

Foreign Affairs Legislation Amendment (Application of Criminal Code) Regulations 2002 (No. 1) 2002 No. 37

EXPLANATORY STATEMENT

STATUTORY RULES 2002 No. 37

Issued by the Authority of the Minister for Foreign Affairs

Subject - Charter of the United Nations Act 1945, Papua New Guinea (Staffing Assistance) Act 1973

Foreign Affairs Legislation Amendment (Application of Criminal Code) Regulations 2002 (No. 1)

Section 6 of the *Charter of the United Nations Act 1945* provides that the GovernorGeneral may make regulations for and in relation to giving effect to decisions that: (a) the Security Council has made under Chapter VII of the *Charter of the United Nations* ("the Charter"); and (b) Article 25 of the Charter requires Australia to carry out; in so far as those decisions require Australia to apply measures not involving the use of armed force. Section 65 of the *Papua New Guinea (Staffing Assistance) Act 1973* provides that the GovernorGeneral may make regulations, not inconsistent with this Act, prescribing all matters that by this Act are required or permitted to be prescribed or to be provided for by regulation, or that are necessary or convenient to be prescribed for giving effect to this Act.

The purpose of the *Foreign Affairs Legislation Amendment (Application of Criminal Code) Regulations 2002* is to amend various criminal offence provisions in relevant existing Foreign Affairs and Trade Portfolio Regulations in accordance with the application of Chapter 2 of the *Criminal Code Act 1995* ("*Criminal Code*") to all criminal offence provisions in existing Commonwealth laws. The Regulations will harmonise the offence-creating and related provisions within Foreign Affairs and Trade 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.

Chapter 2 of the *Criminal Code* replaces common law notions of a criminal act and a guilty mind with physical and fault elements respectively. One key effect of Chapter 2 is that offences of strict liability (that is, offences in respect of which a fault element need not be proven at present) will 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.

The Regulations amend existing Foreign Affairs and Trade portfolio Regulations 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 provide that defences set out in Foreign Affairs and Trade portfolio regulations are subject to proof at the evidential standard. The proposed Regulations also update some pecuniary penalties by converting them into penalty units rather than dollar amounts.

Details of the Regulations are set out in the Attachment.

Attachment

Regulation 1

This regulation provides that the name of these Regulations is the *Foreign Affairs Legislation Amendment (Application of the Criminal Code) Regulations 2002 (No. 1)*.

Regulation 2

This regulation provides that these Regulations commence on gazettal.

Regulation 3

This regulation provides that Schedule 1 amends the *Charter of the United Nations (Sanctions - Angola) Regulations 1994*.

Regulation 4

This regulation provides that Schedule 2 amends the *Charter of the United Nations (Sanctions - Rwanda) Regulations*.

Regulation 5

This regulation provides that Schedule 3 amends the *Charter of the United Nations (Sanctions - Sierra Leone) Regulations*.

Regulation 6

This Schedule provides that Schedule 4 amends the *Papua New Guinea (Staffing Assistance) (Superannuation) Regulations 1973*

Schedule 1 - Amendments of Charter of the United Nations (Sanctions - Angola) Regulations 1994.

Item 1 substitutes Regulation 3 and provides that the words "intentionally or recklessly" are no longer used in the provision. The effect of this amendment is to bring the provision 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 the physical element of conduct: see section 5.2 and 5.3 of the *Criminal Code*. This item also clarifies that strict liability applies in paragraph 3(1)(a) to the circumstance for which the item was mentioned in Schedule 14AA to the *Customs (Prohibited Imports) Regulations 1958*. This approach has been taken to ensure that the Criminal Code does not have the effect of requiring a mental element in what is really a knowledge of law issue. The application of strict liability to Regulation 3 maintains the current operation of the Regulation after Chapter 2 of the *Criminal Code* takes effect.

Item 2 substitutes Regulation 4 to provide that the words "intentionally or recklessly" are no longer used in the provision for the same reasons outlined in Item 1 of these Regulations (see above). This item also clarifies that strict liability applies in subregulation 4(1)(a) to the circumstances for which the goods were specified in Schedule 2. The application of strict liability maintains the current operation of Regulation 4 after Chapter 2 of the *Criminal Code* takes effect.

Item 3 substitutes a new subregulation 5(1) such that it now provides that a person commits an offence if the conditions in subparagraphs (a) and (b) are met. The effect of this amendment is to re-structure the existing provision to account for the application of strict liability to subregulation (5)(1) by virtue of Item 5 (see below).

Item 4 amends subregulation 5(2) by omitting the words "does not apply to" and inserting the words "does not prohibit". The effect of this amendment is to clarify that the effect of subregulation 5(1) does not prohibit action undertaken which is approved under paragraph 5 of Resolution 1127, by the Committee established under Resolution 864 (1993).

Item 5 inserts a new subregulation 5(3) after subregulation 5(2) to clarify that an offence against subregulation (5)(1) is an offence of strict liability. The application of strict liability maintains the operation of the provision in the same manner in which it was intended after the application of Chapter 2 of the *Criminal Code*. This item also inserts an evidential burden note. This note advises that a defendant bears an evidential burden in relation to the matters mentioned in subregulation 5(2). It also draws attention to the provisions of section 13.3 of the *Criminal Code* which provide that 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.

Item 6 amends subregulation 6(1) by omitting the words ", intentionally or recklessly,". The effect of this amendment is to bring the provision 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 the physical element of conduct: see section 5.2 and 5.3 of the *Criminal Code*.

Item 7 inserts a new subregulation 6(1A) after subregulation 6(1), including penalty. The effect of this amendment is to clarify that strict liability applies in the circumstances outlined in paragraphs 6(1A)(a) and (b). The application of strict liability to this provision maintains the current operation of the provision after the application of Chapter 2 of the *Criminal Code* takes effect and avoids the prosecution having to establish knowledge of law issues.

Item 8 amends subregulation 6(2) by omitting the words "does not apply" and substituting the words "does not prohibit". The effect of this amendment is to clarify that the actions in subregulation 6(1) do not prohibit actions undertaken in the circumstances outlined in paragraphs 6(2)(a) and (b).

Item 9 amends paragraph 6(2)(a) by omitting the words "to provision" and substituting the words "the provision". The effect of this amendment is to clarify the physical element of the action for the purposes of paragraph 6(2)(a).

Item 10 amends paragraph 6(2)(b) by omitting the words "to provision" and substituting the words "the provision". The effect of this amendment is to clarify the physical element of the action for the purposes of paragraph 6(2)(b).

Item 11 inserts an evidential burden note after subregulation 6(2). This note advises that a defendant bears an evidential burden in relation to the matters mentioned in subregulation 6(2). It also draws attention to the provisions of section 13.3 of the *Criminal Code* which provide that 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.

Item 12 amends subregulation 7(2) by omitting the words ", intentionally or recklessly,". The effect of this amendment is to bring the provision 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 the physical element of conduct: see section 5.2 and 5.3 of the *Criminal Code*.

Item 13 inserts a new subregulation 7(3) after subregulation 7(2) and the penalty, to clarify that strict liability applies to the offences set out in paragraphs 7(2)(a), 7(2)(b) and 7(2)(c), in the circumstances proscribed. The application of strict liability to this provision maintains the current operation of the provision after the application of Chapter 2 of the *Criminal Code* takes effect.

Schedule 2 - Amendments of *Charter of the United Nations (Sanctions - Rwanda) Regulations.*

Item 1 substitutes a new Regulation 4 such that it now omits reference to the words "intentionally or recklessly". The effect of this amendment is to bring the provision 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 the physical element of conduct: see section 5.2 and 5.3 of the *Criminal Code*.

The item also clarifies that strict liability applies in subregulations 4(1), 4(2) and 4(3) to the circumstance that the goods were specified in the schedule. The application of strict liability to this provision maintains the current operation of the provision after the application of Chapter 2 of the *Criminal Code* takes effect.

This item also inserts an evidential burden note after Regulation 4. This note advises that a defendant bears an evidential burden in relation to the matters mentioned in subregulation 4(4). It also draws attention to the provisions of section 13.3 of the *Criminal Code* which provide that 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 3 - Amendments of *Charter of the United Nations (Sanctions - Sierra Leone) Regulations.*

Item 1 substitutes a new subregulation 4(1) such that it now has no reference to the the words "intentionally or recklessly". The effect of this amendment is to bring the provision 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 the physical element of conduct: see section 5.2 and 5.3 of the *Criminal Code*. This item also inserts a new subregulation 4(1 A) which clarifies that strict liability applies in paragraph 4(1) to the circumstance that the item was mentioned in subregulation 4(2). This is because the words "an item mentioned in subregulation (2)" raise a knowledge of law issue. The application of strict liability to this provision maintains the current operation of the provision after the application of Chapter 2 of the *Criminal Code* takes effect.

The item also inserts a new subregulation 4(1B) which sets out a stand alone defence to a prosecution under subregulation 4(1). An evidential burden note is also inserted which provides that a defendant bears an evidential burden in relation to the matters mentioned in subregulation 4(1B). It also draws attention to the provisions of section 13.3 of the *Criminal Code* which provide that 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.

Item 2 substitutes Regulation 5 such that it now contains no reference to the words "intentionally or recklessly". The effect of this amendment is to bring the construction of the provision 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 the physical element of conduct: see section 5.2 and 5.3 of the *Criminal Code*. The item also inserts a penalty provision after each subregulation (5(1) and 5(2)) respectively. The pecuniary penalty remains the same as previously, however the item inserts a new subregulation 5(3) to clarify the circumstances for which strict liability will apply in each subregulation.

Item 3 inserts a penalty provision after subregulation 6(1).

Item 4 omits a penalty clause from the foot of subregulation 6(2).

Item 5 inserts a new subregulation 6(3) after subregulation 6(2). This clarifies that an offence under this regulation is an offence of strict liability. The application of strict liability maintains the current operation of subregulation 6(2) after Chapter 2 of the *Criminal Code* takes effect.

Schedule 6 - Amendments of the *Papua New Guinea (Staffing Assistance) (Superannuation) Regulations 1973*.

Item 1 substitutes a new subregulation 112 such that it now contains no reference to the words "without reasonable excuse". This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence. Strict liability applies in subregulation (2) because the words "under these Regulations" raise a knowledge of law issue. The defence of reasonable excuse becomes new subregulation 112(3).

An evidential burden note is also inserted which provides that a defendant bears an evidential burden in relation to the matters mentioned in subregulation (2). It also draws attention to the provisions of section 13.3 of the *Criminal Code* which provide that 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 updates the pecuniary penalty provision by expressing it in penalty units instead of monetary units. This amendment does not alter the penalty substantially as section 4AB of the *Crimes Act 1914* has the effect of converting references to dollar amounts to equivalent penalty units.