical Products Levy Imposition (Customs) Act 1994*. Levies are collected under the *Agricultural and Veterinary Chemicals Products (Collection of Levies) Act 1994*. The Act's Regulations prescribe the levy rates, which are based on a product's disposals for each calendar year. 'Disposals' refers to Australian products sold, used or given away in Australia by the manufacturer; and imported products sold, used or given away in Australia by the importer.

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 Act. Second, they replace references to certain Crimes Act provisions. Third, they clarify the defence of reasonable excuse presently contained in some sections of the Act. Fourth, they identify a number of offences as offences of strict liability.

Details of proposed amendments

Item 12 amends the *Agricultural and Veterinary Chemical Products (Collection of Levy) Act 1994* (Levy Act) by removing references in the Levy Act to sections of the *Crimes Act 1914* which deal with ancillary offences and replacing them with references to sections in the *Criminal Code* dealing with these matters. The Crimes Act provisions will ultimately be repealed on 15 December 2001. The relevant sections of the *Criminal Code* commenced operation in May 2001 with the commencement of the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001*.¹⁹

Item 13 amends the *Levy Act* by inserting **new section 5A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

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Items 14, 16, 18 re-structure offence provisions in order to clarify their associated defence of ‘reasonable excuse’. At present there is a risk that the provision could be interpreted as an element of the offence, which would have to be proved by the prosecution. The relocation of the element of ‘reasonable excuse’ is necessary to ensure that it is clear that reasonable excuse is a defence.

The relevant offence provisions are contained in subsections 15(2), 20(3), and 23(3) of the Levy Act. 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 15, 17, 19, 20 insert new subsections which specify that particular offences are offences 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.²⁰

Item 15 inserts **new subsection 15(2B)** which states that subsection 15(2) is an offence of strict liability. This is an offence of failing to comply with a requirement of the NRA to calculate the total leviable value in respect of leviable disposals of a chemical product for a year and the amount of levy payable, and to notify the NRA of the results and basis of the calculations.

Item 17 inserts **new subsection 20(5)** which states that subsection 20(3) is an offence of strict liability. This is an offence of refusing or failing to comply with a requirement from the NRA to provide information regarding the importation, manufacture or disposal of a chemical product, necessary to determine the total annual leviable value for that product.

Item 19 inserts **new subsection 23(5)** which states that subsection 23(3) is an offence of strict liability. This is an offence of refusing or failing to comply with a requirement to give information or produce documents requested by an inspector.

Item 20 inserts **new subsection 36(2)** which states that subsection 36(1) is an offence of strict liability. This is an offence of failure to keep and/or retain records relating to the importation, manufacture or disposal of a leviable product.

Amendments to the Agricultural and Veterinary Chemicals (Administration) Act 1992

This Act established the National Registration Authority for Agricultural and Veterinary Chemicals (NRA) which administers Commonwealth/State/Territory laws relating to agricultural and veterinary chemical products where those laws confer functions and powers on the NRA.

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Prior to the introduction of the *Agricultural and Veterinary Chemicals Act 1988* there was no specific Commonwealth legislation for the clearance and registration of new agricultural and veterinary chemicals. The then non-statutory scheme provided for clearance and registration to be carried out by Commonwealth and State technical committees. This scheme was considered unsatisfactory as it did not eliminate duplication of laws and procedures between the Commonwealth and States (eg. chemicals were frequently re-assessed at State level).

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 *Agricultural and Veterinary Chemicals Administration Act* ('*Agvet Administration Act*'), re-structure and re-word some offence provisions into their constituent physical elements, as well as identify certain offences as offences of strict liability.

Details of proposed amendments

Item 21 amends the *Agvet Administration Act* by inserting **new section 5A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act, with the exception of the principles of corporate criminal responsibility contained in Chapter 2.5 of the Code. Existing section 69EU relating to corporate criminal responsibility is not amended by the Bill.

Items 22-25 and 28-37 excise the element of reasonable excuse from subsections 69B(1), 69C(5), 69EB(6), 69EN(3), 69EP(6), 69EP(7), 69F(5) of the *Agvet Administration Act* and place it in new subsections.

These offence provisions are contained within Part 7A of the Act which deals with the importation, manufacture and export of chemicals. Section 69B creates offences of importing an active chemical constituent or chemical product (that is neither registered nor exempt) without the approval of the NRA. Section 69C creates an offence of breaching a restriction or conditions set out in the regulations concerning the dealing with (ie. importing, manufacturing, or exporting) a chemical product or active constituent which is the subject of a prescribed international agreement or arrangement. Subsection 69EB(6) creates an offence of refusing or failing to comply with a direction given by an inspector in the course of a search of premises aimed at checking compliance with Part 7A or the Act. Section 69EN creates an offence of refusing or failing to comply with a requirement made by an inspector to give information to the inspector and to produce documents. Subsection 69EP(6) is an offence of contravening a direction given by the NRA at a hearing prohibiting or restricting the publication of submissions or evidence given at a hearing, whether in public or in private, or of matters contained in such submissions or evidence or in documents produced at such a hearing. Subsection 69EP(7) is an offence of being present at a private portion of a hearing without being a member of the staff of the

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NRA or being a person authorised by the NRA to attend. Subsection 69F(5) is an offence of failing to return an identity card to the NRA upon retirement.

Items 23, 25, 26, 27, 29, 31, 33, 37 insert new subsections into the above provisions to expressly identify particular offences 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, 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.²¹

Amendments to the *Agricultural and Veterinary Chemicals Code Act 1994*

This Act provides for the evaluation, approval, registration and control and supply of agricultural and veterinary chemicals in the Australian Capital Territory and prescribed Territories. The Act forms part of a package of legislation directed at the regulation of agricultural and veterinary chemicals in the Territories. Collectively, this package provides a scheme for the evaluation, registration and control of agricultural and veterinary chemicals under an 'Agvet Code' in the Australian Capital Territory and prescribed Territories. This Act applies only to the Australian Capital Territory and prescribed Territories by virtue of s.7 of the *Agricultural and Veterinary Chemicals Code Act 1994* (Code Act). The Agricultural and Veterinary Chemicals Code (Agvet Code), set out in the Schedule, was adopted by the enactment of complementary legislation by each State and the Northern Territory. The evaluation, approval, registration and control and supply of agricultural and veterinary chemicals is administered uniformly across Australia by the NRA.

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 *Agvet Code Act*, re-structure and re-word some offence provisions into their constituent physical elements, identify certain offences as offences of strict liability, and insert notes as to legal burden and evidential burden. Other amendments remove or replace inappropriate fault elements and clarify defences.

Details of proposed amendments

Item 38 amends the Code Act by removing references to sections of the *Crimes Act 1914* which deal with ancillary offences and replacing them with references to sections in the *Criminal Code* dealing with these matters. The Crimes Act provisions will ultimately be repealed on 15 December 2001. The relevant sections of the *Criminal Code* commenced operation in May 2001 with the commencement of the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001*.²²

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Item 39 applies Chapter 2 of the *Criminal Code*, by inserting **new section 8A**. This section applies Chapter 2 to all offences against the Act, with the exception of the principles of corporate criminal responsibility contained in Chapter 2.5 of the Code. Existing section 151 relating to corporate criminal responsibility is not amended by the Bill.

Items 40, 41, 42, 44, 45 insert new subsections to identify particular offences as offences 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.²³

Item 40 inserts **new subsection 26(1A)** which states that subsection 26(1) is an offence of strict liability. This is an offence of failing to inform the NRA in circumstances where a person has reasonable cause to believe that a matter recorded in certain registers is not correct in a material respect.

Item 41 inserts **new subsection 32(3A)** which states that subsection 32(3) is an offence of strict liability. **Item 42** inserts **new subsection 33(2A)** which states that subsection 33(2) is an offence of strict liability. **Item 44** inserts **new subsection 55(6A)** which has the effect of applying strict liability to a specified physical element of circumstance of an existing offence provision contained in section 55. **Item 45** inserts **new subsection 61(2)** which states that subsection 61(1) is an offence of strict liability.

Items 43, 48, 51 make amendments in order to replace inappropriate fault elements contained in offence provisions in paragraph 55(4)(b), subsections 74(1), and 75(1) of the Act respectively. In all cases the phrase ‘for the purpose’ is replaced with ‘with the intention’. The change is avoid potential ambiguities associated with the phrase ‘for the purpose’ (either meaning ‘with the result that’ or ‘with the intention of’).

Items 46, 47, 70, 71, 77, 78, 83-86, 89, 90-96, 98-109 re-structure offence provisions in order to clarify their associated defence of ‘reasonable excuse’. 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 this phrase is not read as an element of the offence (which would have to be proved by the prosecution), but is clearly identified as a defence.

Items 47, 69, 76, 84, 86, 88, 97, 99, 101, 103, 105, 107, 109, 110, 117, 119 insert new subsections to expressly identify particular offences 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, 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.²⁴

Items 49, 52, 54, 56, 58, 60, 62, 64, 80, 81, 84, 86, 88, 90, 92, 94, 96, 99, 101, 103, 105, 107, 109, 113, 114, 117 all insert a standard note after offence provisions which present

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defences, that the defendant bears an *evidential burden* if s/he wishes to rely upon such defences. For example, the offence provision in section 74 of the Act, of possession or custody of unapproved active chemical constituents for the purpose of supply provides four specific defences, such as subsection 74(1)(b) that the ‘the substance is exempted by the NRA from the operation of this section’. In event of a prosecution under section 74, a defendant wishing to rely upon this defence would bear a burden of introducing sufficient evidence to merely raise the issue of whether the chemical constituents in question had been exempted by the NRA. According to Gilles in *The Law of Evidence in Australia*, where the evidential burden applies to a defendant, s/he must raise a *prima facie* case as to the existence of the purported fact, i.e., the evidence raised must be such as to make the existence of the fact a live issue. This does not require the defendant to prove the matter raised, but merely to introduce or point to some evidence sufficient to raise the issue as a genuine issue.²⁵ The effect of the evidentiary burden on a defendant is that s/he cannot raise frivolous defences, but not that s/he must comprehensively prove such matters beyond reasonable doubt or even on the balance of probabilities.²⁶

Items 50, 53, 55, 57, 59, 61, 63, 65, 68, 82 all insert a standard note after offence provisions which present defences, that the defendant bears a *legal burden* if s/he wishes to rely upon such defences. For example, **Item 50** inserts a note at the end of subsection 74(3) to the effect that the defendant bears a legal burden in relation to the matter in subsection (3), which provides in relation to the offence in subsection 74(1) of having possession or custody of unapproved active chemical constituents for the purpose of supply, as follows:

It is a defence to a prosecution of a person for an offence against subsection (1) if the person proves that at the relevant time the person did not know, and could not reasonably be expected to have known, that the substance was not an approved active constituent.

This is an example of a situation where a defendant wishing to raise this defence bears a greater burden of proving sufficient facts to establish the defence, in this context a legal burden as opposed to an evidential burden. Professor Fisse writes:

In some situations a defendant carries more than an evidentiary burden of proof. Where the law makes available...an affirmative defence, it imposes upon him the persuasive burden of proving that defence. The quantum required of him is proof on the balance of probability which is the same as the quantum required of a litigant in a civil action.²⁷

Further amendments are aimed at re-organising and reconstructing existing offence provisions in order to clarify defences (**items 66, 67, 72, 73, 74, 76, 79, 80, 87, 88, 111, 113, 115, 117**). These existing statute specific defences – such as actions authorised by a permit - are retained, but are placed in separate subsections in order to ensure that various phrases are interpreted as a defence and not as an element of the offence (which would have to be proved by the prosecution).

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Items 112, 116, 118 propose the amendment of fault elements of three offence provisions. In each case, the amendments remove the word ‘recklessly’. As presently worded the provisions suggest that the fault element of recklessness applies to the physical element of conduct in the offences. However, recklessness is not applied by Chapter 2 of the *Criminal Code* to the physical element of conduct. Removal of the word ‘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 word ‘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.²⁸ The Explanatory Memorandum states:

‘Intentionally’ is also deleted. In the absence of any stated fault elements, the default fault elements will apply because of Section 5.6 of the *Criminal Code*. The result of this is that intention will be the applicable fault element for any physical elements of conduct...²⁹

Amendments to the *Australian Meat and Live-stock Industry Act 1997*

This Act forms part of a package of legislation that restructured the regulatory framework of the Australian meat and livestock industry. The major provisions provide:

- for the continuation of existing exporting licensing, quota, and enforcement provisions under the administration of Department of Primary Industries and Energy, rather than the Australian Meat and Live-stock Corporation, and
- the Minister with power to declare a body to be either the industry marketing or research body for the purposes of receipt of levy/charge amounts or eligible to receive Commonwealth matching research and development funds.

Details of proposed amendments

Items 120 and 121 identify offences of strict liability, by the insertion of **new subsections 47(4) and 49(4)**. These are offences of failing to comply with a requirement to give information to, or to produce documents to an authorised officer under subsection 47(1), and of failing to return an identity card upon retirement.

Amendments to the *Australian Wine and Brandy Corporation Act 1980*

This Act created the Australian Wine and Brandy Corporation. It has objects including the promotion and control of the export of grape products from Australia; and the sale and distribution, after export, of Australian grape products. It is also intended to enable Australia to fulfil its obligations under prescribed wine-trading agreements. The Act provides the Corporation with the powers to control the export of wine by means of the grant or withholding of approved carrier status.

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The Act contains ‘labelling integrity’ provisions that are designed to ensure the truth, and the reputation for truthfulness, of statements made on wine labels, about the vintage, variety or geographical indication of wine manufactured in Australia. These labelling requirements are linked to extensive recording obligations imposed on wine manufacturers for record keeping in relation to manufacture, sales, disposal and transfer of wine products.

Brief Summary of proposed amendments

In short, 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 Wine and Brandy Corporation Act. Second, they replace references to certain Crimes Act provisions. Third, they clarify the defence of reasonable excuse presently contained in some sections of the Act. Fourth, they identify a number of offences as offences of strict liability. Fifth, the Bill seeks to correct a number of offence provisions which are not in harmony with the approach taken by the *Criminal Code* by altering the fault elements of these offence provisions.

Details of proposed amendments

Item 123 amends the *Australian Wine and Brandy Corporation Act* by inserting **new section 4B** which applies Chapter 2 of the *Criminal Code* to all offences against the Act, with the exception of the principles of corporate criminal responsibility contained in Chapter 2.5 of the Code. Existing section 44A relating to corporate criminal responsibility is not amended by the Bill.

Items 124, 128, 129, 131, 136, 137 insert new subsections to expressly identify particular offences 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, 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.³⁰

Items 125, 132, 133, 134 propose the removal of inappropriate fault elements in offence provisions which are inconsistent with the *Criminal Code*. **Item 125** proposes the amendment of fault elements of an offence against paragraphs 39ZAAA(1)(a) and (b). The amendment would remove the phrase ‘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

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elements are intention in the case of conduct, and recklessness in the case of circumstance or result.³¹

Items 132, 133, 134 propose the amendment of fault elements of three offence provisions. In each case, the amendments remove the word ‘knowingly’. As presently worded the provisions suggest that the fault element of knowledge applies to the physical element of conduct in the offences. However, knowledge is not applied by Chapter 2 of the *Criminal Code* 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 word ‘knowingly’, 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.³²

Items 126, 127, 130, 131, 135, 136 re-structure offence provisions in order to clarify their associated defence of ‘reasonable excuse’. 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 this phrase is not read as an element of the offence (which would have to be proved by the prosecution), but is clearly identified as a defence.

Item 138 amends paragraph 44A(9)(b) of the Act by removing references to sections of the *Crimes Act 1914* which deal with ancillary offences and replacing them with references to sections in the *Criminal Code* dealing with these matters. The Crimes Act provisions will ultimately be repealed on 15 December 2001. The relevant sections of the *Criminal Code* commenced operation in May 2001 with the commencement of the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001*.³³

Amendments to the *Biological Control Act 1984*

This Act created procedures for the proposal and implementation of biological control programs of invasive alien species.³⁴ In other words, the Act applies a regulatory scheme to proposals to control pest species (‘target organisms’) by biological means, such as where those pest species can be controlled by the release of other kinds of live organisms (‘agent organisms’). The operation of the Act is not limited to species that are a threat to agriculture. The *Biological Control Act 1984* provides for the biological control of pests primarily in the Australian Capital Territory.

Under the Act, if there is any evidence that persons or the environment would be adversely affected by the release of an organism or the control of the target organism, and there has not been an adequate inquiry into these effects, then the Biological Control Authority can arrange for an inquiry to be conducted. An inquiry examines, from the broad community viewpoint, the overall benefits and disadvantages of declaring organisms of the kind to which the inquiry relates to be target organisms or agent organisms.

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Action for declarations can be commenced by any person applying to a Biological Control Authority, or by the Agriculture and Resource Management Council of Australia and New Zealand (ARMCANZ). In the Commonwealth case, the Biological Control Authority is the Minister for Primary Industries and Energy.

If there is any evidence that any persons or the environment would be adversely affected by the release of the proposed agent, or the control of the proposed target and there has not been adequate investigation or inquiry into that effect, the Biological Control Authority may, with the unanimous agreement of ARMCANZ, direct a Commission of Inquiry to be held under the *Biological Control Act 1984*.

State and the Northern Territory Biological Control Authorities can gazette the Commonwealth Act as a 'relevant Act' and make similar declarations of target and agent organisms.

Brief Summary of proposed amendments

The amendments effected by the Bill do the following. First, they apply Chapter 2 of the *Criminal Code* to all offences against the Act. Second, they clarify the defence of reasonable excuse presently contained in some sections of the Act. Third, they identify a number of offences as offences of strict liability.

Details of proposed amendments

Item 139 amends the Biological Control Act by inserting **new section 6A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act.

Items 140-143 re-structure offence provisions in order to clarify their associated defence of 'reasonable excuse'. 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 this phrase is not read as an element of the offence (which would have to be proved by the prosecution), but is clearly identified as a defence. These changes affect subsection 43(1), which is an offence of failing to attend as a witness to an inquiry, and subsection 45(1) which is an offence of refusing or failing to be sworn or to make an affirmation, answer a question or produce a document as required.

Items 141 and **143** insert new subsections which specify that particular offences are offences 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.³⁵ **Item 141** provides that an offence under subsection 43(1) is a strict liability offence. **Item 143** provides that an offence under subsection 45(1) is a strict liability offence.

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Amendments to the *Dairy Produce Act 1986*

This Act created the Australian Dairy Corporation, and deals with the marketing and export of dairy produce and the collection of certain levies imposed in connection with the dairy industry. The Act sets out an export control regime for dairy products administered by the Corporation which enables it to apply licensing, quality and minimum price requirements.

Brief Summary of proposed amendments

The Bill proposes the following amendments. First, it applies Chapter 2 of the *Criminal Code* to all offences against the Act. Second, it clarifies the defence of reasonable excuse presently contained in some existing offence provisions. Third, it identifies a number of offences as offences of strict liability. Fourth, it amends a number of offence provisions to remove inappropriate fault elements which are not in harmony with the Code. Other amendments delete certain offence provisions relating to false or misleading statements contained in a Schedule to the Act and instead place reliance upon the standard provisions of the *Criminal Code*.

Details of proposed amendments

Item 144 applies Chapter 2 of the *Criminal Code* to all offences against the Act.

Section 54 sets out that it is an offence to export a controlled dairy product without a licence. **Items 145 and 146** amend subsection 54(1) in order to clarify that the ‘unless the person is a licensee’ element of the provision is not an element of the offence which would have to be disproved by the prosecution.

Item 147 inserts a **new subsection 54(3)** which provides that strict liability applies to the physical element of the offence in subsection 54(2) that regulations were made under subsection 52(1). 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.³⁶

Items 148, 149, 150, 151 re-structure offence provisions in order to clarify their associated defence of ‘reasonable excuse’. 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 this phrase is not read as an element of the offence (which would have to be proved by the prosecution), but is clearly identified as a defence.

Items 152 and 153 propose the removal of inappropriate fault elements in offence provisions which are inconsistent with the *Criminal Code*. For example, **Item 152** proposes the amendment of fault elements of an offence provision in subsection 113(1). The amendment would remove the word ‘knowingly’. As presently worded the provisions

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suggest that the fault element of knowledge applies to the physical element of conduct in the offences. However, knowledge is not applied by Chapter 2 of the *Criminal Code* 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 word ‘knowingly’, the *Criminal Code*’s default fault elements apply to each physical element of the offences. This default fault element is intention in the case of conduct.

Further amendments are aimed at re-organising and reconstructing existing offence provisions in order to clarify defences (**Items 145, 146, 154, 155**). These existing defences are retained, but are placed in separate subsections in order to ensure that various phrases are interpreted as a defence and not as an element of the offence (which would have to be proved by the prosecution).

Items 163 and 164 apply strict liability by inserting **new subsections 116(2), (3) and 117(1A)** which provides that strict liability applies to the physical elements of circumstance of the offences in subsections 116(1) and 117(1) respectively. 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.³⁷

Amendments to the *Export Control Act 1982*

This Act provides a regime for the control of export of certain products in order to indirectly achieve various objectives relating to primary industries. The main category of export products which are regulated under the Act are food products, principally in order to ensure their safety and quality, and thereby protect Australia’s export reputation.³⁸ The Act has also been used to satisfy other conditions of trade including satisfying quality standards, product descriptions and limitations placed on market access by overseas governments.³⁹

The Act has been used in the past to control the export of minerals and native forest woodchips from native forests and plantations. However, during 1997 and 1998 the government abolished export controls on all minerals except uranium.⁴⁰ This involved lifting export controls on LNG, coal, alumina/bauxite, and mineral sands. In relation to forestry, the export licensing regime of the *Export Control Act* and Regulations previously provided the Commonwealth with the capacity to regulate forestry operations both in native forests and plantations.⁴¹ In particular, exports of hardwood woodchips were previously controlled under the licensing regime. These controls have been effectively removed with the amendment of the export control regulations applying to this industry in tandem with the progressive signing of Regional Forest Agreements for 10 forestry operations regions within four states.⁴²

The Act operates by means of regulations which prohibit the export of ‘prescribed goods’ from Australia. Such goods may be exported subject to licences and the conditions

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attached to them. The Act also spells out inspection responsibilities and the authority of inspection staff to carry out these responsibilities; and sets penalties to apply in the case of fraud or deliberate malpractice. It imposes penalties for non-compliance with its provisions, including for malpractice and fraudulent behaviour. It also gives Australian Quarantine and Inspection Service (AQIS) inspectors a number of powers including the right to inspect goods, premises and records. In addition, AQIS inspectors have the power, at their discretion, to issue export certification.⁴³

Brief Summary of proposed amendments

The amendments to the *Export Control Act* proposed by the Bill propose the following. First, they apply Chapter 2 of the *Criminal Code* to all offences against the Act. Second, they replace references to certain Crimes Act provisions. Third, they identify a number of offences as offences of strict liability. Fourth, other offence provisions are reorganised in order to clarify defences to remove the possibility that elements of defences would be misinterpreted as elements of the offence.

Details of proposed amendments

Item 166 amends section 3 of the Act by removing references to sections of the *Crimes Act 1914* which deal with ancillary offences and replacing them with references to sections in the *Criminal Code* dealing with these matters. The Crimes Act provisions will ultimately be repealed on 15 December 2001. The relevant sections of the *Criminal Code* commenced operation in May 2001 with the commencement of the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001*.⁴⁴

Item 167 applies Chapter 2 of the *Criminal Code* to all offences against the Act.

Items 168 to 175 insert new subsections to expressly identify particular offences 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, only that the defendant engaged in the relevant physical elements of the offence.

Items 176 to 179 clarify defences. In all cases the phrase ‘except as approved in writing by the Secretary’ or its equivalent is removed from the subsection creating the offence and transferred to a separate subsection in order to ensure that the provision is not misinterpreted as an element of the offence which would have to be disproved by the prosecution.

Amendments to the *Export Inspection and Meat Charges Collection Act 1985*

Inspection of meat for export is carried out by the AQIS under Government policy, AQIS is required to cost recover for the inspection and certification services it provides to

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clients.⁴⁵ AQIS provides and inspection and certification for a range of animal and plant products exported from Australia.

This Act ('the *Collection Act*') provides for the collection of the charges imposed by the *Export Inspection (Establishment Registration Charges) Act 1985*, the *Export Inspection (Quantity Charge) Act 1985* and the *Export Inspection (Service Charge) Act 1985*.

Brief Summary of proposed amendments

The amendments to the *Collection Act* proposed by the Bill suggest the following. First, they apply Chapter 2 of the *Criminal Code* to all offences against the Act. Second, they clarify the defence of reasonable excuse presently contained in some sections of the Act. Third, they identify a number of offences as offences of strict liability.

Details of proposed amendments

Item 180 applies Chapter 2 of the *Criminal Code* to all offences against the *Collection Act*.

Item 181 clarifies the penalty provisions contained within section 9 of the Act, so that it is clear that the penalty specified applies to subsections 9(1), 9(1A) as well as subsection 9(2). However it must be noted that the maximum penalty provided is a dollar amount, rather than amount indicated by penalty units. This means that the quantum of penalty is likely to be gradually eroded by inflation, whereas the election of a penalty unit approach would enable the indexation of the penalty by mere amendment of the universal provision in *Crimes Act 1914*, section 4AA.

Items 182, 184, 186 insert new subsections to expressly identify particular offences 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, 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.⁴⁶

For example, **item 182** inserts **new subsection 9(3)** which states that the offence in section 9 is an offence of strict liability. This is an offence of failing to keep records and failing to retain records for a three year period. (These records relate to monthly returns relating to prescribed commodity exports under licence).

Items 183-186 re-structure offence provisions in order to clarify their associated defence of 'reasonable excuse'. At present there is a risk that this phrase could be interpreted as an element of the offence, which would have to be proved by the prosecution. The relocation of the element of 'reasonable excuse' is necessary to ensure that it is clear that reasonable excuse is a defence.

The relevant offence provisions are contained in subsections 10(1), and subsection 15(8) of the *Collection Act*. The amendments excise the element of 'without reasonable excuse'

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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.

Amendments to the *Farm Household Support Act 1992*

As well as making provision for the making of loans to certain farmers who cannot obtain a loan through normal means, this Act also provides for the conversion, in circumstances, of such a loan to a grant where a farmer sells his/her farm. The objects of this Act are to provide financial assistance to farmers who are unable to meet day-to-day living expenses and cannot get commercial loans, and to provide financial incentives for them to leave farming. The Act also provides for the transfer of financial assistance to farmers who are experiencing difficulty in meeting living expenses; and are in exceptional circumstances.⁴⁷

Brief Summary of proposed amendments

The amendments proposed by the Bill do the following. First, they apply Chapter 2 of the *Criminal Code* to all offences against the Act. Second, they identify a number of offences as offences of strict liability. Third, they clarify the defence of reasonable excuse presently contained in some sections of the Act. Fourth, other offence provisions are reorganised in order to clarify defences so that elements of defences cannot be misinterpreted as elements of the offence.

Details of proposed amendments

Item 187 applies Chapter 2 of the *Criminal Code* to all offences against the Act.

Items 189, 191 identify particular offences contained within Part 7 of the Act dealing with obligations of recipients of farm income support, as offences of strict liability. These are the offences contained in subsections 41(5), 42(5) – of failing to comply with a notice requiring a recipient to give notice of a specified event or change in their personal circumstances; and of failing to comply with a notice requiring a recipient to give particular information about a particular matter (eg. that might affect the recipients eligibility for support).

Items 188 to 191 clarify defences associated with these offence provisions, so that elements of defences cannot be misinterpreted as elements of the offence. The existing provisions contain defences of reasonable excuse and of being ‘not capable of complying with the notice’. The amendments re-locate these words to **new subsections 41(5A), 41(5B), 42(5A), and 42(5B)**. 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).

Similarly, **items 192 and 193** move the element of ‘reasonable excuse’ from subsection 54(7) to a new subsection [**new subsection 54(7A)**]. The reason for relocating the

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‘reasonable excuse’ 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 193 identifies the offence contained in subsection 54(7), of failing to comply with a general directive to give information or produce a document to the Secretary, as an offence of strict liability. The present maximum penalty is listed as imprisonment for 6 months. The reader may ask whether such a penalty is compatible with a strict liability offence.

Note that subsection 4B(2) of the *Crimes Act 1914* allows a court that convicts an individual of an offence to impose a fine instead of, or in addition to, a term of imprisonment. The maximum fine that a court can impose on the individual is worked out by multiplying the maximum term of imprisonment (in months) by 5, and then multiplying the resulting number by the amount of a penalty unit. The amount of a penalty unit is stated in section 4AA of the Crimes Act.

Amendments to the *Fisheries Management Act 1991*

The *Fisheries Management Act 1991* provides the legislative basis for the management of fisheries by AFMA, the Australian Fisheries Management Authority. The Act deals with management plans for fisheries, provides for statutory fishing rights, creates offences for the taking of certain marine species and bans driftnet fishing in the Australian Fishing Zone (AFZ). Under the Act, the Minister has a statutory duty when making decisions to take full account of ecological sustainability and resource management.⁴⁸

The Commonwealth and States are responsible for managing fisheries within the AFZ in accordance with traditional jurisdictional arrangements (States to three nautical miles and the Commonwealth from three to 200 nautical miles) or arrangements under the Offshore Constitutional Settlement (OCS). The Act applies to Australian persons and boats inside and outside the AFZ (section 6), but does not apply to waters declared by the Governor-General to be excepted waters (section 9).

AFMA has a responsibility to enforce the provisions of the *Fisheries Management Act 1991* and the *Torres Strait Fisheries Act 1984* through the detection and investigation of illegal activities by both domestic and foreign fishing boats in the Australian fishing zone (AFZ) and Commonwealth managed fisheries. It undertakes this function in conjunction with other relevant Commonwealth agencies such as the defence forces, with specific compliance functions in the field being undertaken by officers from State fisheries authorities on an agency basis. Through these arrangements, State agencies provide the personnel and expertise while AFMA provides overall coordination, policy direction, technical advice and funding for these activities.

AFMA undertakes several compliance monitoring programs to obtain information for use in routine surveillance. These programs include prior-to-landing reports, fish receiver reports, catch disposal records for product landed in port, and Vessel Monitoring System position reports.

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Offence provisions in the *Fisheries Management Act* are contained in sections 13, 15, 57, 89(4), 93, 95-104, 107, 108, 168(2)(a) and the Regulations. The Act also provides for the forfeiture of boats, fishing equipment and catch under section 106.

Brief Summary of proposed amendments

The proposed amendments to the *Fisheries Management Act 1991* 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 Act. Second, they identify a number of offences as offences of strict liability. Third, they clarify the defence of reasonable excuse presently contained in some sections of the Act. Fourth, the Bill seeks to clarify a number of offence provisions by means of alteration of certain fault elements (ie 'clarifying fault element'). Fifth, the Bill seeks to correct a number of aspects of existing offence provisions which are not in harmony with the approach taken by the *Criminal Code*, by altering the fault elements of these offence provisions (ie. amendment of inappropriate fault elements).

Details of proposed amendments

Item 194 applies Chapter 2 of the *Criminal Code* to all offences against the Act (except those relating to corporate criminal responsibility) by inserting **new section 6A**. Section 164 of the FMA sets out specific principles of corporate criminal responsibility, and is not amended by the Bill. These principles specify the scope of liability of directors, servants and agents of a body corporate.

The existing provision differs from the principles set out in Chapter 2.5 of the *Criminal Code* in that it does not include concepts contained there of 'due diligence' and 'corporate culture'.

Items 195-198, 202, 204, 206, 209, 210, 213, 215, 217, 220 insert new subsections to expressly identify particular offences under the *Fisheries Management 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, only that the defendant engaged in the relevant physical elements of the offence. For example, **item 195** relates to the offence in section 13(1) of engaging in driftnet fishing within the AFZ with a maximum penalty of 500 penalty units, ie \$55 000. The equivalent offence by a body corporate is 2500 penalty units or \$275 000. (One penalty unit is equivalent to \$110 under *Crimes Act 1914*, section 4AA).

The amendments proposed in **item 199** are aimed at clarifying fault element in the offence provision in section 57, of making a false entry in the Register of Statutory Fishing Rights or of tendering in evidence a document falsely purporting to be an extract from the Register. The item replaces 'wilfully' with 'intentionally' as the former term is not a fault element used in the *Criminal Code*.

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Item 200 amends subsection 84(7) of the Act and **item 221** amends paragraph 164(9)(b) by removing references to sections of the *Crimes Act 1914* which deal with ancillary offences and replacing them with references to sections in the *Criminal Code* dealing with these matters. The Crimes Act provisions will ultimately be repealed on 15 December 2001. The relevant sections of the *Criminal Code* commenced operation in May 2001 with the commencement of the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001*.⁴⁹

Items 201- 204, 207, 208, 212-217, 219 and 220 re-structure offence provisions in order to clarify their associated defence of ‘reasonable excuse’. At present there is a risk that the provision could be interpreted as an element of the offence, which would have to be proved by the prosecution. The relocation of the element of ‘reasonable excuse’ is necessary to ensure that it is clear that reasonable excuse is a defence.

It must be noted that this Bill does not take advantage of the opportunity to increase penalties under the Act. Nor does it introduce a regime of civil penalties, similar to those contained in the *Environment Protection and Biodiversity Conservation Act 1999*. The introduction of a civil penalties regime may be of benefit - as civil offences involve a less onerous burden of proof (‘on the balance of probabilities’ only) and would be likely to involve fewer technical difficulties with evidential issues.

An issue raised by non-government organisations working on the issue of illegal fisheries by foreign ‘flag of convenience’ boats, particularly in relation to poaching of patagonian toothfish in the Southern Ocean,⁵⁰ is the need to prevent boats or companies who have been involved in poaching in the past from successfully applying for a ‘foreign fishing licence’ under section 34 of the Act. One solution suggested is to include a provision within that section enabling AFMA to investigate the prior record of both the company and the boats involved. A precedent for such a provision exists within section 136(4) of the *Environmental Protection and Biodiversity Conservation Act 1999* which enables the Minister to consider ‘the person’s history in relation to environmental matters.’

Amendments to the Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Act 2000

This Act provided for the transition from the Australian Horticultural Corporation (AHC), the Horticultural Research and Development Corporation (HRDC) and the Australian Dried Fruits Board (ADFB) to a horticultural industry services corporation.

It provides for:

- abolition of the AHC, HRDC and ADFB
- transfer of assets, liabilities and staff from the AHC, HRDC and ADFB to the new industry services body

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- continuation of the existing export control system for another two years, and
- repeal of some legislation and consequential amendments to other legislation.

Brief Summary of proposed amendments

The proposed amendment to the Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Act 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 Act. Second, it identifies certain offences as offences of strict liability. Third, it inserts a provision which clarifies that in raising a particular defence of reasonable excuse, the defendant bears an evidential burden.

Details of proposed amendments

Item 222 amends the Act by inserting **new subsection 45(4)** which applies Chapter 2 of the *Criminal Code* to all offences against the Act, with the exception of the principles of corporate criminal responsibility contained in Chapter 2.5 of the Code. Existing section 120 relating to corporate criminal responsibility is not amended by the Bill.

Other tasks performed by **item 222** include applying strict liability and imposing an evidential burden on a defendant.

Amendments to the *Imported Food Control Act 1992*

This Act provides for increased inspection of imported foods, the destruction or re-export of such food that falls below Australian standards and the charging of importers to cover inspection costs. The Act created new inspection arrangements for imported food.

The key features of the Act include:

- all imported foods are liable to point of entry checks;
- imported food products must meet Australian standards in terms of safety and cleanliness, compliance with limits for residues of chemicals and heavy metals, and truth in labelling, and
- foods in high and medium risk categories are to be monitored and extensively sampled to ensure compliance with the Australian Food Standards Code.

Brief Summary of proposed amendments

The proposed amendments to the *Imported Food Control Act 1992* 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 Act. Second, they identify a number of offences as offences of strict liability. Third, they clarify the defence of reasonable excuse

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presently contained in some sections of the Act. Fourth, the Bill seeks to clarify a number of offence provisions through alteration of certain fault elements.

Details of proposed amendments

Item 223 amends the Act by inserting **new section 6A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act, with the exception of the principles of corporate criminal responsibility contained in Chapter 2.5 of the Code. Existing section 33 relating to corporate criminal responsibility is not amended by the Bill.

Items 224, 225, 226, 227, 228, 229, 231, and 232 re-structure offence provisions in order to clarify their associated defence of ‘reasonable excuse’. At present there is a risk that the provision could be interpreted as an element of the offence, which would have to be proved by the prosecution. The relocation of the element of ‘reasonable excuse’ is necessary to ensure that it is clear that reasonable excuse is a defence.

Items 227, 230 and 233 insert new subsections which identify particular offences as offences 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.⁵¹

Item 224 proposes replacing the fault element of knowledge in subsection 20(8) with the fault element of intention, because the present provision is inconsistent with the position of the Criminal Code of not applying the fault element of knowledge to a physical element consisting of conduct. Subsection 20(8) is an offence of failing or refusing to comply with a requirement - following the making of an imported food inspection advice – requiring the destruction or re-exportation of food which failed inspection tests.

Amendments to the *Loan (Income Equalization Deposits) Act 1976*

This Act provides a vehicle for the delivery of exceptional circumstances payments to primary producers. It operates in conjunction with the *Loan (Drought Bonds) Act 1969* and the *Income Tax Assessment Act 1936*. Income Equalisation Deposits and farm Management Bonds were replaced by the commercially available Farm Management Deposits Scheme which came into effect in April 1999. At that date there were 12,600 holders of IED/FMBs with deposits totalling \$375 million.⁵²

Details of proposed amendments

Item 234 applies Chapter 2 of the *Criminal Code* to all offences against the Act by inserting **new section 3A**.

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Amendments to the *Meat Inspection Act 1983*

Brief Summary of proposed amendments

The amendments proposed by the Bill propose the following. First, they apply Chapter 2 of the *Criminal Code* to all offences against the Act. Second, they replace references to certain Crimes Act provisions. Third, they identify a number of offences as offences of strict liability. Fourth, they clarify the defence of reasonable excuse presently contained in some sections of the Act.

Details of proposed amendments

Item 235 amends subsection 3(1) of the Act by removing references to sections of the *Crimes Act 1914* which deal with ancillary offences and replacing them with references to sections in the *Criminal Code* dealing with these matters.

Item 236 applies Chapter 2 of the *Criminal Code* to all offences against the Act, by inserting **new section 5A**.

Items 237, 238, and 239 insert new subsections to expressly identify particular offences 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, 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.⁵³ **Item 237** provides that an offence under subsection 28(1) is a strict liability offence. **Item 238** provides that an offence under subsection 29(1) is a strict liability offence. Subsection 29(1) creates offences of bringing prohibited meat into, or removing it from, abattoirs; slaughtering prohibited animals; and processing prohibited meat. **Item 239** provides that an offence under subsection 33(2) is a strict liability offence. Subsection 33(2) is an offence of failing to return an identity card upon retirement as an authorised officer under the Act.

Items 240-243 clarify defences associated with these offence provisions, so that elements of defences cannot be misinterpreted as elements of the offence. The existing provisions contain a defence of having the written approval of the Secretary. **Items 240-243** re-locate the words 'except as approved in writing by the Secretary' or their equivalent to **new subsections 35(1AA) and 35(1B)**. 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).

Amendments to the *Plant Breeder's Rights Act 1994*

This Act replaced the *Plant Variety Rights Act 1987*. A plant variety rights scheme has operated in Australia since the enactment of the *Plant Variety Rights Act 1987*. The purpose of Plant Breeder's Rights (PBR) is to grant a proprietary right to the breeder of

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new varieties of certain plants. Under the legislation, breeders of new plant varieties can claim the exclusive rights to sell, or licence others to sell, plants or seeds of varieties they have developed.

Brief Summary of proposed amendments

In short, 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 *Plant Breeder's Rights Act*. Second, they identify a number of offences as offences of strict liability. Third, the Bill seeks to correct a number of aspects of existing offence provisions which are not in harmony with the approach taken by the *Criminal Code*, by altering the fault elements of these offence provisions.

Details of proposed amendments

Item 244 amends the Act by inserting **new section 9A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act, with the exception of the principles of corporate criminal responsibility contained in Chapter 2.5 of the Code. Existing section 76 relating to corporate criminal responsibility is not amended by the Bill.

Item 246 inserts a new subsection to identify a particular physical element of an offence as an offence of strict liability. Where strict liability applies it is not necessary for the prosecution to prove fault, only that the defendant engaged in the relevant physical element of the offence. The *Criminal Code* supplies a defence of mistake of fact in relation to that physical element.⁵⁴ **Item 246** inserts **new subsection 74(1A)** which states that strict liability applies to the physical element of circumstance in the offence in subsection 74(1).

Items 245 and 247 delete the words 'intentionally or recklessly'. Under the *Criminal Code*, 'recklessness' is an inappropriate fault element for a physical element consisting of conduct. Intention will be supplied as a default fault element by operation of the *Criminal Code*.

Amendments to the *Primary Industries Levies and Charges Collection Act 1991*

This Act introduced a system of uniform collection procedures for certain levies and charges and allowed new levies and charges to be made by regulation. One of the principal effects of the Act was to do away with the practice of having a separate levy or charge collection Act for each levy or charge imposed. The passage of this Act meant that the collection of levies and charges could be governed under the main Act by regulation. However, primary industry Acts which impose a levy or charge could not be consolidated in the same way because of section 55 of the Constitution, part of which provides '...Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only...!'

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Brief Summary of proposed amendments

The amendments of the *Primary Industries Levies and Charges Collection Act* proposed 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 Act. Second, they identify a number of offences as offences of strict liability. Third, they replace references to certain Crimes Act provisions. Fourth, they clarify the defence of reasonable excuse presently contained in some sections of the Act. Fifth, Fifth, the Bill seeks to correct a number of offence provisions which are not in harmony with the approach taken by the *Criminal Code* through the deletion of inappropriate fault elements, thus altering the fault elements of these offence provisions.

Details of proposed amendments

Item 248 amends section 4(3) of the Act by removing references to sections of the *Crimes Act 1914* which deal with ancillary offences and replacing them with references to sections in the *Criminal Code* dealing with these matters.

Item 249 amends the Act by inserting **new section 5A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act, with the exception of the principles of corporate criminal responsibility contained in Chapter 2.5 of the Code. Existing section 25 relating to corporate criminal responsibility is not amended by the Bill.

Items 250, 251, 253, and 255 insert new subsections to expressly identify particular offences 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, 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.⁵⁵

Items 252-255 re-structure offence provisions in order to clarify their associated defence of 'reasonable excuse'. At present there is a risk that the provision could be interpreted as an element of the offence, which would have to be proved by the prosecution. The relocation of the element of 'reasonable excuse' is necessary to ensure that it is clear that reasonable excuse is a defence.

Item 256 proposes the deletion of inappropriate fault elements contained within offence provisions in subsections 24A(3) and (4) of the Act. The Act presently applies intention and recklessness in relation to the physical element of conduct which is incompatible with the application of the *Criminal Code*. It is not necessary to state 'intention' explicitly as a fault element because intention is the applicable fault element by default for any physical elements of conduct (whereas recklessness is the applicable fault element by default for any physical elements of result or circumstance).

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Amendments to the *Torres Strait Fisheries Act 1984*

The *Torres Strait Fisheries Act 1984*, administered by AFMA, regulates fishing in the waters between Australia and Papua New Guinea, in accordance with agreements made in the Torres Strait Treaty regarding sovereignty and maritime boundaries.

The Torres Strait Treaty, ratified in 1985 between Australia and PNG, sets out an area known as the Torres Strait Protected Zone (TSPZ). The Treaty sets out a framework to guide both countries in providing for the management, conservation and sharing of fisheries resources in and around the TSPZ. The Treaty also requires both governments to protect and preserve the marine and terrestrial environment of the area. It also sets out guidelines for the enforcement of fisheries legislation.⁵⁶

In Australian waters, both traditional fishing and commercial fisheries are managed by the Torres Strait Protected Zone Joint Authority (PZJA) under which Commonwealth and Queensland regulatory agencies are jointly responsible for the sustainable management of the Torres Strait fishery. The PZJA, established under the *Torres Strait Fisheries Act 1984*, comprises the Federal and State (Queensland) Ministers responsible for fisheries.

Both the Treaty and the Act address the issue of traditional fishing by the indigenous inhabitants of the Torres Strait. The Treaty, and consequently the Act, have objectives including the preservation of ‘the traditional way of life and livelihood of traditional inhabitants, including their rights in relation to traditional fishing’.⁵⁷ The Act sets out a requirement that those administering it must have regard to these objectives.

Brief Summary of proposed amendments

The proposed amendments to the *Torres Strait Fisheries Act 1984* proposed 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 Act. Second, they identify a number of offences as offences of strict liability. Third, they replace references to certain Crimes Act provisions. Fourth, they clarify the defence of reasonable excuse presently contained in some sections of the Act. Fifth, the Bill seeks to clarify through alteration some fault elements in a number of offence provisions. Finally it seeks to clarify one particular defence in order remove potential ambiguity which might prove adverse to the prospects of success of a prosecution.

Details of proposed amendments

Item 257 amends the Act by inserting **new section 4A** which applies Chapter 2 of the *Criminal Code* to all offences against the Act, with the exception of the principles of corporate criminal responsibility contained in Chapter 2.5 of the Code. Existing section 53A relating to corporate criminal responsibility is not amended by the Bill. The heading in the explanatory memorandum associated with this item is not complete, and may mislead the casual reader.⁵⁸

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Item 260 amends subsection 42(6A) of the Act by removing references to sections of the *Crimes Act 1914* which deal with ancillary offences and replacing them with references to sections in the *Criminal Code* dealing with these matters.

Items 258, 259, 264, 265, 267, 269, 270, 271, 272, 273, 274 insert new subsections to expressly identify particular offences 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, 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.⁵⁹

Amendments to the *Wheat Marketing Act 1989*

This Act deals with the export of wheat and creates the Wheat Export Authority. Its functions are to control the export of wheat from Australia; and to monitor AWB (International) Ltd's performance in relation to the export of wheat and examine and report to wheat growers on that performance.⁶⁰ Under the Act (section 57) it is an offence of export wheat without the written consent of the Authority. The reader should note that the specified maximum penalty attached to this offence is still expressed in dollar terms rather than penalty units.

Details of proposed amendments

Item 275 applies Chapter 2 of the *Criminal Code* to all offences against the Act, by inserting **new section 3A**.

Concluding Comments

The Bill proposes a further step in the process of simplifying and renovating the Commonwealth criminal law which was commenced by the *Criminal Code Act 1995* setting out general principles of criminal responsibility. With the application of the Criminal Code to portfolio legislation, gradually, these principles will apply to every federal offence. One of the guiding concepts applied by the uniform Commonwealth Criminal Code, as expressed in the second reading speech for the Act in 1995, was that 'those accused of federal offences will be dealt with under the same principles—no longer will people charged in different states and territories be treated differently from one another.'⁶¹

In summary, this Bill raises the question of whether the proposed amendments to offence provisions should be viewed as a 'policy-free zone', being merely minor or technical amendments. A contrary view may be that whilst in the process of amending legislation to make it consistent with the Code, it would be logical and appropriate to review legislation in greater depth to ensure that the range of criminal, civil and administrative penalties they

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impose are adequate and sufficient to achieve compliance and enforcement goals. An argument in response is likely to be that it may be more appropriate to wait for a thorough reworking and review of legislation rather than to attempt ad hoc improvement of offence provisions such as levels of penalty and corporate criminal responsibility.

This particular proposed legislation also indirectly raises important policy issues – involving issues such as fisheries management and the protection of Australia’s primary industries and export industries through quarantine inspections, food quality and labelling standards. It is important that compliance with legislation be encouraged by ensuring that offence provisions exert sufficient general deterrence upon the regulated community.

Corporate criminal responsibility

One of the key policy issues which arises in relation to this Bill is the manner in which it proposes to apply the Criminal Code provisions regarding corporate criminal responsibility (Part 2.5). In essence, the Bill proposes to apply Part 2.5 of the Code, except where the legislation in question already contains provisions regarding corporate responsibility. For example, regarding proposed amendments to the *Fisheries Management Act 1991*, the Explanatory Memorandum states:

This Act is one which contains specific provisions relating to corporate criminal responsibility. As the Bill is intended to ensure that agriculture, fisheries and forestry portfolio legislation continues to operate in the same way after the Criminal Code applies to it, the specific corporate criminal responsibility provisions in the Act are retained by excluding the operation of Part 2.5 of the Criminal Code.⁶²

However, the reader is entitled to inquire as to the policy justification for the decision that the Bill is to apply the Code to all legislation, but that it is not to apply a key part of the Code relating to corporate criminal liability. On this basis, the reader may ask why was Part 2.5 of the Code ever introduced, if there was no intention that it would ultimately apply to some Commonwealth legislation ?

In the Second Reading Speech for the *Criminal Code Bill 1995*, the then Attorney-General made the following comments which may be relevant to the question of corporate criminal liability:

By the end of five years, these principles will apply to every federal offence unless there is need to vary these by reason of special considerations applying to particular offences.⁶³

The question that arises is whether corporate criminal responsibility was indeed such a case involving ‘special considerations’. Some have argued that this speech authorised or justified the decision to exclude the application of the Code’s principles for corporate criminal responsibility (contained in Part 2.5 of the Code Act) from existing legislation if that legislation already contained provisions governing corporate liability.

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Another argument advanced by officers for not applying Part 2.5 was that ‘competing and conflicting regimes cannot be kept in place’. However, it is not evident that this is would be the effect of the legislation if Part 2.5 were applied and existing provisions for corporate liability were deleted. The Bill already takes the general approach of ‘repealing some offence-creating provisions, which duplicate general offence provisions in the Criminal Code.’⁶⁴

It must be noted that an approach of partially excluding the application of Part 2.5 of the Code has already been taken in relation to other legislation such as the *Environment and Heritage Legislation Amendment (Application of Criminal Code) Act 2001*.

Nevertheless, the Parliament is entitled to ask ‘What is the policy rationale for excluding the corporate criminal responsibility provisions of the Code?’ Why rely on provisions that pre-date the Code? It may be the case that it would be easier for regulatory agencies such as AFMA and AQIS to achieve a prosecution under the provisions of Part 2.5 of the Code regarding corporate criminal liability, than under older provisions, because the new legislation (Part 2.5 of the Code Act) introduces new concepts of ‘corporate culture’ and due diligence. Members could ask whether this decision amounts to a decision not to take the opportunity to improve legislation, particularly a decision not to take advantage of the improvements contained in the *Criminal Code*.

Strict liability

A theme running through the debates on recent bills which have applied the *Criminal Code* in other portfolios has been an expression of concern by some members over clauses which proposed the identification of certain existing offence provisions as being offences of strict liability. It is possible that similar arguments might be raised in relation to this Bill.

Although the Senate Standing Committee for Scrutiny of Bills has not, at the time of writing, considered this particular Bill, it has passed comment on a number of other similar Bills, regarding provisions which proposed the identification of offences as offences of strict liability. The Committee has typically made comment along the following lines:

The Committee notes that, in some cases, the effect of this bill will be to change the nature of some provisions. The Committee, therefore, *seeks the Minister’s advice* as to whether this bill converts an offence which was previously not one of strict liability into a strict liability offence.

In other words the Committee has typically sought confirmation that the Bills applying the *Criminal Code* create no new offences of strict liability. It appears that the Committee has been particularly concerned about the civil liberties implications of making offences strict liability offences. It is currently holding an inquiry into absolute and strict liability

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offences in Commonwealth legislation, a matter which was referred to the Committee in July 2001 by the Senate. The terms of reference are:

The application of absolute and strict liability offences in Commonwealth legislation, with particular reference to:

- (a) the merit of making certain offences ones of absolute or strict liability;
- (b) the criteria used to characterise an offence, or an element of an offence, as appropriate for absolute or strict liability;
- (c) whether these criteria are applied consistently to all existing and proposed Commonwealth offences; and
- (d) how these criteria relate to the practice in other Australian jurisdictions, and internationally.

On the other hand, the Explanatory Memorandum for this Bill states that ‘The amendments will ensure that the relevant offences continue to have much the same meaning and continue to operate in much the same way as they do at present’.

In particular cases, the public interest in various matters, such as quarantine and environment protection, is perhaps best served by offences or elements of offences attracting strict liability. This is because if such offences were not classified as strict liability, the prosecution would be required to prove that the defendant possessed the requisite fault element (eg. knowledge, intention, recklessness, or negligence) for every element of the offence – an onerous task, which in some circumstances may prove impossible due to practical difficulties in gathering evidence. An example is in relation to offences by foreign fishing vessels in the Australian Fishing Zone (AFZ) under the Fisheries Management Act sections 99-104. For example, if a knowledge requirement were applied to what are presently strict liability offences, such as section 100 (‘using a foreign boat for fishing in the AFZ’) then it would become extremely difficult to successfully prosecute under the legislation.

Those cautious about the application of strict liability provisions could note that for every clause where this Bill identifies an offence as being one of strict liability, the odds are extremely strong that all such offence provisions would already be interpreted by courts as such, without the need for an explicit label indicating the category of the offence. Thus the Bill is doing little more than identifying existing strict liability provisions, by effectively attaching a label to them.

It is arguable that the removal of existing strict liability provisions would defeat the capacity of Commonwealth regulatory agencies such as the Australian Fisheries Management Authority (AFMA), or AQIS to efficiently enforce the legislation which they administer. Fewer prosecutions would be commenced, fewer of these prosecutions would succeed, and the legislation would exert less of a deterrent effect.

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Penalty levels

Another aspect of the Bill which raises policy questions is its implicit decision not to take the opportunity to increase penalties contained in AFFA portfolio legislation to ensure they exert a strong general effect of deterrence. One commentator on the issue of regulatory enforcement cited a judicial observation from a Canadian occupational health and safety judgement that ‘if the regulations were not enforced by the use of sanctions, they would come to be perceived not as regulatory requirements but merely as statements of aspiration.’⁶⁵

In the specific context of this Bill, it is relevant to consider two examples. First, the maximum penalty within provisions that are being amended in the Agricultural and Veterinary Chemicals legislation are in the order of 30 penalty units (i.e., \$3300). A second example is the offence in section 9 of the *Australian Wine and Brandy Corporation Act 1980* of entering into a contract for wine export without the approval of the AWBC. This offence attracts a maximum penalty of \$6000. It is arguable that a penalty imposed under this provision is unlikely to be sufficient to deter a calculating ‘would-be’ offender from breaching the provision if it is in his/her economic interests to do so. In fact, the Explanatory Memorandum itself states in relation to this particular offence provision ‘In the commercial setting, these penalties are not large.’⁶⁶

In penalising breaches of ‘regulatory legislation’ there are two opposing considerations which must be balanced in imposing penalties, and these were summarised by Brennan J of the High Court in *Walden v. Hensler*:

[W]hen a law proscribes conduct which an ordinary person without special knowledge of the law might engage in the honest belief that he is lawfully entitled to do so, the secondary deterrent purpose — i.e., the purpose of educating both the offender and the community in the law's proscriptions so that the law will come to be known and obeyed — must be invoked to justify the imposition of a penalty for breach. In such a case, care must be taken in imposing a penalty lest the offender be made to shoulder an unfair burden of community education.⁶⁷

However, given the small stature of some of the penalties retained in the AFFA portfolio legislation some may draw the conclusion that there is little danger of exerting a deterrent effect which would impose an excessive burden on particular defendants.

Penalty provision uniformity

Also notable is the apparent decision in the Bill not to standardise the penalties in the portfolio legislation to replace references to dollar amounts, where they occur, with references to a specified number of penalty units.⁶⁸ Where the maximum penalty provided is a dollar amount, rather than amount indicated by penalty units, the quantum of penalty is likely to be gradually eroded by inflation. On the other hand, the election of a penalty

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unit approach would enable the indexation of the penalty by mere amendment of the universal provision in *Crimes Act 1914*, section 4AA.

Endnotes

- 1 Review of Commonwealth Criminal Law (Gibbs Committee), *Interim Report. Principles of Criminal Responsibility*, AGPS, Canberra, July 1990, p. 9.
- 2 *ibid.*
- 3 *ibid.*, p. 14.
- 4 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.
- 5 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.
- 6 Second Reading Speech, *Parliamentary Debates (Hansard)*, Senate, Crimes Amendment Bill 1994, 30 June 1994, p. 2377.
- 7 Latin: a guilty act.
- 8 Latin: a guilty mind.
- 9 Subsection 5.1(2).
- 10 Sections 6.1 & 6.2.
- 11 Subsection 13.1(1).
- 12 Subsection 13.2(1).
- 13 Subsections 13.3(1) & 13.3(4).
- 14 Subsection 13.3(6).
- 15 Second Reading Speech, *Parliamentary Debates (Hansard)*, Crimes Amendment Bill 1994, Senate, 30 June 1994, p. 2377.
- 16 These include the *Environment and Heritage Legislation Amendment (Application of Criminal Code) Act 2001*, the *Veterans Affairs Amendment (Application of Criminal Code) Act 2001*, the *Foreign Affairs and Trade Legislation (Application of Criminal Code) Act 2001* and the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001*.
- 17 The *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* received assent on 6.4.01 and commenced operation on 24 May 2001.
- 18 *Criminal Code Act 1995*, s.6.2

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- 19 The *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* received assent on 6.4.01 and commenced operation on 24 May 2001.
- 20 *Criminal Code*, section 6.2.
- 21 *Criminal Code*, section 6.2.
- 22 The *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* received assent on 6.4.01 and commenced operation on 24 May 2001.
- 23 *Criminal Code*, section 6.2.
- 24 *Criminal Code*, section 6.2.
- 25 Gilles, P. (1987), *The Law of Evidence in Australia*, 2nd edition, Legal Books, Sydney, at 45.
- 26 Ibid; Fisse, B. (1990), *Howard's Criminal Law*, 5th edition, Law Book Company, Sydney, at 20.
- 27 *ibid* (Fisse at 20).
- 28 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*.
- 29 *Explanatory Memorandum*, p. 48.
- 30 *Criminal Code*, section 6.2.
- 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 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*.
- 33 The *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* received assent on 6.4.01 and commenced operation on 24 May 2001.
- 34 Sharp, R. (1999), 'Review of Australia's National Environmental Impact Assessment Processes in the Control of Alien Species in order to prevent Biodiversity Loss', 16(1) *Environmental and Planning Law Journal* 92 at 96.
- 35 *Criminal Code*, section 6.2.
- 36 *Criminal Code*, section 6.2.
- 37 *Criminal Code*, section 6.2.
- 38 According to an AQIS document: 'The *Export Control Act* was enacted in 1982 in a period of crisis. The origins of the crisis were the export to the USA of kangaroo and horsemeat labelled as beef. Limited quantities of meat prepared as pet food also entered the export chain. The crisis created a public outcry in Australia. A severe loss of confidence in Australia's inspection arrangements seriously threatened continued access for Australian meat to the US and UK markets. This, in turn, reflected adversely on the status of the Australian

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government's guarantee for all exports of food and agricultural products, not just meat.'
Internet URL www.affa.gov.au/corporate_docs/publications/word/quarantine/mid/98-11.doc ;
accessed 23.7.01

- 39 www.affa.gov.au/corporate_docs/publications/word/quarantine/mid/98-11.doc, accessed 23.7.01
- 40 Senator The Hon Warwick Parer, Federal Minister for Resources and Energy, Speech at the Launch of the Commonwealth Government's Minerals and Petroleum Resources Policy Statement, Parliament House, Canberra, 2 February 1998.
- 41 The export licence regime provided the means for triggering the operation of Commonwealth environmental impact assessment of forestry and other development proposals under the now repealed *Environment Protection (Impact of Proposals) Act 1974* (replaced by the *Environment Protection and Biodiversity Conservation Act 1999*).
- 42 Only one RFA agreement remains unsigned to date, for the South East Queensland CRA region. The Southern NSW RFA was signed on 24 April 2001. An AFFA document describes the progressive removal of the controls: 'In March 1997, the Commonwealth made the Export Control (Regional Forest Agreements) Regulations (the RFA regulations), which provides that if an RFA (within the meaning of the 1996 HWC regulations) is in force for a region (within the meaning of the 1996 HWC regulations), hardwood woodchips (also within the meaning of the 1996 HWC regulations) derived from native forest in that region and other unprocessed wood (eg. logs, billets) and softwood woodchips not derived from plantations in that region (otherwise controlled by the 1986 UPW regulations), are not prescribed goods under the 1996 HWC regulations or the 1986 UPW regulations, respectively. These provisions ensured that, as an RFA came into force for a region, all export controls on woodchips and other unprocessed wood from that region (except that sourced from a plantation in the region) were lifted. The RFA regulations effectively removed the need to obtain either an RFA licence under the 1996 HWC regulations (to export native forest hardwood woodchips) or an unprocessed wood licence under the 1986 UPW regulations (to export native forest material other than hardwood woodchips).'
- 43 www.affa.gov.au/corporate_docs/publications/word/quarantine/mid/98-11.doc, accessed 23.7.01
- 44 The *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* received assent on 6.4.01 and commenced operation on 24 May 2001.
- 45 <http://www.affa.gov.au/docs/quarantine/mid/meatfees.htm>. Accessed 30.7.01.
- 46 *Criminal Code*, section 6.2.
- 47 *Farm Household Support Act 1992*, section 6.
- 48 Senate Standing Committee on Industry, Science, Technology, Transport, Communications and Infrastructure, *Fisheries Reviewed*, December 1993.
- 49 The *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* received assent on 6.4.01 and commenced operation on 24 May 2001.
- 50 For background see AFMA (2001) 'Southern Ocean hot pursuit nets \$1.5 million fishing suspect' *Media Release*, 20 April 2001.

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- 51 *Criminal Code 1995*, section 6.2.
- 52 AFFA, *Annual Report 1999-2000*, Vol.2, p. 128.
- 53 *Criminal Code*, section 6.2.
- 54 *Criminal Code*, section 6.2.
- 55 *Criminal Code*, section.6.2
- 56 <http://www.afma.gov.au>
- 57 *Torres Strait Fisheries Act 1984*, s.8.
- 58 *Explanatory Memorandum* - compare the heading for Item 257 on p.103 (amending the *Torres Strait Fisheries Act*) with the heading for Item 249 on p.99 (amending the *Primary Industries Levies and Charges Collection Act*).
- 59 *Criminal Code*, section 6.2.
- 60 This company is referred to in the legislation as ‘nominated company B’.
- 61 The Hon. D. Kerr, 2nd reading speech for Criminal Code Bill 1995, House of Representatives *Hansard* 1 March 1995, p. 1331.
- 62 *Explanatory Memorandum*, p. 75.
- 63 The Hon. D. Kerr, 2nd reading speech for Criminal Code Bill 1995, House of Representatives *Hansard*, 1 March 1995, p. 1331.
- 64 *Explanatory Memorandum*, p. 3.
- 65 *Re Industrial Hygiene Decision No.167* (1975), 2 W.C.R. 234 at 252. Cited in Saxe, D. (1990) *Environmental Offences: Corporate Responsibility and Executive Liability*, Canada Law Book Co., Aurora, Ontario at 26.
- 66 *Explanatory Memorandum*, p. 51.
- 67 *Walden v. Hensler* (1987) 163 CLR 561 at 570.
- 68 A case in point is section 9 of the *Export Inspection and Meat Charges Collection Act 1985*.

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