

Transport and Regional Services Legislation Amendment (Application of Criminal Code) Regulations 2002 (No. 1) 2002 No. 13

EXPLANATORY STATEMENT

Statutory Rules 2002 No. 13

Minute No 02 of 2002 - Minister for Transport and Regional Services

Subject - *Air Navigation Act 1920*

Airports Act 1996

Interstate Road Transport Act 1985

Navigation Act 1912

Stevedoring Levy (Collection) Act 1998

Transport and Regional Services Legislation Amendment (Application of Criminal Code)
Regulations 2002 (No. 1)

Section 26 of the *Air Navigation Act 1920*; section 252 of the *Airports Act 1996*; section 56 of the *Interstate Road Transport Act 1985*; section 425 of the *Navigation Act 1912*; and section 21 of the *Stevedoring Levy (Collection) Act 1998*, provide that the Governor-General may make regulations for the purposes of those Acts.

The purpose of the Amendment Regulations is to ensure that the existing offence provisions in the Regulations continue to operate in the same manner following the application of the *Criminal Code Act 1995* (the *Criminal Code*) to all Commonwealth legislation.

Chapter 2 of the *Criminal Code* contains general principles of criminal responsibility that apply to the offence provisions contained in the *Criminal Code* and all other Commonwealth offence provisions. If regulations containing existing offence provisions are not amended to have regard to the *Criminal Code*, the *Criminal Code* may alter the interpretation of those offence provisions.

Chapter 2 adopts the common law approach of subjective fault based principles. It clarifies the traditional distinction of dividing offences into *actus reus* (the physical act, now referred to as the physical element) and *mens rea* (what the defendant thought or intended, now referred to as the fault element).

The prosecution bears the onus of proving each of the physical elements. Each offence must contain at least one of the physical elements, but any combination of the physical elements may be present in an offence provision. For every physical element of an offence, the prosecution must also prove a corresponding fault element. If legislation containing an offence provision does not specify a fault element for a physical element of the offence, the *Criminal Code* applies a default fault element under Section 5.6 of the *Criminal Code*.

A fault element can only be dispensed with in relation to an offence (or in relation to a particular element of an offence) if the offence specifies that it is a strict liability offence (or that a particular element is a strict liability element). A strict liability offence is one where proof of a fault element is not required. The defence of mistake of fact is available for a strict liability offence (or a strict liability element of an offence). In the absence of express reference to the fact that an offence is a strict liability offence, a court will be obliged to interpret an offence provision as a fault offence rather than a strict liability offence, and will require proof of fault elements in relation to the physical elements.

The Amendment Regulations amend the Air Navigation (Aerodrome Flight Corridors) Regulations, the Air Navigation (Aircraft Noise) Regulations 1984, the Air Navigation (Checked Baggage) Regulations 2000, the Air Navigation (Coolangatta Airport Curfew) Regulations 1999, the Air Navigation (Fuel Spillage) Regulations 1999, the Airports Regulations 1997, the Airports (Control of On-Airport Activities) Regulations 1997, the Airports (Environment Protection) Regulations 1997, the Airports (Protection of Airspace) Regulations 1996, the Interstate Road Transport Regulations 1986, the Navigation (Coasting Trade) Regulations, the Navigation (Marine Casualty) Regulations 1990, the Navigation (River Murray Traffic) Regulations, and the Stevedoring Levy(Collection) Regulations 1998.

The Regulations:

1. specify that an offence is one of strict liability;
2. clarify the physical elements of an offence;
3. clarify the fault elements of an offence (especially where the fault elements vary from those specified by the *Criminal Code*);
4. separate defences from offences and identify the evidential burden in relation to the defence;
5. identify circumstances where offences under the Regulations are created by enabling legislation;
6. repeal offence provisions that duplicate general provisions in the *Criminal Code*;
7. give effect to current drafting protocols; and
8. update pecuniary penalties by converting them to penalty units.

Details of the Amendment Regulations are set out in the Attachment.

The Amendment Regulations commenced on gazettal.

Authority: Section 26 of the *Air Navigation Act 1920*

Section 252 of the *Airports Act 1996*

Section 56 of the *Interstate Road Transport Act 1985*

Section 425 of the *Navigation Act 1912*

Section 21 of the *Stevedoring Levy (Collection) Act 1998*

ATTACHMENT

Item 1 provides that the name of the Regulations is the Transport and Regional Services Legislation Amendment (Application of Criminal Code) Regulations 2002.

Item 2 provides that the Regulations commence on Gazettal.

Items 3 to 16 inclusive provide that each Schedule to the Amendment Regulations amends the specified Regulations.

The Regulations specified in Schedules 3 - 16 inclusive are amended as follows:

Strict Liability

The Amendment Regulations provide that each of the offences (or particular elements of offences) listed in Table 1 below are offences (or elements) of strict liability.

The offence of strict liability is an offence where no fault elements apply to the physical elements of the offence. A fault element can only be dispensed with in relation to an offence (or in relation to a particular element of an offence) if the offence specifies that it is a strict liability offence (or that a particular element is a strict liability element). The defence of mistake of fact is available for a strict liability offence (or a strict liability element of an offence). In the absence of express reference that an offence (or element of an offence) is strict liability, a court will be obliged to interpret the offence (or element of the offence) as a fault offence (or fault element) rather than a strict liability offence (or fault element), and will require proof of fault elements in relation to the physical elements.

The Regulations identified in Table 1 below are currently strict liability offences (or strict liability elements of offences). The amendments ensure that the offences (or elements of the offences) continue to operate as strict liability following application of the Criminal Code.

Table 1

Schedule	Name of Regulations	Regulation/s	Item/s
Schedule 1	Air Navigation (Aerodrome Flight Corridors) Regulations	5(1)	1
Schedule 2	Air Navigation (Aircraft Noise) Regulations 1984	10(4)	10
		10BA(5)	11
		10D(2)	13
		11(2A)	14
Schedule 3	Air Navigation (Checked Baggage) Regulations 2000	6(1)	2
		7(1), 7(2)	3
		8(2)	4
		10(1)	5
		11(1)	7
		13(1), 13(3)	10
Schedule 7	Airports (Control of On-Airport Activities) Regulations 1997	118(1), 118(2)	1
		118(3)	2
		119(1), 119(2)	3
		119(3)	4
		120(2)	5
		123(2)	6
		129(3)	7

		130(1)	8
		131(2)	9
		137(1)	10
		142(1)	11
Schedule 10	Interstate Road Transport Regulations 1986	12C(4), 12C(6)	3
		12H(2)	5
		12K(2)	13
		12L(1)	16
		12ZAB(1)	17
		15(4)	20
		17(1), 17(2), 17(3)	24
		20(1)	27
		22(1), 22(2), 22(3)	31
		23B(1), 23B(2)	36
		24(1), 24(2)	40
		26(1), 26(2), 26(3), 26(6), 26(7)	48
		28	51
		29	53
		29A(1)	54
		51B(1), 51B(2)	57
Schedule 1	Navigation (Marine Casualty) Regulations 1990	7(2), 7(3)	7
		24(2), 24(3)	12
		33(1)	15

Knowledge of Law

In the Regulations identified in Table 2 below, the prosecution may be required to prove, as part of the offence, that the defendant had knowledge of a provision of statute law or subordinate legislation referred to in the offence provision. It is generally very difficult for the prosecution to establish such knowledge and is contrary to the usual maxim that ignorance of the law is no excuse. Subsections 9.3(1), and 9.4(1), of the *Criminal Code* provide that mistake or ignorance of statute law, or subordinate legislation, is no excuse. However, subsections 9.3(2) and 9.4(2) provide that subsections 9.3(1) and 9.4(1) do not apply if the particular statute law or subordinate legislation is expressly or impliedly to the contrary effect.

To ensure that the provisions are not interpreted to indicate contrary intention for the purposes of section 9.4 of the *Criminal Code*, the Amendment Regulations amend the offence provisions identified in Table 2 below to provide that strict liability applies to that part of the physical element of conduct that raises the knowledge of law issues. The defence of mistake of fact will then apply.

Table 2

Schedule	Name of Regulations	Regulations/s	Item/s
Schedule 2	Air Navigation (Aircraft Noise) Regulations 1984	10(4)(c)	10
Schedule 3	Air Navigation (Checked Baggage) Regulations 2000	9(1), 9(1A), 9(2) 7(1)	6 3
Schedule 4	Air Navigation (Coolangatta Airport Curfew) Regulations 1999	13(1)(b)(i) 8(2)	10 2
Schedule 8	Airports (Environment Protection) Regulations 1997	13(2) 22(3) 4.05(1)	3 4 1

		6.02	7
		6.04	9
Schedule 10	Interstate Road Transport Regulations 1986	5B	2
		12E	4
		12I(3), 12I(3B)	11
		12ZAB(1)	17
		17(1), (2)	24
		20(1), 20(2)	27
		22(3)	31
		26(1)(c), 26(1)(d), 26(3), 26(5)(a), 26(5)(b), 26(5)(c)	48
		28(1)	51
		51B(2)	57
Schedule 14	Stevedoring levy (Collection) Regulations 1998	9	1

Restructuring offences to clarify the defence

The Amendment Regulations amend the offence provisions identified in Table 3 below, to clarify that the defence to the offence does not form part of the elements of the offence for the prosecution to establish. The amendments are achieved by removing the defence from the offence provisions and inserting them in new stand-alone defence provisions, each of which is followed by a Note to the effect that the defendant bears an evidential burden of proof. The *Criminal Code* requires proof of defences at an *evidential* standard unless the law creating the offence expressly imposes proof at the higher *legal* standard.

Table 3

Schedule	Name of Regulations	Regulation/s	Item/s
Schedule 1	Air Navigation (Aerodrome Flight Corridors) Regulations	3(1)	2, 3
Schedule 2	Air Navigation (Aircraft Noise) Regulations 1984	9(3)	6
		11(2A)	14
		9(2)	6
Schedule 3	Air Navigation (Checked Baggage) Regulations 2000	6(1)	1, 2
Schedule 4	Air Navigation (Coolangatta Airport Curfew) Regulations 1999	8(1)	2
Schedule 5	Air Navigation (Fuel Spillage) Regulations 1999	14	1
Schedule 7	Airports (Control of On-Airports Activities) Regulations 1997	118 (1), 118(2)(a), 118(2)(b)	1
		119(1), 119(2)(a), 119(2)(b)	3
		130(1)	8
		137(1)	10
Schedule 8	Airports (Environment Protection) Regulations 1997	5.18(2)	3
		6.01(4)	5
Schedule 10	Interstate Road Transport Regulations 1986	12I(3), 12I(3B)	11
		12L(1)	16
		23B(1), 23B(2)	36
		24(1)	37
		26(1), 26(2), 26(3), 26(4), 26(6), 26(7)	48
		29A(1)	54

Restructuring the offence provision to clarify that the "exception" is an element of the offence

The Amendment Regulations amend the offence provisions identified in Table 4 below, to clarify that the exception is intended to form part of the elements of the offence for the prosecution to establish. The amendments are achieved by redrafting the offences so that the use of the terms "unless" or "except" are removed and replaced by terminology that makes clear that the wording concerned forms part of the offence.

Table 4

Schedule	Name of Regulations	Regulation/sItem/s	
Schedule 2	Air Navigation (Aircraft Noise) Regulations 1984	9(1)	2
		9(1A)	3
		9(2)	4
Schedule 3	Air Navigation (Checked Baggage) Regulations 2000	13(1)	8, 9
Schedule 7	Airports (Control of On-Airport Activities) Regulations 1997	118(2)(c)	1
		119(2)(c)	3
Schedule 10	Interstate Road Transport Regulations 1986	12ZAB(1)	17
		29A	54

Restructuring the offence provision to clarify the physical elements of the offence

The Amendment Regulations restructure, and reword using simpler language, the offence provisions identified in Table 5 below, to clarify the physical elements (conduct, circumstance and result) of the offences. The amendments do not alter the operation or the effect of the offence provisions.

Table 5

Schedule	Name of Regulations	Regulation/sItem/s	
Schedule 2	Air Navigation (Aircraft Noise) Regulations 1984	49AB(4)	7
		10BA(5)	11
Schedule 10	Interstate Road Transport Regulations 1986	26(4)	47
Schedule 11	Navigation (Coasting Trade) Regulations	33(2)	4

Definition of "engage in conduct"

The Amendment Regulations insert a definition of the term "engage in conduct" in the Regulations identified in Table 6 below. The amendments are a consequence of the amendments to clarify the physical elements of "conduct" and "result" in the offence provisions detailed in Table 5 above.

Table 6

Schedule	Name of Regulations	Regulation/sItem/s	
Schedule 2	Air Navigation (Aircraft Noise) Regulations 1984	2	1
Schedule 4	Air Navigation (Coolangatta Airport Curfew) Regulations 1999	5(1)	1
Schedule 10	Interstate Road Transport Regulations 1986	2(1)	1
Schedule 11	Navigation (Coasting Trade) Regulations	4(1)	2

Clarify the meaning of the phrase "as soon as practicable"

The Amendment Regulations amend the Regulations identified in Table 7 below to clarify the meaning of the phrase "as soon as practicable", by specifying a period of time as an element of the offence.

Table 7

Schedule	Name of Regulations	Regulation/s	Item/s
Schedule 2	Air Navigation (Aircraft Noise) Regulations 1984	10(4)	8
		11(2A)	4
Schedule 12	Navigation (Marine Casualty) Regulations 1990	4(1)	1
		4(2)	2
		7(2)	3
		7(3)	5
		24(2)	8
		24(3)	10

Remove "refuse" to clarify the offence

The Amendment Regulations amend the provisions identified in Table 8 below, to omit the term refuse. The affected provisions describe the proscribed conduct as fail or refuse to do a certain act, and also contain the defence of without reasonable excuse which is usually an indicator that an offence is intended to be a strict liability offence. The offence of refusing to do the act would not normally be regarded as being strict liability because refuse implies that fault must be proved. However, the offence of failing to do the act is not generally regarded as implying that fault must be proved. This combined with the nature of the offence, the low level penalty, and the defence of without reasonable excuse in the affected provisions indicates that the offences are currently strict liability and therefore do not require proof of fault. The amendments clarify the offence.

Table 8

Schedule	Name of Regulations	Regulation/s	Item/s
Schedule 2	Air Navigation (Aircraft Noise) Regulations 1984	11(2A)	14
Schedule 12	Navigation (Marine Casualty) Regulations 1990	33(1)	13

Remove "knowingly and recklessly" or "knowledge" - inappropriate fault elements for physical element of conduct

The Amendment Regulations amend the provisions identified in Table 9 below, to remove the fault elements of knowingly and recklessly, or the term knowledge, in relation to the physical element of conduct. It is not possible under the Criminal Code, to apply these fault elements to the physical element of conduct. These fault elements can only be applied to the physical elements of circumstance or result (see Part 2.2, Division 5 of the Criminal Code). As a result of the amendment, the fault element of intention now applies to the physical element of conduct in the offence.

Table 9

Schedule	Name of Regulations	Regulation/s	Item/s
Schedule 4	Air Navigation (Coolangatta Airport Curfew) Regulations 1999	8(2)	2
		13(2)	3
		22(3)	4
		23	5
Schedule 10	Interstate Road Transport Regulations 1986	5B	2
		12E	4

Remove "wilfully" - inappropriate fault element for physical element of conduct

The Amendment Regulations amend the provisions identified in Table 10 below, to remove the word wilfully, which is akin to intentionally, in relation to the physical element of conduct. The fault element of intention is the equivalent used in the Criminal Code. The Criminal Code allows the use of new fault elements and the offence will still operate in the same manner (see subsection 5.1(2) of the Criminal Code). The amendment ensures that the courts do not attempt to distinguish wilfulness from intention on the basis that it appears to differ from the basic Criminal Code fault element.

Table 10

Schedule	Name of Regulations	Regulation/sItem/s
Schedule 10	Interstate Road Transport Regulations 1986	26(4) 47
Schedule 11	Navigation (Coasting Trade) Regulations	33(2) 4

Note to clarify that the offence is created, and the penalty is set by enabling legislation

The Amendment Regulations insert a Note to the provisions identified in Table 11 below, that failure to comply with the Regulation is an offence that is created, and the penalty is set, by the enabling legislation.

Table 11

Schedule	Name of Regulations	Regulation/sItem/s
Schedule 6	Airports Regulations 1997	3.22(1) 1, 2
		3.23(2) 3, 4
		3.24(4) 5, 6
		3.25(1) 7
		3.25(4) 8
		3.26(1) 9
		3.26(2) 10
		8.02(4) 11
		8.03(3) 12
		Schedule 8
7.06(2) 11		
Schedule 9	Airports (Protection of Airspace) Regulations 1996	7(1) 3
		8 4
		14(4) 5
Schedule 13	Navigation (River Murray Traffic) Regulations	21(2) 2

Repeal offence provisions where there is an equivalent provision in the Criminal Code

The Amendment Regulations repeal the provisions identified in Table 12 below, as there is an equivalent provision in the Criminal Code (see section 137.1).

Table 12

Schedule	Name of Regulations	Regulation/sItem/s
Schedule 12	Navigation (Marine Casualty) Regulations 1990	33(2) 16

Consequential Amendments

The Amendment Regulations make consequential amendments to the provisions identified in Table 13 below. With the exception of the amendment at Item 1 of Schedule 9, the amendments are a consequence of the amendments detailed at Table 3 above. The amendment at Items 1 and 2 of Schedule 9 are a consequence of the amendment detailed at Table 11 above.

Table 13

Schedule	Name of Regulations	Regulation/s	Item/s
Schedule 8	Airports (Environment Protection) Regulations 1997	5.18(2)	2
		6.01(4)	4
Schedule 9	Airports (Protection of Airspace) Regulations 1996	7(1)	1, 2
Schedule 10	Interstate Road Transport Regulations 1986	12I(3)	6
		12I(3A)	8
		12I(3B)	9
		12L(1)	14
		23B(1)	32
		23B(2)	34
		24(1)	37
		26(1)	41
		26(2)	43
		26(3)	45
Schedule 12	Navigation (Marine Casualty) Regulations 1990	33(1)	13

Drafting protocol - reference to Regulations

The Amendment Regulations give effect to current drafting protocol regarding the reference to Regulations. The amendments add the year of the Regulations to the title.

Table 14

Schedule	Name of Regulations	Regulation/s	Item/s
Schedule 1	Air Navigation (Aerodrome Flight Corridors) Regulations	1	1
Schedule 11	Navigation (Coasting Trade) Regulations	1	1
Schedule 13	Navigation (River Murray Traffic) Regulations	1	1

Drafting protocol - correct numbering of Regulations

The Amendment Regulations give effect to current drafting protocol regarding numbering of Regulations. The amendments correct the numbering of the Regulations.

Table 15

Schedule	Name of Regulations	Regulation/s	Item/s
Schedule 3	Air Navigation (Checked Baggage) Regulations 2000	11	6

Substitute penalty units for pecuniary penalty

The Amendment Regulations amend the Regulations identified in Table 16 below, by updating pecuniary penalties by converting them into penalty units rather than dollar amounts. The amendment to subregulation 32(1) of the Navigation (Coasting Trade) Regulations (see Item 3 of Schedule 11), replaces the penalty amount of \$10 with 1 penalty unit (\$110). Although this appears to be an increase in the penalty, the effect of paragraph 4AB(1)(b) of the Crimes Act 1914 is that \$10 is taken to be a reference to 1 penalty unit. Accordingly, the penalty amount has not changed.

Table 16

Schedule	Name of Regulations	Regulation/s	Item/s
Schedule 2	Air Navigation (Aircraft Noise) Regulations 1984	9(3)	5
		9AB(4)	7
		10(4)	9
		10BA(5)	11
		10D(2)(a)	12

Schedule 10 Interstate Road Transport Regulations 1986	11(2A)	14
	5B	2
	12E	4
	12I(3)	7
	12I(3B)	10
	12K(2)	12
	12ZAB(1)	17
	15(1)	18
	15(4)	19
	17(1)	21
	17(2)	22
	17(3)	23
	20(1)	25
	20(2)	26
	22(1)	28
	22(2)	29
	22(3)	30
	23B(1)	33
	23B(2)	35
	24(1)	38
	24(2)	39
	26(1)	42
	26(2)	44
	26(3)	46
	26(4)	47
	26(5)	48
	28	50
	29(1)	52
	29A	54
	51B(1)	55
	51B(2)	56
	Schedule 11 Navigation (Coasting Trade) Regulations	32(1)
	32(2)	4
Schedule 12 Navigation (Marine Casualty) Regulations 1990	7(2)	4
	7(3)	6
	24(2)	9
	24(3)	11
	33(1)	14
Schedule 14 Stevedoring Levy (Collection) Regulations 1998		1