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Treasury Legislation Amendment (Application of  
Criminal Code) Bill (No. 3) 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

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No. 38 2001–02

Treasury Legislation Amendment (Application of Criminal  
Code) Bill (No. 3) 2001

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29 August 2001

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# Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 3) 2001

**Date Introduced:** 28 June 2001

**House:** House of Representatives

**Portfolio:** Treasury

**Commencement:** Most of the Act commences on 15 December 2001.

## Purpose

The Bill's main purpose is to amend 5 Acts in the Treasury portfolio in order to harmonise the criminal offence provisions with the principles of criminal responsibility found in Chapter 2 of the Criminal Code.

## Background

For an account of the background to the Criminal Code and a brief description of Chapter 2 of the Code, see the [Bills Digest](#) for the Environment and Heritage Legislation Amendment (Application of Criminal Code) Bill 2000 (*Bills Digest No. 92, 2000-2001*). Chapter 2 of the Criminal Code contains principles of criminal responsibility. Since 1995 there has been a staggered program of applying those principles to Commonwealth criminal laws. Chapter 2 applies to all offences against the Code. From 1 January 1997 it applied to all new Commonwealth offences. From 15 December 2001 it will apply to pre-existing Commonwealth offences. In order to meet this deadline, the Commonwealth has been reviewing pre-existing offence provisions with a view to harmonising them with Chapter 2, modifying the application of Chapter 2 where necessary or clarifying how Chapter 2 will apply.

The Parliament has passed the following laws which apply Chapter 2 to legislation in a range of portfolios—*Communications and the Arts Legislation Amendment (Application of Criminal Code) Act 2001*, *Environment and Heritage Legislation Amendment (Application of Criminal Code) Act 2001*, *Foreign Affairs and Trade Legislation Amendment (Application of Criminal Code) Act 2001*, *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001*, *Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Act 2001*, *Treasury Legislation Amendment*

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*(Application of Criminal Code) Act (No. 1) 2001, and Veterans' Affairs Legislation Amendment (Application of Criminal Code) Act 2001.*

Currently before the Parliament are the Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Bill 2001, Family and Community Services Legislation Amendment (Application of Criminal Code) Bill 2001, Finance and Administration Legislation (Application of Criminal Code) Bill 2001, Health and Aged Care Legislation Amendment (Application of Criminal Code) Bill 2001, Industry, Science and Resources Legislation Amendment (Application of Criminal Code) Bill 2001, Migration Legislation Amendment (Application of Criminal Code) Bill 2001, Reconciliation and Aboriginal and Torres Strait Islander Affairs Legislation Amendment (Application of Criminal Code) Bill 2001, Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 2) 2001, Education, Training and Youth Affairs Legislation Amendment (Application of Criminal Code) Bill 2001 and the present Bill.

Some major aspects of criminal responsibility relevant to the Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 3) 2001 are described below.

## Offences—Physical elements and fault elements

The Criminal Code provides that an offence consists of physical elements and fault elements. Physical elements relate to external events such as conduct or the result of conduct. Fault elements relate to a person's state of mind eg intention, knowledge, recklessness and negligence.

The Criminal Code defines the physical elements of an offence to be conduct, the circumstances in which it occurs and the results of conduct.<sup>1</sup> An omission to act can be a physical element if there is appropriate statutory provision or if it is the result of a breach of duty to act.<sup>2</sup> Each offence must contain at least one of these physical elements, but any combination of physical elements may be present in an offence provision.

In general, for every physical element of an offence, the prosecution must also prove a corresponding fault element. The Code establishes four fault elements—intention, knowledge, recklessness and negligence—in descending order of culpability. Where the physical element of an offence consists of conduct, intention is the default fault element. However, if the physical element is a circumstance or a result of conduct the default fault element is recklessness.<sup>3</sup> The Code does not prevent an offence from specifying an alternative fault element, but indicates that the default fault element will apply in the absence of a specified fault element.

The Bill amends a number of offence provisions so that their constituent fault and physical elements correspond with the scheme supplied by the Criminal Code.

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## Proof of criminal responsibility

It is the duty of the prosecution to prove the guilt of the accused person.<sup>4</sup> The prosecution bears the legal burden of proving every element of an offence. The legal burden means 'in relation to a matter, the burden of proving the existence of the matter'.<sup>5</sup> The prosecution bears the legal burden of proof beyond reasonable doubt, unless the law creating the offence provides otherwise.

Generally, where a burden of proof is placed on a defendant it is an evidential burden only.<sup>6</sup> The evidential burden can be discharged by the defendant pointing to evidence suggesting there was a reasonable possibility that a matter existed or did not exist.<sup>7</sup> The Code provides that a defendant will have a legal burden of proof only if the law creating the offence so provides. When a legal burden is placed on the defendant it must be discharged on the balance of probabilities.<sup>8</sup>

The Bill inserts standard notes after offence provisions which present defences so as to indicate whether the defendant bears an evidential or legal burden if s/he wishes to rely upon such defences.

## Strict liability

The majority of the proposed amendments in the Bill relate to strict liability.

At common law there is a presumption that every offence contains a mental element. However, an increasing number of statutory offences dispense with fault elements.<sup>9</sup> Whether an offence is a strict liability offence depends on the interpretation of the offence provision. Working from common law principles, Chapter 2 of the Criminal Code requires offences of strict liability to be expressly identified as such.<sup>10</sup> Failure to do so means that fault elements are applied to all the physical elements in the offence.

Strict liability is most often used in minor or regulatory offences attracting small penalties where requiring the prosecution to prove a fault element would render the legislation unenforceable because it would inhibit prosecution and make the hearing of cases more complex and lengthy.

As well as providing for the identification of strict liability offences, the Criminal Code allows a law which creates an offence to provide that strict liability applies to some physical elements of that offence.<sup>11</sup> The Bill identifies some physical elements of offences as attracting strict liability.

Although the prosecution need not prove fault in relation to strict liability, the Criminal Code supplies a defence of mistake of fact to strict liability offences and to other offences to where strict liability is applied to some of their physical elements.<sup>12</sup> The Code does not prevent defences other than mistake of fact applying.<sup>13</sup>

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The Bill retains additional defences to some strict liability offences. For example, the Bill relocates and re-phrases defences of reasonable excuse where they presently exist in offences identified as strict liability offences.

The Minister's Second Reading Speech notes that the Bill does not change the criminal law but rather ensures the current law is maintained following application of the Criminal Code.<sup>14</sup> As with other 'application of criminal code' Bills, the Senate Standing Committee for the Scrutiny of Bills has requested an assurance from the Minister that no new strict liability offences are created by the Bill.<sup>15</sup>

## Absolute liability

An absolute liability offence is one where the prosecution does not have to prove any fault elements and where no defence of honest and reasonable mistake of fact is available. 'Guilt is established by proof of the objective elements of the offence'<sup>16</sup>

The *Criminal Code* provides that an offence which is an absolute liability offence must be identified as such<sup>17</sup>, as must any particular physical elements which are intended to attract absolute liability in other offences.<sup>18</sup> While mistake of fact is not available as a defence<sup>19</sup>, the *Criminal Code* recognises that other defences may be provided in particular statutes.

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

## Defences

Defences to criminal offences are usually external to the physical and fault elements of offences and to offences themselves.<sup>20</sup> Possibly for this reason, and to clearly identify defences as defences and not as elements of offences which have to be proved or disproved by the prosecution, the amendments relocate defences from provisions which set out the physical elements of an offence into their own separate subsections.

## Main Provisions

### Amendments to the *Corporations Act 2001*

The *Corporations Act 2001* was enacted to remove deficiencies in the framework of corporate regulation revealed by the High Court decisions in the cases of *Re Wakim; ex parte McNally*<sup>21</sup> and *The Queen v Hughes*<sup>22</sup>. The Act substantially re-enacts the existing Corporations Law of the ACT as a Commonwealth Act applying throughout Australia. The Commonwealth has been referred the constitutional power to enact this legislation by the Parliaments of the States.

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The Bill proposes 306 amendments to the Corporations Act. Some of these amendments are explained below.

### Strict liability offences

By far the majority of the proposed amendments identify offences as strict liability offences. For example, under subsection 319(1) it is an offence for certain entities, required to prepare a report under Division 1, to fail to lodge that report with ASIC within the required timeframe. The penalty for this offence is 5 penalty units.<sup>23</sup> **Item 104** inserts **new subsection 319(1A)** stating that this is an offence of strict liability. A strict liability offence is one where the prosecution does not have to prove fault, only that the defendant carried out the requisite physical elements of the offence. The policy of the Criminal Code is that strict liability offences have to be expressly identified in legislation.<sup>24</sup> Failure to do so means that the offence will be interpreted as one where the prosecution has to prove fault eg intention (if, for example, ‘conduct’ is the relevant physical element).

The Bill also identifies particular physical elements of circumstance and conduct of existing offence provision as being of strict liability (**see items 36, 39, 41, 55 and 97**). For example, under subsection 191(1) it is an offence for a Director to fail to notify other directors of a material personal interest in a matter that relates to the affairs of the company. **Item 36** inserts a **new subsection 191(1A)** which specifies that strict liability will apply to one physical element of the offence—the circumstance that the director of a company has a material personal interest in a matter that relates to the affairs of a company. In other words, the prosecution will not have to prove that the defendant put his or her mind to the letter of the law, however a defence of mistake of fact would be available.<sup>25</sup>

### Absolute liability

Subsections 606(1), (2) and (4) of the Corporations Act prohibit certain acquisitions of relevant interests in voting shares. The penalty for these offences is a fine not exceeding \$2750 and/or imprisonment for 6 months. **Item 196** identifies these offence as ones of absolute liability—that is, no fault elements attach to the physical elements of the offences and the defence of mistake of fact which is applicable to strict liability offences<sup>26</sup> is not available. The Criminal Code does not however prevent other defences applying to an absolute liability offence (subsection 6.2(3)). Existing defences under subsection 606(5) are therefore unaffected by the Bill.

**Items 143, 152, 155 and 158** apply absolute liability to certain physical elements in some offences under the Corporations Act. Amongst the offences affected by these amendments are offences relating to a director's duty to prevent insolvent trading, the fraudulent incurring of certain debts by company officers and other fraudulent activity of company officers. In each case absolute liability applies to a particular element of circumstance—(for example, that the particular company was a company to which the section applied). Section 6.2(2) of the *Criminal Code* provides that if absolute liability applies to a

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particular physical element of an offence, then no fault elements apply to that physical element. However the prosecution must still prove the fault element of intention in relation to the physical element of conduct in the offence (for example, engaging in an act to defraud creditors).

## Defences

The Bill contains numerous amendments that propose to re-structure offence provisions in order to clarify their associated defences. For example under subsection 597(10A) a person must not, without reasonable excuse, refuse or fail to comply with a direction from the Court to produce, at an examination, books in his or her possession. **Items 161 and 162** 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.

The Bill also inserts a standard note after offence provisions which present defences, that the defendant bears an *evidential burden* if s/he wishes to rely upon such defences (for example **items 137, 139 and 162**). 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.<sup>27</sup> 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.<sup>28</sup>

**Items 35, 154, 197 and 268** insert a note after subsections 188(3), 592(2), 605(5) and 1307(3) respectively to clarify that the defendant bears a legal burden if s/he wishes to rely upon the particular defences. A legal burden of proof must be discharged by a defendant on the balance of probabilities.<sup>29</sup>

## Clarification of physical and fault elements of offences

The Bill also proposes amendments to some offence provisions in order to specify the physical elements of an offence and the corresponding fault elements (where they vary from those specified by the *Criminal Code*). For example subsection 530B(3) reads:

A person must not hinder or obstruct a liquidator of a company in obtaining possession of books of the company, unless the person is entitled, as against the company and the liquidator, to retain possession of the books.

**Item 135** removes the words 'hinder or obstruct' and replaces them with 'engage in conduct that results in the hindering or obstruction of'. The amendment more clearly identifies the constituent physical elements of conduct and result to which the default fault

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elements supplied by the *Criminal Code* will apply. **Items 146-151, 157, 266 and 267** make similar amendments to more clearly identify the physical elements of other offences.

The Bill also makes proposed amendments to clarify the appropriate fault elements for certain offences. For example under subsection 597(6) a person who is summoned under sections 596A or 596B to attend before the Court must not, without reasonable excuse, fail to attend as required. **Items 159 and 160** reword this offence in two ways. Firstly they relocate the defence of reasonable excuse to a **new subsection 597(6A)** and secondly they insert the words 'intentionally or recklessly' so that the provision reads: 'a person who intentionally or recklessly fails to attend...' This clarifies that either recklessness or intention are the appropriate fault elements for the conduct of failing to attend. As the provision currently reads the prosecution would have to prove that the defendant intentionally failed to attend, thus enabling a defence of forgetfulness to be raised. **Items 130 and 161** make similar amendments to subsections 486A(8) and 597(10A) respectively.

### Application of the Criminal Code and corporate criminal responsibility

**Item 269** inserts **new section 1308A** which reads:

'subject to contrary indication within the Act, Chapter 2 of the Criminal Code applies to all offences against the Act.'

According to the Explanatory Memorandum, the qualification 'subject to contrary indication' is necessary as parts of the Corporations Act exclude the application of Part 2.5 of the Criminal Code.<sup>30</sup> It is of note that **item 269** is drafted differently from the relevant clause used in other 'application of criminal code' Bills. Where there is an intention to exclude Part 2.5, the more usual formula reads:

'Chapter 2 (other than Part 2.5) of the *Criminal Code* applies to all offences against this Act'.

For a discussion of the issue of corporate criminal responsibility, see *Bills Digest No. 20, 2001-02*.<sup>31</sup>

### Schedule 2—Amendments to the *Treasury Legislation Amendment (Application of Criminal Code) Act (No.1) 2001*

The *Treasury Legislation Amendment (Application of Criminal Code) Act (No.1) 2001*, was the first of the series of 'application of criminal code' Bills passed by the Parliament. It makes amendments to a number of offence provisions in the *Insurance Act 1973*, the *Life Insurance Act 1995*, the *Retirement Savings Accounts Act 1997* and the *Superannuation Industry (Supervision) Act 1993*. In particular, the Act inserts a non-Code definition of recklessness into some provisions. The definition is based on that found in the Criminal

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Code but in addition relates to acts or omissions of a person. It was considered that this definition would more accurately reflect the nature of the particular offences.

**Items 1-54** of the Schedule repeal the provisions containing this non-code definition of recklessness, the stated rationale being that it has subsequently been discovered that this definition would have unintended consequences. The Explanatory Memorandum states the non-code definition could be interpreted as requiring proof that a person is aware of the elements of the offence in question, which means that ignorance of the law could be used as an excuse when the prosecution is trying to prove recklessness.<sup>32</sup> For this reason, the non-Code definition of recklessness will be removed and the Code definition will apply by default.

These amendments commence immediately after the commencement of **item 14** of Schedule 1 to the *Treasury Legislation Amendment (Application of Criminal Code) Act (No.1) 2001*, which commences on 15 December 2001.

### Schedule 3 Other Amendments

#### **Amendments to the *Financial Sector Shareholdings Act 1998***

Amongst other things, the *Treasury Legislation Amendment (Application of Criminal Code) Act (No.1) 2001* inserted into subsections 24(4) and (5) and subsections 26(4A) and (4B) of the Financial Sector Shareholdings Act a non-Code definition of recklessness. The definition is based on that found in the Criminal Code but in addition relates to acts or omissions of a person. It was considered that this definition would more accurately reflect the nature of the particular offences.

**Items 1-4** of the Schedule repeal the provisions containing this non-code definition of recklessness, the stated rationale being that it has subsequently been discovered that this definition would have unintended consequences. The Explanatory Memorandum states the non-code definition could be interpreted as requiring proof that a person is aware of the elements of the offence in question, which means that ignorance of the law could be used as an excuse when the prosecution is trying to prove recklessness.<sup>33</sup> For this reason, the non-Code definition of recklessness will be removed and the Code definition will apply by default.

These amendments commenced on 29 April 2001, the day after the *Treasury Legislation Amendment (Application of Criminal Code) Act (No.1) 2000* received Royal Assent.

#### **Amendments to the *Insurance Contracts Act 1984***

**Items 5-14** amend sections of the Insurance Contracts Act. These amendments are designed to:

- apply Chapter 2 of the Criminal Code to all offences against the Act (**item 5**)

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- identify offences as offences of strict liability (**items 6 and 9**)
- insert a standard note after offence provisions which present defences, that the defendant bears an *evidential burden* if s/he wishes to rely upon such defences (**items 7, 8, 10, 11, 12 and 13**). The evidential burden can be discharged by the defendant pointing to evidence suggesting there was a reasonable possibility that a matter existed or did not exist<sup>34</sup>, and
- insert a note stating that a defendant bears a legal burden of proof in relation to the matter in subsection 75(7) (**item 14**). A legal burden of proof must be discharged by a defendant on the balance of probabilities.<sup>35</sup>

### Amendments to the *Commonwealth Places (Mirror Taxes) Act 1998*

The *Commonwealth Places (Mirror Taxes) Act 1998* applies State taxation laws to Commonwealth places. **Item 15** inserts a **new subsection 20(1A)** to clarify that Chapter 2 of the Criminal Code does not operate in relation to offences under the relevant State taxation laws.

## Endnotes

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- 1 Criminal Code, section 4.1.
- 2 Criminal Code, section 4.3.
- 3 Criminal Code, section 5.6.
- 4 This is the ‘golden thread’ of English criminal law referred to in *Woolmington v. DPP* (1935) AC 462.
- 5 Criminal Code, subsection 13.1(3).
- 6 Criminal Code, subsection 13.3(1).
- 7 Criminal Code, subsection 13.3(6).
- 8 Criminal Code, sections 13.4 and 13.5.
- 9 *He Kaw Teh v R* (1985) 157 CLR 523.
- 10 Criminal Code, subsection 6.1(1).
- 11 Criminal Code, subsection 6.1(2).
- 12 Criminal Code, paragraphs 6.1(1)(b) and 6.1(2)(b).
- 13 Criminal Code, subsection 6.1(3).
- 14 Second Reading Speech, *Parliamentary Debates (Hansard)*, 28 June 2001, p. 28816.

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- 15 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest, No. 9 of 2001*, 22 August 2001, p. 33.
- 16 Halsburys, op.cit, 130–7965.
- 17 Subsection 6.2(1).
- 18 Subsection 6.2(2).
- 19 Paragraphs 6.2(1)(b) and 6.2(2)(b).
- 20 Matthew Goode, 'The Modern Criminal Code Project', *Australian Law Librarian*, 5(4), December 1997, pp.267-76 at p.267.
- 21 (1999) 198 CLR 511.
- 22 (2000) 171 ALR 155.
- 23 One penalty unit = \$110.
- 24 Criminal Code section 6.1.
- 25 Criminal Code, paragraph 6.1(1)(b).
- 26 This is found in section 9.2 of the Criminal Code.
- 27 Gilles, P. (1987), *The Law of Evidence in Australia*, 2<sup>nd</sup> edition, Legal Books, Sydney, at p. 45.
- 28 Ibid; Fisse, B. (1990), *Howard's Criminal Law*, 5<sup>th</sup> edition, Law Book Company, Sydney, at p. 20.
- 29 Criminal Code, Section 13.5.
- 30 para 4.267.
- 31 James Prest, *Bills Digest No. 20, 2001–02*, Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Bill 2001.  
<http://www.aph.gov.au/library/pubs/bd/2001-02/02bd020.pdf>
- 32 para 4.276.
- 33 ibid.
- 34 Criminal Code, subsection 13.3(6).
- 35 Criminal Code, Section 13.5.

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