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No. 72 2001–02

Industry, Science and Resources Legislation
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. 72 2001-02

Industry, Science and Resources Legislation Amendment
(Application of Criminal Code) Bill 2001

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Law and Bills Digest Group
26 September 2001

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Industry, Science and Resources Legislation Amendment (Application of Criminal Code) Bill 2001

Date Introduced: 22 August 2001

House: Senate

Portfolio: Industry, Science and Resources

Commencement: The day after Royal Assent

Purpose

The Bill's main purpose is to revise criminal offence provisions in legislation administered by the Department of Industry, Science and Resources in the light of uniform principles of criminal responsibility contained 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— *Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Act 2001*, *Communications and the Arts Legislation Amendment (Application of Criminal Code) Act 2001*, *Environment and Heritage Legislation Amendment (Application of Criminal Code) Act 2001*, *Family and Community*

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Services Legislation Amendment (Application of Criminal Code) Act 2001, Finance and Administration Legislation Amendment (Application of Criminal Code) Act 2001, Health and Aged Care 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, Migration Legislation Amendment (Application of Criminal Code) Act 2001, Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Act 2001, Reconciliation and Aboriginal and Torres Strait Islander Affairs Legislation Amendment (Application of Criminal Code) Act 2001, Treasury Legislation Amendment (Application of Criminal Code) Act (No. 1) 2001, Treasury Legislation Amendment (Application of Criminal Code) Act (No. 3) 2001, and Veterans' Affairs Legislation Amendment (Application of Criminal Code) Act 2001.

Currently before the Parliament are the Education, Training and Youth Affairs Legislation Amendment (Application of Criminal Code) Bill 2001, Employment, Workplace Relations and Small Business Legislation Amendment (Application of Criminal Code) Bill 2001, Treasury Legislation Amendment (Application of Criminal Code) Bill (No. 2) 2001, Defence Legislation Amendment (Application of Criminal Code) Bill 2001 and the present Bill.

Some major aspects of criminal responsibility relevant to the Industry, Science and Resources Legislation Amendment (Application of Criminal Code) Bill 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.¹ 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.² 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.³ 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.

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The Bill amends a number of offence provisions within Industry, Science and Resources portfolio legislation so that their constituent fault and physical elements correspond with the scheme supplied by the Criminal Code.

Proof of criminal responsibility

It is the duty of the prosecution to prove the guilt of the accused person.⁴ 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'.⁵ 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.⁶ 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.⁷ 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.⁸

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

The Bill also retains several provisions that place a legal burden of proof on the defendant. Standards notes are placed after these provisions to indicate this burden of proof.

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.⁹ 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.¹⁰ 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.¹¹ The Bill identifies some physical elements of offences as attracting strict liability.

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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.¹² The Code does not prevent defences other than mistake of fact applying.¹³

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.¹⁴ 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.¹⁵

Corporate criminal responsibility

In general, the Bill applies Chapter 2 to all offence provisions in relevant legislation administered by the Department of Industry, Science and Resources. However, in some cases, the application of Chapter 2 is modified. The application of the Code's principles of corporate criminal responsibility is one example. At the time the Criminal Code Bill 1994 was introduced, the responsible Minister said, 'Part 2.5 [of the Criminal Code dealing with corporate criminal responsibility] concerns general principles suitable for ordinary offences. It will be the basis of liability if no other basis is provided.'¹⁶

For a discussion of the issue of corporate criminal responsibility, see *Bills Digest No. 20, 2001-02*.¹⁷

Defences

Defences to criminal offences are usually external to the physical and fault elements of offences and to offences themselves.¹⁸ 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 away from provisions which set out the physical elements of an offence, into their own separate subsections.

Removing and replacing inappropriate fault elements

The Bill amends a number of offence provisions so that their constituent fault and physical elements correspond with the scheme supplied by the Criminal Code. For example, amendments ensure that the Code fault element of knowledge does not apply to the physical element of conduct in an offence. In the process of applying appropriate fault elements, some of the amendments also restructure offence provisions so that their

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constituent physical elements are clearly identified and the Code's default fault elements can be applied to them.

Ancillary offences

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

Additionally, some Commonwealth statutes themselves contain provisions creating ancillary offences. These provisions will no longer be necessary once the Criminal Code is applied as it contains ancillary offence provisions. The Bill therefore removes some ancillary offence provisions from statutes administered by the Department of Industry, Science and Resources. Equivalent Criminal Code provisions will take their place.

Main Provisions

Amendments to the *Atomic Energy Act 1953*

Item 1 applies the principles of criminal responsibility contained in Chapter 2 of the Criminal Code to all offences against the Atomic Energy Act.

Subsection 37(2) provides that it is an offence for a person to refuse or fail, without reasonable excuse, to comply with a notice served on the person under subsection (1).

Item 5 repeals and restructures this provision in several ways:

- It separates the conduct elements of 'refusal to comply' and 'failure to comply' into two separate offences (**new subsections 37(2) and 37(4)** respectively) The default fault element under the Criminal Code for a 'refusal to comply' will be intention
- It specifies that the 'failure to comply' is an offence of strict liability (**new subsection 37(6)**). This means that the prosecution does not have to prove fault elements in relation to the physical elements of the offence. However, the defendant can use a defence of mistake of fact, and
- It recreates and relocates the defence of reasonable excuse to the offences in **new subsections 37(3) and (5)**. The purpose of these amendments is to ensure that the words are interpreted as a defence and not as an element of the offence which would have to be proved by the prosecution. These new subsections include an explanatory note indicating that the defendant bears an evidential burden in proving the defence.

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Items 6-8 make similar amendments.

Amendments to the *Bounty and Capitalisation Grants (Textile Yarns) Act 1981*

Item 9 applies the principles of criminal responsibility contained in Chapter 2 of the Criminal Code to all offences against the Bounty and Capitalisation Grants (Textile Yarns) Act.

Subsection 10B(1) requires a person, who has lodged a bounty claim and becomes aware that the claim was excessive, to lodge a variation form within 28 days. The penalty for this offence is \$3000. **Item 10** amends subsection 10B(1) by replacing 'becomes aware' with 'subsequently knows'. This amendment is necessary because, if left unamended, then following application of the *Criminal Code* the phrase 'becomes aware' would constitute a physical element of circumstance, to which the default fault element of recklessness would apply. The effect would be that the prosecution would be required to prove that the defendant was reckless as to becoming aware of the relevant event - which would be an unworkable proposition. The amendment ensures that this element of the offence remains a fault element of knowing the relevant fact.

Items 11 and 12 relocate and rephrase the element of reasonable excuse currently found in subsection 18(1). Under subsection 18(1) it is an offence for a person, 'without reasonable excuse' to refuse or fail to attend before an authorised officer, make an oath or affirmation, answer a question or produce a document. **Item 11** omits the words, 'without reasonable excuse' from subsection 18(1) and **item 12** inserts a defence of reasonable excuse in **new subsection 18(2)**. The purpose of these amendments is to ensure that the words are interpreted as a defence and not as an element of the offence which would have to be proved by the prosecution. **New subsection 18(2)** includes an explanatory note indicating that the defendant bears an evidential burden in proving the defence.

Amendments to the *Bounty (Bed Sheeting) Act 1977*

Items 13-16 amend the offence provisions of this Act in the same manner as the Bounty and Capitalisation Grants (Textile Yarns) Act is amended. See above for a discussion of these amendments.

Amendments to the *Bounty (Books) Act 1986*

Items 17-20 amend the offence provisions of this Act in the same manner as the Bounty and Capitalisation Grants (Textile Yarns) Act is amended. See above for a discussion of these amendments.

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Amendments to the *Bounty (Citric Acid) Act 1991*

Items 21-24 amend the offence provisions of this Act in the same manner as the Bounty and Capitalisation Grants (Textile Yarns) Act is amended. See above for a discussion of these amendments.

Amendments to the *Bounty (Computers) Act 1984*

Items 25-28 amend the offence provisions of this Act in the same manner as the Bounty and Capitalisation Grants (Textile Yarns) Act is amended. See above for a discussion of these amendments.

Amendments to the *Bounty (Fuel Ethanol) Act 1994*

Items 29-30 amend the offence provisions of this Act in the same manner as the Bounty and Capitalisation Grants (Textile Yarns) Act is amended. See above for a discussion of these amendments.

Item 31 repeals and replaces subsection 55(1). Under subsection 55(1) it an offence for a person, without reasonable excuse, to refuse or fail to:

- attend before an authorised officer,
- make an oath or affirmation, or
- answer a question or produce a document.

The maximum penalty for this offence is imprisonment for 6 months.

Item 31 restructures this provision in several ways.

- It separates the conduct elements of 'failure' to attend etc and 'refusal to attend etc' into two separate offences (**new subsections 55(1) and 55(3A)** respectively). The default fault element under the Criminal Code for a 'refusal to attend' will be intention.
- It specifies that 'failure to attend etc' is an offence of strict liability (**new subsection 55(2)**). This means that the prosecution does not have to prove fault elements in relation to the physical elements of the offence. However, the defendant can use a defence of mistake of fact.
- It recreates and relocates the defence of reasonable excuse to these offences in **new subsections 55(3) and 55(3B)**. The purpose of these amendments is to ensure that the words are interpreted as a defence and not as an element of the offence which would have to be proved by the prosecution. The new subsections include an explanatory note indicating that the defendant bears an evidential burden in proving the defence.

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Amendments to the *Bounty (Machine Tools and Robots) Act 1985*

Items 32-33 and 35-36 amend the offence provisions of this Act in the same manner as the Bounty and Capitalisation Grants (Textile Yarns) Act is amended. See above for a discussion of these amendments.

Item 34 repeals subsection 24(7) which creates an offence of providing false or misleading information in a return of costs to the Collector. General offences of supplying false or misleading information are found in the Criminal Code (Part 7.4).

Amendments to the *Bounty (Photographic Film) Act 1989*

Items 37-40 amend the offence provisions of this Act in the same manner as the Bounty and Capitalisation Grants (Textile Yarns) Act is amended. See above for a discussion of these amendments.

Amendments to the *Bounty (Printed Fabrics) Act 1981*

Items 41-44 amend the offence provisions of this Act in the same manner as the Bounty and Capitalisation Grants (Textile Yarns) Act is amended. See above for a discussion of these amendments.

Subsection 18(2) of the Bounty (Printed Fabrics) Act provides that it is an offence for a person, to knowingly obtain or attempt to obtain bounty that is not payable.

Item 45 removes the words 'knowingly obtain or attempt to obtain' and replaces them with the word 'obtain'. 'Knowingly' is removed because it is an inappropriate fault element in this provision. By operation of the Criminal Code, default fault elements—intention in relation to the physical element of conduct and recklessness in relation to the physical elements of circumstance and result—will apply. The words 'attempt to obtain' are removed on the basis that ancillary offences such as attempt will be supplied by the Criminal Code. **Item 46** removes the words 'attempt to obtain' from subsection 18(3) for the same reason.

Amendments to the *Bounty (Ships) Act 1989*

Items 47-48 amend the offence provisions of this Act in the same manner as the Bounty and Capitalisation Grants (Textile Yarns) Act is amended. See above for a discussion of these amendments.

Items 49 and 50 repeal and restructure subsection 25(1). Under subsection 25(1) it an offence for a person, without reasonable excuse, to refuse or fail to:

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- attend before an authorised officer
 - make an oath or affirmation, or
 - answer a question or produce an account, book, document or other record.,
- when so required under this Act.

The maximum penalty for this offence is \$3,000 and/or imprisonment for 6 months.

Items 49 and 50 restructure this provision in several ways.

- It separates the conduct elements of 'refusal to attend etc' and 'failure to attend etc' into two separate offences (**new subsections 25(1) and 25(3)** respectively) The default fault element under the Criminal Code for a 'refusal to attend' will be intention.
- It specifies that the 'failure to attend etc' is an offence of strict liability (**new subsection 25(5)**). This means that the prosecution does not have to prove fault elements in relation to the physical elements of the offence. However, the defendant can use a defence of mistake of fact.
- It recreates and relocates the defence of reasonable excuse to these offences in **new subsections 25(2) and 25(4)**. The purpose of these amendments is to ensure that the words are interpreted as a defence and not as an element of the offence which would have to be proved by the prosecution. The new subsections include an explanatory note indicating that the defendant bears an evidential burden in proving the defence.

Amendments to the *Designs Act 1906*

Item 51 applies the principles of criminal responsibility contained in Chapter 2 of the Criminal Code to all offences against the Designs Act.

Item 52 removes the non-Code fault expression, 'wilfully' from section 36. In its place the default fault element of intention will apply.

Items 53-57 remove the defence of 'lawful excuse' from the offence provisions subsections 42B(3) and 42C(2) and section 42C and recreates it in separate subsections 42B(1) and (2) and section 42C. According to the Explanatory Memorandum the reason for doing so is to ensure that the words are interpreted as words of defence and not as an element of the particular offence (which would have to be disproved in the negative by the prosecution).¹⁹ The new provisions include an explanatory note indicating that the defendant bears an evidential burden in proving the defence.

It is of note that the Criminal Code contains a general defence of lawful authority in section 10.5. This defence applies to all offences against Commonwealth law and thus make redundant the defence of lawful excuse presently found in subsections 42B and 42C.

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In contrast to this Bill, other 'application of criminal code' Bills have removed this defence from offence provisions and instead rely on the general defence of lawful authority supplied by the Criminal Code (section 10.5).

Subsection 45(1) of the Designs Act provides that it is an offence for a person to knowingly falsely represent that any design applied to any article sold by him is a registered design. **Item 58** removes the inappropriate fault element, 'knowingly', from the offence in subsection 45(1). By operation of the Criminal Code, default fault elements—intention in relation to the physical element of conduct and recklessness in relation to the physical elements of circumstance and result—will apply.

Item 59 repeals subsections 45A(1) and (2) which deal with the vicarious liability of a body corporate for offences committed by a director, servant or agent of the body corporate. The vicarious liability of a body corporate will, instead, be dealt with under Part 2.5 of the Criminal Code. **Item 61** repeals subsection 45A(7) for the same reason. **Item 60** is a consequential amendment.

Amendments to the *Liquefied Petroleum Gas (Grants) Act 1980*

Item 64 applies Chapter 2 of the Criminal Code to all offences against the Liquefied Petroleum Gas (Grants) Act, except for principles of corporate criminal responsibility. Corporate criminal responsibility is dealt with in subsections 7A(19), (20) and (20A) of the Act.

Subsection 7A(12) of the Liquefied Petroleum Gas (Grants) Act provides that a corporation shall not knowingly obtain or attempt to obtain the benefit of payments under schemes to which it is not entitled. **Item 65** removes the words 'knowingly obtain or attempt to obtain' and replaces them with the word 'obtain'. 'Knowingly' is removed because it is an inappropriate fault element in this provision. By operation of the Criminal Code, default fault elements—intention in relation to the physical element of conduct and recklessness in relation to the physical elements of circumstance and result—will apply. The words 'attempt to obtain' are removed on the basis that ancillary offences such as attempt will be supplied by the Criminal Code.

Amendments to the *Liquid Fuel Emergency Act 1984*

Item 67 applies Chapter 2 of the Criminal Code to all offences against the Liquid Fuel Emergency Act, except for principles of corporate criminal responsibility. Corporate criminal responsibility is dealt with in section 40 of the Act.

Under subsection 30(2) it is an offence for a person to refuse or fail to comply with a notice under this section to the extent that the person is capable of complying with it. The maximum penalty for this offence is \$1000. **Item 71** repeals this section and restructures it in several ways.

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- It separates the two offences of 'refusing to comply' and 'failing to comply'. The default fault element under the Criminal Code for a 'refusal to comply' will be intention.
- It specifies that the 'failure to comply' is an offence of strict liability (**new subsection 30(2B)**). This means that the prosecution does not have to prove fault elements in relation to the physical elements of the offence. However, the defendant can use a defence of mistake of fact.
- It also recreates and relocates the defence of being incapable of complying to **new subsection 30(2A)**. This is to ensure that the words are interpreted as a defence and not as an element of the offence which would have to be proved by the prosecution. An explanatory note is included indicating that the defendant bears an evidential burden in proving the defence.

Item 69 repeals section 28 which deals with ancillary offences such as attempts to commit offences, incitement and conspiracy. This provision will no longer be necessary once the Criminal Code is applied as it contains ancillary offence provisions.

Under subsection 30(3) it is an offence for a person to knowingly furnish information that is false or misleading in regard to complying with a notice under this section. **Item 72** removes the words 'knowingly furnish information that' and replaces them with the words 'furnish information knowing that it'. Knowingly is an inappropriate fault element, for the conduct of furnishing information. By rephrasing the offence in this way, the default fault element, intention will apply to the conduct and the fault element of 'knowledge' has been preserved in relation to the physical element of circumstance that the information furnished is false or misleading. **Item 68** makes a similar amendment to subsection 14(5).

Item 70 identifies an offence against subsection 29(5) as an offence of strict liability. This is an offence of failing to return an identity card on ceasing to be an authorised officer appointed under the Act. The maximum penalty for this offence is \$100.

*Amendments to the **Management and Investment Companies Act 1983***

Item 74 applies the principles of criminal responsibility contained in Chapter 2 of the Criminal Code to all offences against the Management and Investment Companies Act.

*Amendments to the **National Measurement Act 1960***

Item 75 applies the principles of criminal responsibility contained in Chapter 2 of the Criminal Code to all offences against the National Measurement Act. **Item 76** is a consequential amendment.

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Amendments to the *Offshore Minerals Act 1994*

Item 78 applies the principles of criminal responsibility contained in Chapter 2 of the Criminal Code to all offences against the Offshore Minerals Act.

Item 77 amends subsection 11(1) by omitting the words ‘intentionally or recklessly’. Recklessness is an inappropriate fault element for a physical element of conduct. ‘Intention’ is the appropriate Code fault element for conduct and will apply as a default fault element by operation of the Criminal Code. **Item 79** makes a similar amendment to paragraph 44(b).

Under subsection 364(3) a person must not fail to comply with a request for further information under subsection (1) without reasonable excuse. **Item 80** restructures this offence and removes the defence of ‘reasonable excuse’ from the offence provision and recreates it in a separate subsection. The reason for doing so is to ensure that the words are interpreted as words of defence and not as an element of the particular offence (which would have to be disproved in the negative by the prosecution). **New subsection 364(4)** includes an explanatory note indicating that the defendant bears an evidential burden in proving the defence. **Items 81-82** and **85** make similar amendments to subsection 372(1) and section 423 respectively.

Item 84 re-structures subsection 404(5) in order to clarify the associated defence. This is to ensure that the defence 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 84** also inserts a note after subsection 404(5) 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. **Item 83** adds a similar explanatory note to subsection 404(4).

Amendments to the *Patents Act 1990*

Item 86 applies the principles of criminal responsibility contained in Chapter 2 of the Criminal Code to all offences against the Patents Act.

Items 87-92 remove the defence of ‘lawful excuse’ from sections 179, 180 and 181 and recreates it in separate subsections 179(2), 180(2) and 181(2). According to the Explanatory Memorandum the reason is to ensure that the words are interpreted as words of defence and not as an element of the particular offence (which would have to be disproved in the negative by the prosecution).²⁰ The new provisions include an explanatory note indicating that the defendant bears an evidential burden in proving the defence. It is of note that the Criminal Code contains a general defence of lawful authority in section 10.5. This defence applies to all offences against Commonwealth law and thus make redundant the lawful excuse defence presently found in sections 179, 180 and 181. In contrast to this Bill, other ‘application of criminal code’ Bills have removed the words

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'without lawful excuse' from offence provisions and rely on the general defence of lawful authority supplied by the Criminal Code (section 10.5).

Item 93 omits the words, 'knowingly or recklessly' from offences against section 191 of the Patents Act. Under section 191 it is an offence for a person to knowingly or recklessly make a false entry in the Register. 'Knowingly or recklessly' are inappropriate fault elements in relation to the physical element of conduct in an offence. They are therefore removed by **item 93**. The Criminal Code default fault elements—for example, 'intention' in the case of conduct—will apply to each physical element of the offence.

Item 94 repeals subsections 225(1) and (2) which deal with the vicarious liability of a body corporate for offences committed by a director, servant or agent of the body corporate. The vicarious liability of a body corporate will, instead, be dealt with under Part 2.5 of the Criminal Code. **Item 97** repeals subsection 225(8) for the same reason. **Item 96** is a consequential amendment.

Amendments to the *Petroleum Excise (Prices) Act 1987*

Item 99 applies Chapter 2 of the Criminal Code to all offences against the Petroleum Excise (Prices) Act except for principles of corporate criminal responsibility. Corporate criminal responsibility is dealt with in section 11 of the Act.

Under subsection 10(7) it is an offence for a person to fail to provide information to the Minister or authorised officer as required under this section. The maximum penalty for this offence is \$1000 and/or or imprisonment for 6 months, in the case of a natural person, and \$5000 in the case of a body corporate. **Item 100** identifies this as a strict liability offence.

Amendments to the *Petroleum Retail Marketing Sites Act 1980*

Item 101 applies the principles of criminal responsibility contained in Chapter 2 of the Criminal Code to all offences against the Petroleum Retail Marketing Sites Act.

Under subsection 14(2) it is an offence for a person, without reasonable excuse, to fail to provide information and produce books for authorised officers as requested under this section. The maximum penalty for this offence is a fine of \$1000.

Items 102 and 103 amend subsection 14(2) in two ways.

- It relocates and rephrases the element of reasonable excuse in order to ensure that the words are interpreted as defences and not as elements of the offence which would have to be proved by the prosecution (**new subsection 14(2A)**).
- It stipulates that an offence against subsection 14(2) is an offence of strict liability (**new subsection 14(2B)**).

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Amendments to the *Petroleum (Submerged Lands) Act 1967*

Item 104 applies the principles of criminal responsibility contained in Chapter 2 of the Criminal Code to all offences against the Petroleum (Submerged Lands) Act with the exception that the principles of corporate criminal responsibility will not apply to offences created by Schedule 7. Schedule 7 deals with occupational health and safety. Corporate criminal responsibility in this schedule is dealt with in clause 50.

Subsection 82(1) prohibits a person from lodging with the Designated Authority an instrument in relation to a transfer that, to the knowledge of the person, is false or misleading regarding the amount of money paid or payable. **Item 105** stipulates that strict liability applies to the physical element of circumstance in the offence—the circumstance that the instrument is an instrument of the kind referred to in paragraph 81(4)(b). In other words, the prosecution will not have to prove that the defendant turned his or her mind to the letter of the law.

Under subsection 84(2) a person, required to furnish information under this section, shall not knowingly furnish information that is false or misleading. **Item 106** rewords this by replacing the words 'shall not knowingly furnish information that...' with the words 'furnish information knowing that it...' Knowingly is an inappropriate fault element, for the conduct of furnishing information. By rephrasing the offence in this way, the default fault element, 'intention' will apply to the conduct and the fault element of 'knowledge' has been preserved in relation to the physical element of circumstance that the information furnished is false or misleading.

Subsection 87(2) provides that it is an offence for a person to refuse or fail, without reasonable excuse, to comply with a requirement given to him under subsections (1) or (1A). **Item 107** restructures this provision by separating the conduct elements of 'failure to comply' and 'refusal to comply' into two separate offences (**new subsections 85(2) and 85(4)** respectively). The default fault element under the Criminal Code for a 'refusal to comply' will be intention. The 'failure to comply' is expressly stated to be an offence of strict liability (**new subsection 85(3)**). This means that the prosecution does not have to prove fault elements in relation to the physical elements of the offence. However, the defendant can use a defence of mistake of fact.

Item 108 removes the non-Code fault expression, 'wilfully' from section 90. In its place the default Code fault element of intention will apply.

Items 110, 114, 120, 122, 125 and 128 identify a number of offences against the Petroleum (Submerged Lands) Act as strict liability offences. These are offences against subsections 98(2) and (3), 101(7), 119(3), 140D(1), paragraph 140E(2)(a), and subclauses 32(2) and 39(1) of Schedule 7.

A number of amendments – see, for example **items 117, 118, 124, 125, 127, 128 and 129**, remove the defence of 'reasonable excuse' from the offence provisions and recreate it in separate subsections. The reason for doing so is to ensure that the words are interpreted as

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words of defence and not as an element of the particular offence (which would have to be disproved in the negative by the prosecution). The new provisions include an explanatory note indicating that the defendant bears an evidential burden in proving the defence.

Items 109, 121, 131 and 132 insert a note after subsections 97(6), 140D(2) and subclause 48(2) and clause 52 of Schedule 7 respectively, indicating that the defendant bears a legal burden in proving the defences in those provisions. For example subsection 97(6) provides that it is a defence if a person, charged with failing to comply with a provision of this section, can prove that he took all reasonable steps to comply with the provision. The note inserted by **item 109** confirms that this provision imposes a legal burden on the defendant²¹. This means that the defendant must prove the existence of the matter.

Paragraph 117(a) makes it an offence to refuse or fail to comply with an instrument under section 115 to the extent the person is capable of complying with it. Paragraphs 117(b) and (c) make it an offence for a person, to knowingly furnish information, make a statement or provide a document that contains false or misleading information in relation to these requirements. The maximum penalty for these offences is a fine of 100 penalty units.

Item 113 repeals and restructures section 117 in several ways.

- It separates the conduct elements of 'refusal to comply' and 'failure to comply' into two separate offences (**new paragraphs 117(1)(a) and (b)** respectively). The default fault element under the Criminal Code for a 'refusal to comply' will be intention.
- It specifies that the 'failure to comply' is an offence of strict liability (**new subsection 117(3)**).
- It recreates and relocates the defence of incapacity to comply in **new subsection 117(2)**.
- It removes the words 'knowingly furnish', 'knowingly make a statement' or 'knowingly produce documents' and replaces them with 'furnish information knowing that ...' and 'make a statement or produce a document knowing that ...' (**new paragraphs 117(1)(c) and 117(1)(d)**). By rephrasing the offences in this way, the default fault element, intention will apply to the conduct and the fault element of 'knowledge' has been preserved in relation to the physical element of circumstance that the information furnished is false or misleading.

Under subsection 124A(1) it is an offence for a person to intentionally or recklessly to damage or interfere with a structure or vessel. **Item 115** repeals and restructures the offence in subsection 124A(1) to clearly identify the physical elements of the offence (in this case, conduct and result). Identification of the physical elements of the offence will allow the relevant default fault elements (in this case, intention and recklessness) to be applied by the Criminal Code. For this reason the words 'intentionally or recklessly' are deleted.

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Items 129 and 130 repeal and restructure the offences in clause 45 and paragraphs 48(1)(b) and (c) of Schedule 7 in order to clearly identify the physical elements of the offences (ie conduct and result). In addition **item 129** removes the defence of reasonable excuse from clause 45 and recreates it in **new subclause 45(2)**. The reason for doing so is to ensure that the words are interpreted as words of defence and not as an element of the particular offence (which would have to be disproved in the negative by the prosecution). The new provisions include an explanatory note indicating that the defendant bears an evidential burden in proving the defence.

Item 116 inserts a penalty of 50 penalty units at the end of subsection 126(2) to clarify that the penalty at the end of section 126 applies equally to subsection (2).

Amendments to the *Petroleum (Timor Gap Zone of Cooperation) Act 1990*

Item 133 applies the principles of criminal responsibility contained in Chapter 2 of the Criminal Code to all offences against the Petroleum (Timor Gap Zone of Cooperation) Act.

Item 134 inserts a penalty of \$5000 at the end of subsection (2) to clarify that the penalty at the end of section 9 applies equally to subsection 9(2).

Items 135 and 136 remove the defence of 'reasonable excuse' from subsection 9(3) and recreate it in **new subsection 9(4)**. The reason for doing so is to ensure that the words are interpreted as words of defence and not as an element of the particular offence (which would have to be disproved in the negative by the prosecution).

Amendments to the *Pooled Development Funds Act 1992*

Item 137 applies the principles of criminal responsibility contained in Chapter 2 of the Criminal Code to all offences against the Pooled Development Funds Act.

Subsection 28(2B) provides that it is an offence for a Pooled Development Fund to make an investment that breaches a condition covered by subsection 28(2A). **Item 138** restructures the offence in subsection 28(2B) to clearly identify the physical elements of the offence (in this case, circumstance, conduct and result). Identification of the physical elements of the offence will allow the relevant default fault elements (in this case, intention and recklessness) to be applied by the Criminal Code.

Item 140 amends subsection 42(1) by replacing 'becomes aware' with 'the PDF knows'. This amendment is necessary because, if left unamended, then following application of the *Criminal Code* the phrase 'becomes aware' would constitute a physical element of circumstance, to which the default fault element of recklessness would attach. The effect would be that the prosecution would be required to prove that the defendant was reckless as to becoming aware of the relevant event - which would be an unworkable proposition.

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The amendment ensures that this element of the offence remains a fault element of knowing the relevant fact. **Item 141** amends section 49 in a similar fashion.

Item 142 omits the words, ‘knowingly or recklessly’ from offences against paragraphs 50(3)(a), (b) and (d) of the Pooled Development Funds Act. Section 50 deals with the criminal consequences of contravening certain provisions in the Act and paragraphs 50(3)(a), (b) and (d) deal specifically with ancillary offences such as incitement and conspiracy. ‘Knowingly or recklessly’ are inappropriate fault elements in relation to the physical element of conduct in an offence. They are therefore removed by **item 142**. The Criminal Code default fault elements—for example, ‘intention’ in the case of conduct—will apply to each physical element of the offence. It is of note that another option may have been to repeal these paragraphs on the basis that ancillary offences are now covered by the Criminal Code.

Item 143 removes the defence of ‘reasonable excuse’ from subsections 51(1) and (2) and **item 144** recreates it in **new subsection 51(3)**. The reason for doing so is to ensure that the words are interpreted as words of defence and not as an element of the particular offence (which would have to be disproved in the negative by the prosecution). The new provision includes an explanatory note indicating that the defendant bears an evidential burden in proving the defence.

Amendments to the *Scout Association Act 1924*

Item 145 applies the principles of criminal responsibility contained in Chapter 2 of the Criminal Code to all offences against the Scout Association Act.

Section 4 deals with the offence of unauthorised use of the scout uniform. **Item 146** inserts a note after section 4 indicating that the defendant bears a legal burden in proving the defence to offence. This means that the defendant must prove the existence of the matter.

Amendments to the *Trade Marks Act 1995*

Item 149 applies the principles of criminal responsibility contained in Chapter 2 of the Criminal Code to all offences against the Trade Marks Act.

Under subsection 143(2) it is an offence for an importer, to intentionally or recklessly fail to comply with a request for information as set out in subsection (1). **Item 150** amends subsection 143(2) by omitting the words ‘intentionally or recklessly’. Recklessness is an inappropriate fault element for a physical element of conduct. ‘Intention’ is the appropriate Code fault element for conduct and will apply as a default fault element by operation of the Criminal Code. **Items 151, 152, and 155** make similar amendments to subsections 145(1), 146(1), 151(1), (2), (3) and (4) respectively.

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A number of amendments –**items 156, 157, 159 and 160** remove the defence of ‘reasonable excuse’ from the offence provisions, subsections 153(1) and (2) and subsection 154(1), and recreate it in separate subsections. The reason for doing so is to ensure that the words are interpreted as words of defence and not as an element of the particular offence (which would have to be disproved in the negative by the prosecution). The new provisions include an explanatory note indicating that the defendant bears an evidential burden in proving the defence.

Sections 145, 146 and 147 deal with offences relating to the counterfeiting and the forging of trade marks. Specifically subsection 147 deals with the offences of the manufacture and possession of die or other materials, likely to be used for, or in the course of committing an offence against sections 145 or 146. **Item 153** stipulates that strict liability applies to the physical element of circumstance in the offences referred to in paragraphs 147(1)(a), 1(b), 147(2)(a), 2(b) and subsection 147(3)—an offence against sections 145 or 146. In other words, it is not necessary for the prosecution to prove that the defendant put his or her mind to the letter of the law. As the Explanatory Memorandum suggests, if the prosecution were required to demonstrate fault in regard to this matter, the offence would become almost unenforceable. Further it argues that the person's degree of culpability under this offence is not materially affected by absence of the subject fault.²²

A number of offences against the Trade Marks Act are already identified as strict liability offences. These identifying provisions currently contain a note referring the reader to section 153 for an explanation of strict liability. **Items 158, 161, 163 and 164** repeal this explanation and the referring notes and replace them with a note referring the reader to section 6.1 of the Criminal Code.

Item 167 repeals subsections 160(2) and (3) which deal with the vicarious liability of a body corporate for offences committed by a director, servant or agent of the body corporate. The vicarious liability of a body corporate will, instead, be dealt with under Part 2.5 of the Criminal Code. **Items 166 and 168** are consequential amendments.

Subsection 156(3) of the Trade Marks Act provides that if it a body is found guilty of an offence against this section, and an officer of the body corporate has knowingly been a party to the offence, that officer is guilty of an offence punishable, on conviction by a fine not exceeding 30 penalty units. **Item 162** removes an inappropriate fault element, ‘knowingly’, from the offence in subsection 156(3). By operation of the Criminal Code, default fault elements—intention in relation to the physical element of conduct and recklessness in relation to the physical elements of circumstance and result—will apply.

Amendments to the *Tradex Scheme Act 1999*

Section 47 of the Tradex Scheme Act already applies the principles of criminal responsibility contained in Chapter 2 of the Criminal Code to all offences against the Act.

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Section 26(1) provides that it is an offence for a holder of a tradex order to fail to comply with a requirement of subsection 9(6) to notify the Secretary of the details of a change in any of the particulars entered in the Register. The maximum penalty for this offence is 30 penalty units. **Item 169** inserts **new subsection 26(2)** which stipulates that strict liability applies to the physical element of circumstance in subsection 26(1)—that the requirement is a requirement made by subsection 9(6). In other words, it is not necessary for the prosecution to prove that the defendant put his or her mind to the letter of the law. According to the Explanatory Memorandum, if the prosecution were required to demonstrate fault in regard to this matter of circumstance, the offence would become almost unenforceable. It argues that this element of the offence is therefore appropriately classified as strict liability.²³ **Items 170 and 171** make similar amendments to section 27 and 29 respectively.

Endnotes

- 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)*, 22 August 2001, p. 26288.
- 15 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest, No. 11 of 2001*, 29 August 2001, p. 13.
- 16 Second Reading Speech, Senate, *Parliamentary Debates (Hansard)*, 30 June 1994, p. 2381.
- 17 James Prest, *Bills Digest No. 20, 2001–02*, Agriculture, Fisheries and Forestry Legislation Amendment (Application of Criminal Code) Bill 2001.

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- 18 Matthew Goode, 'The Modern Criminal Code Project', *Australian Law Librarian*, 5(4),
December 1997, pp. 267–76 at p. 267.
- 19 *Explanatory Memorandum*, p. 16.
- 20 *Explanatory Memorandum*, pp. 24–25.
- 21 Criminal Code, section 13.4.
- 22 page 42.
- 23 page 45.

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