

Environment and Heritage Legislation Amendment (Application of Criminal Code) Regulations 2002 (No. 1) 2002 No. 8

EXPLANATORY STATEMENT

STATUTORY RULES 2002 No. 8

Issued by the Authority of the Minister for the Environment and Heritage

Subject - *Antarctic Marine Living Resources Conservation Act 1981, Antarctic Treaty (Environment Protection) Act 1980, Great Barrier Reef Marine Park Act 1975, Historic Shipwrecks Act 1976; Ozone Protection Act 1989; Australian Antarctic Territory Act 1954; Heard Island and McDonald Islands Act 1953.*

Environment and Heritage Legislation Amendment (Application of Criminal Code) Regulations 2002 (No. 1)

Australian Antarctic Territory Ordinances Amendment (Application of Criminal Code) Ordinance 2002 (No. 1)

Territory of Heard Island & McDonald Islands Ordinances Amendment (Application of Criminal Code) Ordinance 2002 (No. 1)

Section 24 of the *Antarctic Marine Living Resources Conservation Act 1981*; Section 29 of the *Antarctic Treaty (Environment Protection) Act 1980*; Section 66 of the *Great Barrier Reef Marine Park Act 1975*; Section 32 of the *Historic Shipwrecks Act 1976*; and Section 70 of the *Ozone Protection Act 1989* respectively, provide that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 10 of the *Heard Island & McDonald Islands Act 1953* provides that the Governor-General may make Ordinances for the peace, order and good government of the Territory.

Section 11 of the *Australian Antarctic Territory Act 1954* provides that the Governor-General may make Ordinances for the peace, order and good government of the Territory.

The purpose of the Regulations and Ordinances is to amend various criminal offence provisions in the existing Environment and Heritage portfolio Regulations and Ordinances as a consequence of the application of Chapter 2 of the *Criminal Code* to all criminal offence provisions in existing Commonwealth laws from 15 December 2001. The *Criminal Code* is set out in the schedule to the *Criminal Code Act 1995*. Its purpose is to codify the general principles of criminal responsibilities under laws of the Commonwealth.

The Regulations and Ordinances will harmonise the offence-creating and related provisions within Environment and Heritage portfolio regulations with the general principles of criminal responsibility as codified in the *Criminal Code* whilst at the same time ensuring that the offences continue to operate as intended by Parliament.

The effect of Chapter 2 of the *Criminal Code* may be summarised as follows:

- The common law notions of a criminal act and a guilty mind will be replaced with physical and fault elements respectively.

- Offences of strict liability, that is offences in respect of which a fault element did not previously need to be proven at present, gain fault elements by force of Chapter 2 after 15 December 2001. On the other hand, the Criminal Code permits the regulations to specify certain offences to be offences of strict liability, to maintain their current operation.
- Defences will require proof at an 'evidential' standard unless the law creating the offence expressly imposes proof at the higher, 'legal', standard. An evidential burden means the burden of adducing or pointing to evidence that suggests a reasonable possibility that a matter exists or does not exist. By contrast, a legal burden is more onerous than an evidential burden and is defined in the Criminal Code to mean the burden of positively proving the existence of a matter.

The Regulations and Ordinances amend Environment and Heritage portfolio Regulations and Ordinances to comply with the scheme set out in Chapter 2 of the *Criminal Code* with regard to physical and fault elements. A number of regulations have been specified as strict liability offences to preserve their current operation.

The Regulations and Ordinances also update pecuniary penalties by converting them into penalty units rather than dollar amounts, and provide that defences set out in Environment and Heritage portfolio Regulations and Ordinances are subject to proof at the evidential standard.

Details of the Regulations and Ordinances are set out in the Attachment.

The Regulations and Ordinances commence on gazettal.

Attachment

Environment and Heritage Legislation Amendment (Application of Criminal Code) Regulations 2002 (No. 1)

Regulation 1 provides that the name of these regulations is the *Environment and Heritage Legislation Amendment (Application of Criminal Code) Regulations 2002* (No. 1).

Regulation 2 provides that these Regulations commence on gazettal.

Regulation 3 provides that Schedule 1 amends the *Antarctic Marine Living Resources Conservation Regulations*.

Regulation 4 provides that Schedule 2 amends the *Antarctic Seals Conservation Regulations*.

Regulation 5 provides that Schedule 3 amends the *Antarctic Treaty (Environment Protection) (Environmental Impact Assessment) Regulations*.

Regulation 6 provides that Schedule 4 amends the *Antarctic Treaty (Environment Protection) (Waste Management) Regulations*.

Regulation 7 provides that Schedule 5 amends the *Great Barrier Reef Marine Park (Aquaculture) Regulations 2000*.

Regulation 8 provides that Schedule 6 amends the *Great Barrier Reef Marine Park Regulations 1983*.

Regulation 9 provides that Schedule 7 amends the *Historic Shipwrecks Regulations*.

Regulation 10 provides that Schedule 8 amends the *Ozone Protection Regulations 1995*.

Schedule 1 - Amendments of Antarctic Marine Living Resources Conservation Regulations

1. This item substitutes Regulation 1 to specify that the name of the Regulations are the *Antarctic Marine Living Resources Conservation Regulations 1994*.
2. This item amends Subsection 11 (1) to omit the existing fault elements of "knowingly or recklessly" in the provision in order to bring them in line with the *Criminal Code*. Following application of the *Criminal Code* these fault elements will be restricted to physical elements of circumstance or result, and intention will be the sole *Criminal Code* fault element that can be applied to physical element of conduct: see section 5.2 and 5.3 of the *Criminal Code*.
3. This item omits everything before paragraph (a) in Subregulation 11(2) and specifies that it is a defence to a prosecution under Subregulation 11 (1) if the person is a permit holder, is identified in an entry permit as a person under the permit holder's control; or holds a foreign permit in relation to the site.
4. This item inserts a note at the foot of Subregulation 11 (2). This note advises that a defendant bears an evidential burden in relation to the matters mentioned in paragraphs 2(a), (b) and (c). It also draws attention to the provisions of section 13.3 of the *Criminal Code*. The question of whether an evidential burden has been discharged is one of law. An evidential burden means adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

5. This item replaces the words "without reasonable excuse" with the words "unless he or she has a reasonable excuse" in paragraphs 11 (3)(a) to (c). The effect of this amendment is to identify better the defence of reasonable excuse and to bring the provision in line with the *Criminal Code*.

6. This item inserts a note after the penalty provision in Subregulation 11 (3) This note advises that a defendant bears an evidential burden in relation to whether he or she had a reasonable excuse. It also draws attention to the provisions of section 13.3 of the *Criminal Code*. The question of whether an evidential burden has been discharged is one of law. An evidential burden means adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

7. This item substitutes Subregulation 11 (4) in order to remove the words "knowingly or recklessly" from Subregulation 11 (4) for reasons discussed in item 2 above and to also clarify the physical elements of conduct and circumstance. The effect of this amendment is to bring the provision in line with the *Criminal Code*.

Schedule 2 - Amendments of Antarctic Seals Conservation Regulations

1. This item substitutes Regulation 1 to specify that the name of the Regulations are the *Antarctic Seals Conservation Regulations 1986*.

2. This item substitutes Subregulations 11(1) to (5) for the existing Subregulations 11 (1) to (5). The new Subregulations 11 (1), (2) and (3) restructure these provisions. First the new Subregulation 11(1), (2) and (3) does not retain "kill" as the active verb. Instead the new Subregulations proscribe the acts of a person whose conduct, by performance of an act or omission results in the death of a seal. The rationale for this amendment is that a person does not kill, rather the killing is a result of the person's actions and is not in itself a physical element of conduct. It follows that retaining "kill" as the active verb in a criminal offence may lead to difficulties in interpreting the offence following application of the *Criminal Code*. Constructing the offence in the amended form will better identify the physical elements of conducts and result, and the fault elements that attach to these physical elements. This item also inserts a note at the foot of regulation 11 (5) advising that a defendant bears an evidential burden in relation to whether or not he or she was acting in accordance with the permit. It also draws attention to the provisions of section 13.3 of the *Criminal Code*. The question of whether an evidential burden has been discharged is one of law. An evidential burden means adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. The new Subregulation 11 (4) omits the fault elements of "intentionally or recklessly" as recklessly is not an appropriate fault element for a physical element of conduct. The default fault elements specified in the *Criminal Code* will apply to the appropriate elements of conduct and circumstance. The new Subregulation 11 (5) incorporates the defences under the existing Subregulations 11 (1) to 11 (4) into one regulation and inserts a note specifying that the defendant bears an evidential burden.

3. This item omits the text "for the purpose" and inserts the text "with the intention" to paragraph 11 (5A)(a). The effect of this amendment is to clarify the physical elements of conduct and circumstance in the offence.

4. This item inserts a new Subregulation 11 (5C) after Subregulation 11 (5B). This specifies that an offence against Subregulation 11 (5A) or 11 (5B) is a strict liability offence. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.

Schedule 3 - Amendment of Antarctic Treaty (Environment Protection) (Environmental Impact Assessment) Regulations

1. This item substitutes Regulation 1 to specify that the name of the Regulations are the *Antarctic Treaty (Environment Protection) (Environmental Impact Assessment) Regulations 1993*.
2. This item inserts a new Subregulation 5(3). This provision stipulates that an offence against Subregulation 5(1) or 5(2) is an offence of strict liability and preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.

Schedule 4 - Amendment of Antarctic Treaty (Environment Protection) (Waste Management) Regulations

1. This item substitutes Regulation 1 to specify that the name of the Regulations are the *Antarctic Treaty (Environment Protection) (Waste Management) Regulations 1994*.
2. This item provides that the existing text of Regulation 5 shall become Subregulation 5(1) to allow for the insertion of a new Subregulation 5(2).
3. This item inserts a new Subregulation 5(2) which provides that an offence against Subregulation 5(1) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.
4. This item provides that the existing text of Regulation 6 shall become Subregulation 6(1) to allow for the insertion of a new Subregulation 6(2).
5. This item omits the word "except" and inserts "that is not" into Subregulation 6(1)(f). This avoids the words "except low density polyethylene containers" from appearing to form part of the elements of the offence. The effect of this change is to remove ambiguity and is in line with drafting conventions for the *Criminal Code*.
6. This item inserts a new Subregulation 6(2) which provides that an offence against Subregulation 6(1) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.
7. This item substitutes Regulation 7 which deals with solid non-combustible waste. This item also inserts a note at the foot of Subregulation 7(1) stating that it is an offence under section 21A of the *Antarctic Treaty (Environment Protection) Act 1980* to carry on an activity to which Part 3 of that Act applies in the Antarctic without authorisation of the Minister under that Part. This item also provides that strict liability applies to an offence against Subregulation 7(1).¹ This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements any physical elements of the offence in Subregulation 7(1) of the offence against Subregulation 7(1). The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.
8. This item provides that the existing text of Regulation 8 shall become Subregulation 8(1) to allow for the insertion of a new Subregulation 8(2).
9. This item inserts a new Subregulation 8(2) which provides that an offence against Subregulation 8(1) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This

means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.

10. This item provides that the existing text of Regulation 9 shall become Subregulation 9(1) to allow for the insertion of a new Subregulation 9(2).

11. This item inserts a new Subregulation 9(2) which provides that an offence against Subregulation 9(1) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.

12. This item provides that the existing text of Regulation 11 shall become Subregulation 11 (1) to allow for the insertion of a new Subregulation 11(2).

13. This item inserts a new Subregulation 11(2) which provides that an offence against Subregulation 11 (1) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.

14. This item inserts a new Subregulation 12(3) which provides that an offence against Subregulation 12(2) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for an physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.

15. This item substitutes Regulation 13 which deals with the prohibition on burning waste in an open fire. The item provides that an offence under Subregulation 13(1) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.

16. This item substitutes Regulations 14 and 15 dealing with the prohibition of disposal of waste in ice-free areas, in fresh water and on ice. This item provides that offences under these Regulations are offences of strict liability. This preserves the current status of the provisions. A note on strict liability is included in each Regulation referring to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.

17. This item substitutes Regulation 17 which deals with disposal of sewage and domestic waste into the sea. The item also inserts a note at the foot of Subregulation 17(2). This note advises that a defendant bears an evidential burden in relation to the matters mentioned in Subregulation 17(2). It also draws attention to the provisions of section 13.3 of the *Criminal Code*. The question of whether an evidential burden has been discharged is one of law. An evidential burden means adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. This item also inserts a note at the foot of Subregulation 17(3) stating that it is an offence under sections 26BC and 26D of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* to discharge sewage into the sea from a ship.

18. This item substitutes Subregulations 19(1) and 19(2) dealing with cleaning up waste disposal sites and abandoned work sites. The item provides that an offence against the amended Subregulation 19(1) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of

mistake of fact under section 9.2 of the *Criminal Code* is available. This item also inserts a note at the foot of Subregulation 19(1) stating that it is an offence under section 21A of the *Antarctic Treaty (Environment Protection) Act 1980* to carry on an activity to which Part 3 of that Act applies in the Antarctic without authorisation of the Minister under that Part.

19. This item inserts a note at the foot of Subregulation 19(3). This note advises that a defendant bears an evidential burden in relation to the matters mentioned in Subregulation 19(3). It also draws attention to the provisions of section 13.3 of the *Criminal Code*. The question of whether an evidential burden has been discharged is one of law. An evidential burden means adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

20. This item inserts a new Subregulation 21(3). This provides that an offence against Subregulation 21(1) or 21(2) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available. This item also inserts a note stating the defendant bears an evidential burden of proof in relation to whether or not he or she had a reasonable excuse.

Schedule 5 - Amendment of Great Barrier Reef Marine Park (Aquaculture) Regulations 2000

1. This item inserts a new Subregulation 9(2A) to specify that an offence under Subregulation 9(2) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.

2. This item inserts a new Subregulation 14(3A) to specify that an offence under Subregulation 14(3) is an offence of strict liability and preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.

Schedule 6 - Great Barrier Reef Marine Park Regulations 1983

1. This item substitutes Subregulation 38(1) to (3) and has the effect of better identifying the physical elements of conduct, circumstance and result of the offence. This item also amends the penalty for this provision by replacing the penalty of \$ 1000 with a penalty of 10 penalty units. A note is also inserted clarifying that the defendant bears an evidential burden in relation to the defences mentioned in Subregulation 38(2), referring to section 13.3 of the *Criminal Code*. The question of whether an evidential burden has been discharged is one of law. An evidential burden means adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

2. This item substitutes Subregulation 40(1) and inserts a new Subregulation 40(1A) and 40(1B). Subregulation 40(1A) clarifies that it is a defence to a prosecution under Subregulation (1) if the person is acting in accordance with the written permission of the Authority, and inserts a note specifying that a defendant bears an evidential burden of proof in relation to whether he or she was acting in accordance with the written permission of the Authority. Subregulation 40(1B) specifies that an offence under Subregulation 40(1) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical element of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.

3. This item amends the definition of "take" in Subregulation 40(3) to incorporate a physical element of "engage in conduct". The effect of this amendment is to enable the elements of conduct and result to be better distinguished from each other.
4. This item amends Subregulation 41(2). The effect of this amendment is to clarify that it is a defence to a prosecution under Subregulation (1) if the person is acting in accordance with the provisions of Subregulation 41(2).
5. This item omits the word "that" from Paragraph 41(2)(b). In conjunction with the amendment in Item 4, this has the effect of clarifying the provision and removing ambiguity.
6. This item inserts a new Subregulation 41(5) specifying that an offence under Subregulation 41(4) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.
7. This item substitutes Subregulation 41A which deals with the taking of certain animals onto Commonwealth islands. The effect of this amendment is to clarify the provision and remove ambiguity. A note is inserted stating that the defendant bears an evidential burden of proof in relation to the matters outlined in Subregulation (2). This item also omits the existing fault element of "knowingly" in the provision in order to bring the provision in line with the *Criminal Code*. Following application of the *Criminal Code* this fault element will be restricted to physical elements of circumstance or result, and intention will be the sole *Criminal Code* fault element that can be applied to physical element of conduct: see section 5.2 and 5.3 of the *Criminal Code*.
8. This item amends Subregulation 45A(2) dealing with the defence to a prosecution under Subregulation 45A(1). The effect of this amendment is to clarify the provision and remove ambiguity
9. This item substitutes Regulation 46 which deals with littering in the Marine Park. This item replaces the monetary penalty of \$200 with a penalty of 2 penalty units. This amendment also provides that the offence under Subregulation 46(1) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.
10. This item substitutes Regulation 48 which deals with Authority moorings. The new Subregulation replaces the verb "damage" and instead proscribes the actions of a person whose conduct results in damage to a mooring. The effect of the amendment is to identify better the physical elements of conduct and result. A note is also inserted in Subregulation 48(2) stating that the defendant bears an evidential burden of proof in relation to whether he or she has a reasonable excuse, and refers to section 13.3 of the *Criminal Code*. This item also specifies that an offence under Subregulation 48(1) is an offence of strict liability and preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.
11. This item inserts a new Subregulation 84(3). The effect of this amendment is to specify that for the purposes of Subregulation 84(2), strict liability applies to the physical element of whether, if the receipt or ticket is being used as evidence, this evidence is evidence for the purposes of Regulation 83. This means that there are no fault elements to be established in relation to whether the receipt or ticket is being used for the purposes of regulation 83, and also includes a note which refers to section 6.1 of the *Criminal Code*. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.

12. This item inserts a penalty provision of 10 penalty units at the foot of Subregulation 106(1). This retains the current penalty and is in line with drafting conventions for the *Criminal Code* which provide that offences should be clear on their face and the applicable penalty should appear at the end of each offence.

13. This item inserts a penalty provision of 10 penalty units at the foot of Subregulation 106(2). This retains the current penalty and is in line with drafting conventions for the *Criminal Code* which provide that offences should be clear on their face and the applicable penalty should appear at the end of each offence.

14. This item inserts a penalty provision of 10 penalty units at the foot of Subregulation 106(3). This retains the current penalty and is in line with drafting conventions for the *Criminal Code* which provide that offences should be clear on their face and the applicable penalty should appear at the end of each offence.

15. This item amends Subregulation 106(4) by omitting the words "for the purpose of" and inserting the words "to enable". The effect of this change is to remove ambiguity and is in line with drafting conventions for the *Criminal Code*.

16. This item inserts a new Subregulation 106(5) to specify that an offence under Subregulations 106(1), (2), (3) or (4) is an offence of strict liability. This preserves the current status of the provisions. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.

17. This item inserts a new Subregulation 110(2) to specify that an offence under Subregulation 110(1) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.

18. This item substitutes Subregulation 113(1). In conjunction with Item 20, the effect of this change is to clarify the provision and remove ambiguity while retaining the current effect of the provision.

19. This item inserts a note on strict liability at the foot of Subregulation 113(2) referring to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.

20. This item substitutes Subregulation 113(3). In conjunction with Item 18, the effect of this change is to clarify the provision and remove ambiguity while retaining the current effect of the provision. This item also inserts a note at the foot of Subregulation (3) stating that the defendant bears an evidential burden of proof in relation to whether he or she has a reasonable excuse, and refers to section 13.3 of the *Criminal Code*.

21. This item substitutes Subregulation 117(1). In conjunction with Item 23, the effect of this change is to clarify the provision and remove ambiguity while retaining the current effect of the provision.

22. This item inserts a note on strict liability at the foot of Subregulation 117(2) referring to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.

23. This item substitutes Subregulation 117(3). In conjunction with Item 21, the effect of this change is to clarify the provision and remove ambiguity while retaining the current effect of the provision. This item also inserts a note at the foot of Subregulation (3) stating that the defendant bears an evidential burden of proof in relation to whether he or she has a reasonable excuse, and refers to section 13.3 of the *Criminal Code*.

Schedule 7 - Amendment of Historic Shipwrecks Regulations

1. This item substitutes Regulation 1 to specify that the name of the Regulations are the *Historic Shipwrecks Regulations 1978*.
2. This item omits "for the purpose of" and inserts "for" in Paragraph 4 (1)(a). The effect of this change is to remove ambiguity and is in line with drafting conventions for the *Criminal Code*.
3. This item omits "damage or interfere with" and inserts "cause damage to, or interfere with," in Paragraph 4 (1)(a) in order to better identify the physical elements of conduct and circumstance.
4. This item omits a semicolon in Paragraph 4 (1)(e) and replaces it with a period in order to amend the construction of the clause.
5. This item omits reference to a permit from Subregulation 4(1). The reference is repositioned by item 7.
6. This item inserts a penalty provision at the foot of Subregulation 4(1) which provides for a penalty consisting of 10 penalty units, or imprisonment for 1 year, or both.
7. This item substitutes Subregulation 4(2) and provides that Subregulation 4(1) does not apply if the person is acting in accordance with a permit granted under subsection 15(1) of the Act, or if the person has a reasonable excuse. Item 7 inserts a note advising that a defendant bears an evidential burden in relation to the matters mentioned in Subregulation 4(2). The question of whether an evidential burden has been discharged is one of law. An evidential burden means adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Schedule 8 - Amendment of Ozone Protection Regulations 1995

1. This item inserts a new Subregulation 5(3) after Subregulation 5(2). This specifies that an offence under Subregulation 5(1) and 5(2) is an offence of strict liability and preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.

Australian Antarctic Territory Ordinances Amendment (Application of Criminal Code) Amendment Ordinance 2002 (No. 1)

1. Section 1 specifies that the name of the Ordinance is *Ordinances Amendment (Application of Criminal Code) Amendment Ordinance 2002 (No. 1)*.
2. Section 2 provides that the Ordinance commences on gazettal.
3. Section 3 provides that the *Criminal Procedure Ordinance 1993* is amended as set out in Schedule 1.
4. Section 4 provides that the *Weapons Ordinance 2001* is amended as set out in Schedule 2.

Schedule 1 - Amendment of *Criminal Procedure Ordinance 1993*

1. This item inserts a new Section 4A which provides that Chapter 2 of the Criminal Code applies to offences against this Ordinance. A note is also included which states that Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.
2. This item amends Subsection 5(2) to omit "without reasonable excuse" and to insert "unless he or she has a reasonable excuse". The effect of this change is to remove ambiguity and is in line with drafting conventions for the *Criminal Code*.
3. This item inserts a new Subsection 5(3) after Subsection 5(2), and provides that an offence under Subsection 5(2) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available. This item also inserts a note specifying that a defendant bears an evidential burden of proof in relation to whether they had a reasonable excuse.
4. This item substitutes Subsection 21(5) and inserts a new Subsection 21(6). The effect of Subsection 21(5) is that a person must not fail to give effect to a requirement of a special constable under subsection (2). The penalty is 10 penalty units. Subsection 21(6) provides that an offence under Subsection 21(5) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available. This item also inserts a note advising that a defendant bears an evidential burden in relation to whether he or she had a reasonable excuse. The question of whether an evidential burden has been discharged is one of law. An evidential burden means adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.
5. This item omits the words "refuse or" from Paragraph 50(2)(a). The offence covers the conduct that "refuse" originally covered because a refusal to do an act also amounts to a failure to do an act.
6. This item inserts a new subsection 50(3) after Subsection 50(2) which provides that an offence under Subsection 50(2) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.
7. This item provides for the repeal of existing Section 51 which provides that a person shall not intentionally obstruct, hinder, threaten or intimidate an investigating officer in the exercise or attempted exercise of his or her functions under this Ordinance or who is performing, or attempting to perform his or her powers or duties under this Ordinance. Section 51 is being repealed as it duplicates the general *Criminal Code* offence provision of obstructing, hindering or resisting a Commonwealth public official (section 149.1).

Schedule 2 - Amendment of *Weapons Ordinance 2001*

1. This item inserts a new Section 5A which provides that Chapter 2 of the Criminal Code applies to offences against this Ordinance. A note is also included which states that Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.

Territory of Heard Island & McDonald Islands Ordinances Amendment (Application of Criminal Code) Amendment Ordinance 2002 (No. 1)

1. Section 1 specifies that the name of the Ordinance is *Ordinances Amendment (Application of Criminal Code) Amendment Ordinance 2002 (No. 1)*.
2. Section 2 provides that the Ordinance commences on gazettal.
3. Section 3 provides that the *Criminal Procedure Amendment Ordinance 1993* is amended as set out in Schedule 1.
4. Section 4 provides that the *Environment Protection and Management Amendment Ordinance 1987* is amended as set out in Schedule 2.
5. Section 5 provides that the *Weapons Ordinance 2001* is amended as set out in Schedule 3.

Schedule 1 - Amendment of *Criminal Procedure Ordinance 1993*

1. This item inserts a new Section 4A which provides that Chapter 2 of the Criminal Code applies to offences against this Ordinance. A note is also included which states that Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.
2. This item amends Subsection 5(2) to omit "without reasonable excuse" and to insert "unless he or she has a reasonable excuse". The effect of this change is to remove ambiguity and is in line with drafting conventions for the *Criminal Code*.
3. This item inserts a new Subsection 5(3) after Subsection 5(2), and provides that an offence under Subsection 5(2) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available. This item also inserts a note specifying that a defendant bears an evidential burden of proof in relation to whether they had a reasonable excuse.
4. This item substitutes Subsection 21(5) and inserts a new Subsection 21(6). The effect of Subsection 21(5) is that a person must not fail to give effect to a requirement of a special constable under subsection (2). The penalty is 10 penalty units. Subsection 21(6) provides that an offence under Subsection 21(5) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available. This item also inserts a note advising that a defendant bears an evidential burden in relation to whether he or she had a reasonable excuse. The question of whether an evidential burden has been discharged is one of law. An evidential burden means adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.
5. This item omits the words "refuse or" from Paragraph 50(2)(a). The offence covers the conduct that "refuse" originally covered because a refusal to do an act also amounts to a failure to do an act.
6. This item inserts a new subsection 50(3) after Subsection 50(2) which provides that an offence under Subsection 50(2) is an offence of strict liability. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.
7. This item provides for the repeal of existing subsection 51 which provides that a person shall not intentionally obstruct, hinder, threaten or intimidate an investigating officer in the

exercise or attempted exercise of his or her functions under this Ordinance or who is performing, or attempting to perform his or her powers or duties under this Ordinance. Section 51 is being repealed as it duplicates the general *Criminal Code* offence provision of obstructing, hindering or resisting a Commonwealth public official (section 149.1).

Schedule 2 - Amendment of *Environment Protection and Management Amendment Ordinance 1987*

1. This item amends the definition of take in Section 4 by omitting ", trap or kill" and inserting "or trap" in paragraph (a). The action "kill" is reincorporated in Item 8 below.
2. This item inserts a new Section 5A which provides that Chapter 2 of the Criminal Code applies to offences against this Ordinance. A note is also included which states that Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.
3. This item amends Subsection 12(1) to omit the existing fault elements of "knowingly or recklessly" in the provision in order to bring them in line with the *Criminal Code*. Following application of the *Criminal Code* these fault elements will be restricted to physical elements of circumstance or result, and intention will be the sole *Criminal Code* fault element that can be applied to physical element of conduct: see section 5.2 and 5.3 of the *Criminal Code*.
4. This item amends the penalty provision in Paragraph 12(1)(a) by substituting the monetary penalty of \$ 10,000 with a penalty of 100 penalty units.
5. This item amends the penalty provision in Paragraph 12(1)(b) by substituting the monetary penalty of \$50,000 with a penalty of 500 penalty units.
6. This item inserts a note at the foot of Subsection 12(2). This note advises that a defendant bears an evidential burden in relation to the matters mentioned in subsection 12(2). It also draws attention to the provisions of section 13.3 of the *Criminal Code*. The question of whether an evidential burden has been discharged is one of law. An evidential burden means adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist
7. This item amends Section 13 to omit the existing fault elements of "knowingly or recklessly" in the provision in order to bring them in line with the *Criminal Code*. Following application of the *Criminal Code* these fault elements will be restricted to physical elements of circumstance or result, and intention will be the sole *Criminal Code* fault element that can be applied to physical element of conduct: see section 5.2 and 5.3 of the *Criminal Code*.
8. This item amends the penalty provision in Paragraph 13(c) by substituting the monetary penalty of \$ 10,000 with a penalty of 100 penalty units.
9. This item amends the penalty provision in Paragraph 13(d) by substituting the monetary penalty of \$50,000 with a penalty of 500 penalty units.
10. This item substitutes Subsection 14(1). The effect of this amendment is to bring the provision into line with the *Criminal Code* through omitting existing fault elements of "knowingly or recklessly" as discussed in items 3 and 5 above, and inserts the words "engage in conduct" to identify better the physical elements of conduct and result. This item also amends the penalty provision for Subsection 14(1) in the case of an individual - 100 penalty units or imprisonment for 5 years, or both; or in the case of a body corporate - 500 penalty units.
11. This item inserts a note at the foot of Subsection 14(2) advising that a defendant bears an evidential burden in relation to whether he or she performed the act in question to avoid possible loss of human life or injury to persons, or to risk the safety of an aircraft, a vehicle or a vessel, or

in accordance with a permit issued under the specified Ordinances. The question of whether an evidential burden has been discharged is one of law. An evidential burden means adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

12. This item inserts the words "or killed" after "taken" in Subsection 16(1)(a). The effect of this amendment is to clarify the physical elements in relation to permits taken into account by the Minister.

13. This item substitutes Section 18. The effect of the amendment is to omit the existing fault elements of "knowingly or recklessly" to bring the provision in line with the *Criminal Code* as discussed in items 2 and 3 above. The restructured provision also identifies better the physical elements of conduct and circumstance to which the fault elements under the *Criminal Code* will apply. This item also amends the penalty provision for Section 18 by expressing the monetary penalty in penalty units in the case of an individual - 50 penalty units or imprisonment for 2 years, or both; or in the case of a body corporate - 250 penalty units.

14. This item substitutes Section 21 and inserts a new Subsection 21(2). The effect of this amendment is to specify that an offence against Section 21(1) is a strict liability offence. This preserves the current status of the provision. A note on strict liability is included and refers to section 6.1 of the *Criminal Code*. This means that there are no fault elements for any physical elements of the offence. The defence of mistake of fact under section 9.2 of the *Criminal Code* is available.

15. This item amends the penalty provision in Subparagraph 25(3)(a)(i) by substituting the monetary penalty of \$2,000 with a penalty of 20 penalty units.

16. This item amends the penalty provision in Subparagraph 25(3)(a)(ii) by substituting the monetary penalty of \$10,000 with a penalty of 100 penalty units.

17. This item amends the penalty provision in Subparagraph 25(3)(b)(i) by substituting the monetary penalty of \$ 1,000 with a penalty of 10 penalty units.

18. This item. amends the penalty provision in Subparagraph 25(3)(b)(ii) by substituting the monetary penalty of \$5,000 with a penalty of 50 penalty units.

Schedule 3 - Amendment of *Weapons Ordinance 2001*

1. This item inserts a new Section 5A which provides that Chapter 2 of the Criminal Code applies to offences against this Ordinance. A note is also included which states that Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.