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HOUSE OF REPRESENTATIVES

**COMMUNICATIONS AND THE ARTS
LEGISLATION AMENDMENT
(APPLICATION OF CRIMINAL CODE) BILL 2000**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Communications, Information Technology and
the Arts, Senator the Hon. Richard Alston)

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COMMUNICATIONS AND THE ARTS LEGISLATION AMENDMENT (APPLICATION OF CRIMINAL CODE) BILL 2000

OUTLINE

The *Communications and the Arts Legislation Amendment (Application of Criminal Code) Bill 2000* amends certain offence provisions in legislation within the Communications, Information Technology and the Arts portfolio. The amendments are intended to ensure that when Chapter 2 of the *Criminal Code Act 1995* (the Code) is applied to all Commonwealth criminal offences, from 15 December 2001, those provisions will continue to operate in the same manner as they operated previously.

If legislation containing offence provisions were not amended to have regard to the Code, the Code may have altered the interpretation of existing offence provisions. The *Criminal Code* is contained in Schedule 2 to the *Criminal Code Act 1995*. It sets out the general principles of criminal responsibility that will apply to all Commonwealth criminal offences once the Act comes into force, on and after 15 December 2001. Chapter 2 has been applied to new offences since 1 January 1997 and will apply to all Commonwealth offences from 15 December 2001.

Chapter 2 of the *Criminal Code* codifies the general principles of criminal law and adopts the common law approach of subjective fault based principles. It adopts the traditional distinction of dividing offences into *actus reus* and *mens rea* but uses the plainer labels of physical elements and fault elements. The general rule is that for each physical element of an offence it is necessary to prove that the defendant had the relevant fault element. The prosecution must prove every physical and fault element of an offence. The physical elements are conduct, result of conduct and circumstance of conduct and the fault elements specified in the *Criminal Code* are intention, knowledge, recklessness and negligence. The default fault elements which the *Criminal Code* provides will apply where a fault element is not specified and where the offence (or an element of the offence) is not specified to be a strict or absolute liability offence. The default fault elements set out in the *Criminal Code* are intention for a physical element of conduct and recklessness for a physical element of circumstance or result. 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 or absolute liability offence (or that a particular element is a strict or absolute liability element). The defence of mistake of fact is available for a strict liability (or a strict liability element of an offence) but not for an absolute liability offence (or absolute liability element of an offence). The *Criminal Code* does not prevent an offence from specifying an alternative fault element but this will rarely be done.

In addition, the *Communications and the Arts Legislation Amendment (Application of Criminal Code) Bill 2000* will make other minor amendments to offence provisions in the Communications, Information Technology and the Arts portfolio which are consistent with the general criminal law policy to simplify offence provisions and improve the operation of offence provisions.

The amendments fall broadly into the following categories:

- amendments to restructure provisions where part of the conduct element of the offence includes ‘breach of a condition of a licence, authorisation, permit, certificate or declaration etc’;
- amendments to restructure offences relating to non compliance with a notice, requirement, rule, direction or order;
- amendments to restructure offence provisions which include an inappropriate physical element of conduct;
- an amendment to alter a legal burden of proof;
- creation of a new offence;
- creation of offences of strict liability which could not currently be interpreted as strict liability;
- extension of meaning of ‘engaging in conduct’ to include omissions;
- amendment so as not to require knowledge of the law;
- amendments to repeal false or misleading statements or false or misleading documents provisions; and
- amendments to convert dollar amounts to penalty units.

FINANCIAL IMPACT STATEMENT

The Bill is not expected to have any significant financial impact on Commonwealth expenditure or revenue.

NOTES ON CLAUSES

Clause 1 - Short title

Clause 1 provides for the citation of the *Communications and the Arts Legislation Amendment (Application of Criminal Code) Act 2000* (the Act).

Clause 2 - Commencement

Clause 2 of the Bill provides for the Act to commence on whichever is the latest of:

- a) immediately after the commencement of item 15 of Schedule 1 to the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*;
- b) the start of the 28th day after the day on which the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000* receives the Royal Assent;
- c) the start of the 28th day after the day on which this Act receives the Royal Assent.

The reason for this conditional commencement provision is because certain amendments proposed in the *Communications and the Arts Legislation Amendment (Application of Criminal Code) Bill 2000* rely on amendments to be made in the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* and the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*. In particular, the *Communications and the Arts Legislation Amendment (Application of Criminal Code) Bill 2000* proposes to repeal various false or misleading offence provisions which are to be included in the *Criminal Code* by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*. This Bill also proposes to replace references to certain *Crimes Act 1914* provisions which will be repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000* and replaced by equivalent ancillary offence provisions which are to be included in the *Criminal Code* by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*.

Subclauses 2(2) to 2(8) provide for the commencement of various provisions which this Act is amending, but which provisions are not yet in force.

Subclause 2(2) provides that if item 22 of Schedule 1 to the *Broadcasting Services Amendment Act 2000* has not commenced before the commencement of section 1 of this Act then items 20 to 25 in Schedule 1 (which amend proposed sections 121FH, 121FJ and 121FLF of the *Broadcasting Services Act 1992* (BSA)) are to commence immediately after the commencement of item 22 of Schedule 1 to the *Broadcasting Services Amendment Act 2000*. This is because these proposed sections will be introduced into the BSA by item 22 of Schedule 1 to the *Broadcasting Services Amendment Act 2000*.

Subclauses 2(3), 2(4) and 2(5) provide for the commencement of item 27 (the item amending paragraph 139(2)(c) of the BSA), depending upon the date of commencement of section 1 of this Act. Item 27 makes amendments to paragraph 139(2)(c) of the BSA which are proposed to be made by item 21 of Schedule 1 to the *Broadcasting Services Amendment Act (No. 3) 1999*, which is to commence on 1 July 2001.

Subclause 2(3) provides that if section 1 of this Act commences before 1 July 2001 then item 27 of this Act commences on 1 July 2001. It also provides that item 21 of Schedule 1 to the

Broadcasting Services Amendment Act (No. 3) 1999 does not commence. This is because item 21 of Schedule 1 would no longer be necessary as item 27 of this Act will make these amendments to paragraph 139(2)(c) of the BSA.

Subclause 2(4) provides that if section 1 of this Act commences on 1 July 2001 then item 26 of Schedule 1 to this Act (which inserts a new section 139 into the BSA) will commence immediately after the commencement of item 21 of Schedule 1 to the *Broadcasting Services Amendment Act (No. 3) 1999*, that is 1 July 2001. Item 27 will commence immediately after the commencement of item 26.

Subclause 2(5) provides that if section 1 of this Act commences after 1 July 2001 then item 27 of this Act commences immediately after the commencement of item 26.

Subclause 2(6) provides for the commencement of item 38, which amends clause 10 of Schedule 6 to the *Broadcasting Services Act 1992* (BSA). Clause 10 of Schedule 6 to the BSA will be introduced into the BSA by item 140 of Schedule 1 to the *Broadcasting Services Amendment (Digital Television and Datacasting) Act 2000*. Subclause 2(6) provides that item 38 of Schedule 1 to this Act will commence immediately after the commencement of item 140 of Schedule 1 to the *Broadcasting Services Amendment (Digital Television and Datacasting) Act 2000*, if this item has not commenced before the commencement of section 1 of this Act.

Schedule 1 to this Act makes amendments to various provisions in the *Australian Postal Corporation Act 1989* (APC Act) (see items 13 to 17). Item 2 of Schedule 1 to the *Postal Services Legislation Amendment Act 2000* proposes to change the name of the APC Act to the *Australian Postal Corporation Limited Act 1989*. Subclause 2(7) provides that if this name change is operational prior to the commencement of section 1 of this Act (that is if item 2 of Schedule 1 to the *Postal Services Legislation Amendment Act 2000* commences before this Act) then the amendments to the *Australian Postal Corporation Act 1989* contained in Schedule 1 to this Act have effect as if they were amendments to the *Australian Postal Corporation Limited Act 1989*.

Subclause 2(8) provides for the commencement of items 164 and 165 of Schedule 1 to this Act, which amend sections 20 and 20J of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. These sections are to be introduced by item 1 of Schedule 1 to the *Telecommunications (Consumer Protection and Service Standards) Amendment Act (No. 2) 2000*. Consequently these items cannot commence until the item introducing sections 20 and 20J have commenced. Subclause 2(8) ensures this by providing that if item 1 of Schedule 1 to the *Telecommunications (Consumer Protection and Service Standards) Amendment Act (No. 2) 2000* has not commenced before the commencement of section 1 of this Act, item numbers 166 and 167 commence immediately after the commencement of item 1 of Schedule 1 to the *Telecommunications (Consumer Protection and Service Standards) Amendment Act (No. 2) 2000*.

Clause 3 – Schedule(s)

By virtue of this clause, each Act specified in a Schedule to this Act is amended or repealed as set out in the Schedule, and any other item has effect according to its terms.

Clause 4 – Application of amendments

This clause provides that the Act only applies to acts or omissions after commencement. Subclause 4(2) provides that if there is a discrepancy between whether an act or omission occurred before or after commencement then it will be deemed to have taken place before the amendment commenced.

Schedule 1 – Amendment of Acts

Archives Act 1983

Item 1 – Subsection 3(1)

This item amends subsection 3(1) of the *Archives Act 1983* (Archives Act) by introducing a definition of ‘engage in conduct’ which applies to the whole of the Act. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the Archives Act with the *Criminal Code*. However, it is desirable to clarify that offences which refer to ‘engage in conduct’ in the Act cover both acts and omissions. For example an offence relating to the destruction of a record (see item 3) may be committed if a person omits to perform an act, such as omitting to keep an archival storage room at the correct temperature, and consequently destroys a record. The inclusion of a definition of ‘engage in conduct’ ensures that such offences cover both acts and omissions.

Item 2 - New section 4A - Application of the *Criminal Code*

This item inserts a new section 4A into the Archives Act which provides that Chapter 2 of the *Criminal Code* applies to all offences against the Archives Act. It also inserts a note that says that Chapter 2 of the Code sets out the general principles of criminal responsibility.

Item 3 – Subsection 24(1)

This item repeals the existing subsection 24(1) of the Archives Act and substitutes new subsections 24(1) and 24(1A).

This amendment ensures that the offence provision more accurately identifies the physical elements of conduct and result in the offence in order that there is no doubt as to the default fault elements which will be supplied by the *Criminal Code*. This amendment has rephrased the offence to clarify that the destruction, disposal, transfer, damage or alteration is a physical element of result of the defendant’s conduct to which the default fault element of recklessness will apply.

In addition new subsection 24(1) replaces the reference to a penalty of \$2,000 with a reference to an equivalent penalty of 20 penalty units. This provides consistency with other penalty provisions, which refer to penalty units rather than dollar amounts. It does not alter the penalty which is applied for this offence as section 4AB of the *Crimes Act 1914* has the effect of converting references to dollar amounts to equivalent penalty units.

New subsection 24(1A) specifies that strict liability applies to the physical element of circumstance of this offence, that the record is a Commonwealth record. This amendment is necessary as this particular element of the offence is likely to have been interpreted as a strict liability element before this amendment because of the relatively low penalty attached to this offence and because of the difficulties in proving that a person knew that a record was a Commonwealth record.

Therefore this new subsection should not alter the way a court would interpret this element of the offence. If the amendment were not made then, after the application of the *Criminal Code*, this element of the offence would no longer be interpreted in the same way as it could currently be interpreted. After the *Criminal Code* comes into operation it is necessary to expressly state that an offence, or a particular element of an offence, is one of strict liability if the provision, or element, is to attract strict liability (sections 6.1 and 6.2 of the Code). If it is not specified a court would be obliged to interpret it as a fault offence, or element, and no longer as a strict liability offence, or element, and would require proof of fault elements in relation to the physical elements.

This is consistent with the approach taken in the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*. In this Act where an offence includes a physical element of ‘property belonging to a Commonwealth entity’ absolute liability is applied to the physical element of circumstance of the offence that the ‘property belongs to the Commonwealth entity’.

Item 4 – Subsection 26(1)

This item repeals the existing subsection 26(1) of the Archives Act and substitutes new subsections 26(1) and 26(1A).

This amendment ensures that the offence provision more accurately identifies the physical elements of conduct and result in the offence in order that there is no doubt as to the default fault elements which will be supplied by the *Criminal Code*. This amendment has rephrased the offence to clarify that the addition or alteration is a physical element of result of the defendant’s conduct to which the default fault element of recklessness will apply.

In addition new subsection 26(1) replaces the reference to a penalty of \$2,000 with a reference to an equivalent penalty of 20 penalty units. This provides consistency with other penalty provisions, which refer to penalty units rather than dollar penalties. It does not alter the penalty which is applied for this offence as section 4AB of the *Crimes Act 1914* has the effect of converting references to dollar amounts to equivalent penalty units.

New subsection 26(1A) specifies that strict liability applies to the physical element of circumstance of this offence, that the record is a Commonwealth record that has been in existence for more than 25 years. This amendment is necessary as this particular element of the offence is likely to have been interpreted as a strict liability element before this amendment because of the relatively low penalty attached to this offence and because of the difficulties in proving that a person knew that the record was a Commonwealth record that had been in existence for more than 25 years.

Therefore this new subsection should not alter the way a court would interpret this element of the offence. If the amendment were not made then, after the application of the *Criminal Code*, this element of the offence would no longer be interpreted in the same way as it could currently be interpreted. After the *Criminal Code* comes into operation it is necessary to expressly state that an offence, or a particular element of an offence, is one of strict liability if the provision, or element, is to attract strict liability (sections 6.1 and 6.2 of the Code). If it is not specified a court would be obliged to interpret it as a fault offence, or element, and no longer as a strict liability offence, or element, and would require proof of fault elements in relation to the physical elements.

This is consistent with the approach taken in the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*. In this Act where an offence includes a physical element of ‘property belonging to a Commonwealth entity’ absolute liability is applied to the physical element of circumstance of the offence that the ‘property belongs to the Commonwealth entity’.

Item 5 – Subsection 56(3)

This item repeals subsection 56(3) of the Archives Act and substitutes a new subsection 56(3).

The current subsection 56(3) may be interpreted so that ‘contravention of a condition’ forms part of the conduct element of the offence. This amendment has rephrased the offence to ensure that the contravention of the conditions under which records are made available to the person is part of the physical element of ‘result’. This means that it will attract the default fault element of recklessness.

While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision for the following reason. Under the *Criminal Code* the fault element of intention applies to the physical element of conduct. If the offence were not restructured prior to the Code coming into operation this could give rise to difficulties in the prosecution of this offence as the prosecution may be required to prove that the defendant has specific intention to breach a particular condition. This could be extremely difficult if the defendant had knowledge of the conditions but does not have a specific intention to breach a particular condition. The defendant could merely intend to breach the conditions generally whilst being reckless as to the particular condition breached.

In addition, new subsection 56(3) replaces the reference to a penalty of \$2,000 with a reference to a penalty of 20 penalty units. This provides consistency with other penalty provisions, which refer to penalty units rather than dollar penalties. It does not alter the penalty which is applied for this offence as section 4AB of the *Crimes Act 1914* has the effect of converting references to dollar amounts to equivalent penalty units.

Item 6 – Subsection 61(3)

This item repeals subsection 61(3) of the Archives Act, including the penalty, and substitutes new subsections 61(3) and (4).

This amendment ensures that the offence provision more accurately identifies the physical elements of conduct and result in the offence in order that there is no doubt as to the default

fault elements which will be supplied by the *Criminal Code*. This amendment has rephrased the offence to clarify that the destruction, disposal or damage is a physical element of result of the defendant's conduct to which the default fault element of recklessness will apply.

In addition new subsection 61(3) replaces the reference to a penalty of \$2,000 with a reference to an equivalent penalty of 20 penalty units. This provides consistency with other penalty provisions, which refer to penalty units rather than dollar penalties. It does not alter the penalty which is applied for this offence as section 4AB of the *Crimes Act 1914* has the effect of converting references to dollar amounts to equivalent penalty units.

New subsection 61(4) provides a defence to subsection 61(3) if the person has the permission of the Archives to destroy, dispose or damage the object.

This defence is currently contained in the body of the offence in subsection 61(3). This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence. A note is provided that a defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3 of the *Criminal Code*).

Subsection 13.3 of the Code provides that normally a defendant bears an evidential burden in relation to a defence. An evidential burden requires the defendant to adduce or point to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Australian Communications Authority Act 1997

Item 7 – New section 4A - Application of the *Criminal Code*

This item inserts a new section 4A into the *Australian Communications Authority Act 1997* (ACA Act) which provides that Chapter 2 of the *Criminal Code* applies to all offences against the ACA Act. It also inserts a note that says that Chapter 2 of the Code sets out the general principles of criminal responsibility.

Item 8 – Subsection 55(1)

This item amends subsection 55(1) of the ACA Act by omitting the defence of 'unless if ACA consents in writing' from the terms of the offence in subsection 55(1) and setting it out in a new subsection. This defence becomes a new subsection under item 10. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 9 – Subsection 55(2)

This item amends subsection 55(2) of the ACA Act by removing the reference to the words 'intentionally or recklessly'. This is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct (namely, contravention of subsection (1)). Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* supplying the default fault element of recklessly to a physical element of circumstance or result in an offence (for example, that the name or symbol is a protected name or symbol).

Item 10 – New subsection 55(2A)

This item, which is consequential upon item 8, inserts a new subsection 55(2A) into the ACA Act. It provides that subsections (1) and (2) do not apply if the ACA consents in writing to the use or application of the name or symbol. The note to the subsection provides that the defendant bears an evidential burden in relation to the matters in subsection (2A). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

Australian Film Commission Act 1975

Item 11 – New section 3A - Application of the *Criminal Code*

This item inserts a new section 3A into the *Australian Film Commission Act 1975* (AFC Act) which provides that Chapter 2 of the *Criminal Code* applies to all offences against the AFC Act. It also inserts a note that says that Chapter 2 of the Code sets out the general principles of criminal responsibility.

Item 12 – Subsection 10(5) and 10(5A)

This item repeals subsection 10(5) of the AFC Act and substitutes new subsections 10(5) and 10(5A).

Currently subsection 10(5) provides a defence to an offence under subsection 10(4) if a defendant proves that he or she had a reasonable excuse relating to the availability of Australian short films for not complying with the requirement to which the offence relates. This provision imposes a legal burden on the defendant (see subsection 13.4 of the Code). This means that the defendant must prove the existence of the matter (see subsection 13.1(3) of the Code). This is contrary to the policy behind the *Criminal Code* that a defendant bears only an evidential burden in relation to defences (see subsection 13.3 of the Code).

The proposed new subsection 10(5) requires the defendant to bear only an evidential burden in relation to the defence. While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision to provide consistency with the Code.

The note to the subsection provides that the defendant bears an evidential burden in relation to the matters in subsection (5). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

Proposed new subsection 10(5A) provides that subsection (4) is an offence of strict liability. This amendment is necessary as this offence is likely to have been interpreted as a strict

liability element before this amendment because of the relatively low penalty attached to this offence (\$200), it contains a defence of reasonable excuse, which is an indication of a strict liability offence, and because of the nature of the offence (which does not involve dishonesty or other serious imputation affecting the offender's reputation).

Therefore this new subsection should not alter the way a court would interpret this offence. If the amendment were not made then, after the application of the *Criminal Code*, this offence would no longer be interpreted in the same way as it could currently be interpreted. After the *Criminal Code* comes into operation it is necessary to expressly state that an offence is one of strict liability if the provision is to attract strict liability (sections 6.1 and 6.2 of the Code). If it is not specified a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require proof of fault elements in relation to the physical elements.

Australian Postal Corporation Act 1989

Item 13 – New section 11A - Application of the *Criminal Code*

This item inserts a new section 11A into the *Australian Postal Corporation Act 1989* (APC Act) which provides that Chapter 2 of the *Criminal Code* applies to all offences against the APC Act. It also inserts a note that says that Chapter 2 of the Code sets out the general principles of criminal responsibility.

Item 14 – Subsection 90H(2)

This item amends subsection 90H(2) of the APC Act by removing the reference to the words ‘knowingly or recklessly’. This is intended to make the provision consistent with the principles of the *Criminal Code*. This amendment is necessary because following application of the Code, it will not be possible to apply the fault elements of ‘knowingly or recklessly’ to a physical element consisting of conduct (see Division 5 of Part 2.2 of the *Criminal Code* generally). The fault elements of knowingly or recklessly can only be applied to physical elements of circumstance or result. Accordingly this provision is amended to remove the word ‘knowingly or recklessly’ as in its present operation the word ‘knowingly’ will have no effect following application of the *Criminal Code*. The default fault element of intention will apply to the conduct element of the offence. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* supplying the default fault element of recklessly to a physical element of circumstance or result in an offence.

Item 15 – Subsection 90LB(2)

This item amends subsection 90LB(2) of the APC Act by removing the words ‘knowingly or recklessly’. This is intended to make the provision consistent with the principles of the *Criminal Code*. This amendment is necessary because following application of the Code, it will not be possible to apply the fault elements of ‘knowingly or recklessly’ to a physical element consisting of conduct (see Part 2.2 of Division 5 of the *Criminal Code* generally). The fault elements of knowingly or recklessly can only be applied to physical elements of circumstance or result. Accordingly this provision is amended to remove the word ‘knowingly or recklessly’ as in its present operation the word ‘knowingly’ will have no effect following application of the *Criminal Code*. The default fault element of intention will apply to the conduct element of the offence. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* supplying the default fault element of recklessly to a physical element of circumstances or result in an offence.

Item 16 – Subsection 90LE(2)

This item amends subsection 90LE(2) of the APC Act by removing the words ‘knowingly or recklessly’. This is intended to make the provision consistent with the principles of the *Criminal Code*. This amendment is necessary because following application of the Code, it will not be possible to apply the fault elements of ‘knowingly or recklessly’ to a physical element consisting of conduct (see Part 2.2 of Division 5 of the *Criminal Code* generally). The fault elements of knowingly or recklessly can only be applied to physical elements of circumstance or result. Accordingly this provision is amended to remove the word ‘knowingly or recklessly’ as in its present operation the word ‘knowingly’ will have no effect following application of the *Criminal Code*. The default fault element of intention will apply to the conduct element of the offence. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* supplying the default fault element of recklessly to a physical element of circumstances or result in an offence.

Item 17 – Subsection 90N(2)

This item amends subsection 90N(2) of the APC Act by removing the words ‘knowingly or recklessly’. This is intended to make the provision consistent with the principles of the *Criminal Code*. This amendment is necessary because following application of the Code, it will not be possible to apply the fault elements of ‘knowingly or recklessly’ to a physical element consisting of conduct (see Part 2.2 of Division 5 of the *Criminal Code* generally). The fault elements of knowingly or recklessly can only be applied to physical elements of circumstance or result. Accordingly this provision is amended to remove the word ‘knowingly or recklessly’ as in its present operation the word ‘knowingly’ will have no effect following application of the *Criminal Code*. The default fault element of intention will apply to the conduct element of the offence. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* supplying the default fault element of recklessly to a physical element of circumstances or result in an offence.

Broadcasting Services Act 1992**Item 18 – New section 10A – Application of the *Criminal Code***

This item inserts a new section 10A into the *Broadcasting Services Act 1992* (BSA) which provides that Chapter 2 of the *Criminal Code* applies to all offences against the BSA, subject to subsection (2). It also inserts a note that says that Chapter 2 of the Code sets out the general principles of criminal responsibility.

Proposed new subsection 10A(2) provides that Part 2.5 of the *Criminal Code* does not apply to an offence against Schedule 5 to this Act. Part 2.5 of the Code deals with corporate criminal responsibility. Part 2.5 of the *Criminal Code* is the only Part of Chapter 2 which does not apply automatically to offences. When the Criminal Code Bill was introduced into the Senate on 30 June 1994 it was stated that Part 2.5 would be the basis of liability if no other basis were provided. Since Schedule 5 to the BSA already contains a provision which deals with corporate criminal responsibility (clause 87 of Schedule 5 to the BSA), Part 2.5 of the *Criminal Code* has not been applied to an offence against Schedule 5 to this Act.

Item 19 – New subsection 66(1A)

This item inserts a new subsection 66(1A) into the BSA. This subsection provides that in a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew that the provision breached was a provision of Division 2, 3, 4 or 5.

This amendment ensures that the prosecution does not have to prove that the defendant had knowledge of a particular legal provision. This is consistent with the default position in section 9.3 of the *Criminal Code*, which provides that a person can be criminally responsible for an offence even if he or she is mistaken about, or ignorant of, the provision that creates the offence. While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision for consistency with the Code.

Item 20 - Subsection 121FH(2)

This item repeals subsection 121FH(2) of the BSA and substitutes a new subsection 121FH(2). Subsection 121FH(2) is to be introduced into the BSA by item 22 of Schedule 1 to the *Broadcasting Services Amendment Act 2000* (see subclause 2(2) which relates to the commencement of this item).

This amendment has rephrased the offence to ensure that the non-compliance with a notice under subsection (1) is a physical element of result of the defendant's conduct to which the default fault element of recklessness will apply. While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision to more clearly identify the physical elements of conduct and result in the offence.

Item 21 – New subsection 121FH(4)

This item inserts new subsection 121FH(4) into the BSA which introduces a definition of 'engage in conduct' which applies to section 121FH of the BSA. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the BSA with the *Criminal Code*. However, it is desirable to ensure that the offence in subsection 121FH(2) covers both acts and omissions. For example a notice under subsection (1) which directs a person to cease providing an international broadcasting service without a licence could clearly be contravened by omitting to do an act (for example, omitting to cease providing the service).

Item 22 – Paragraph 121FJ(b)

This item repeals paragraph 121FJ(b) of the BSA and substitutes new paragraphs 121FJ(b) and 121FJ(c). Paragraph 121FJ(b) is to be introduced into the BSA by item 22 of Schedule 1 to the *Broadcasting Services Amendment Act 2000* (see subclause 2(2) which relates to the commencement of this item).

The current paragraph 121FJ(b) may be interpreted so that 'breach of a condition' forms part of the conduct element of the offence. This amendment has rephrased the offence to ensure that the contravention of the conditions of an international broadcasting licence is part of the physical element of 'result'. This means that it will attract the default fault element of recklessness.

While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision for the following reason. Under the *Criminal Code* the fault element of intention applies to the physical element of conduct. If the offence were not restructured prior to the Code coming into operation this could give rise to difficulties in the prosecution of this offence as the prosecution may be required to prove that the defendant has specific intention to breach a particular condition. This could be extremely difficult if the defendant had knowledge of the conditions but does not have a specific intention to breach a particular condition. The defendant could merely intend to breach the conditions generally whilst being reckless as to the particular condition breached.

Item 23 – New subsection 121FJ(2)

This item inserts a new subsection 121FJ(2) into the BSA which introduces a definition of ‘engage in conduct’ which applies to section 121FJ of the BSA. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the BSA with the *Criminal Code*. However, it is desirable to ensure that the offence in section 121FJ covers both acts and omissions. As a licence condition may require a positive action from a person, a breach of a licence condition under paragraph 121FJ(c) could cover an omission to act.

Item 24 – Paragraph 121FLF(b) and (c)

This item repeals paragraph 121FLF(b) of the BSA and substitutes new paragraphs 121FLF(b) and 121FLF(c). Paragraph 121FLF(b) is to be introduced into the BSA by item 22 of Schedule 1 to the *Broadcasting Services Amendment Act 2000* (see subclause 2(2) which relates to the commencement of this item).

The current paragraph 121FLF(b) may be interpreted so that the ‘breach of a condition’ forms part of the conduct element of the offence. This amendment has rephrased the offence to ensure that the breach of a condition of the nominated broadcaster declaration is part of the physical element of ‘result’. This means that it will attract the default fault element of recklessness.

While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision for the following reason. Under the *Criminal Code* the fault element of intention applies to the physical element of conduct. If the offence were not restructured prior to the Code coming into operation this could give rise to difficulties in the prosecution of this offence as the prosecution may be required to prove that the defendant has specific intention to breach a particular condition. This could be extremely difficult if the defendant had knowledge of the conditions but does not have a specific intention to breach a particular condition. The defendant could merely intend to breach the conditions generally whilst being reckless as to the particular condition breached.

Item 25 – New subsection 121FLF(2)

This item inserts a new subsection 121FLF(2) into the BSA which introduces a definition of ‘engage in conduct’ which applies to section 121FLF of the BSA. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the BSA with the *Criminal Code*. However, it is desirable to ensure that the offence in section 121FLF covers both acts and omissions. As a condition of a nominated broadcaster declaration may require a positive action from a person, a breach of a condition under paragraph 121FLF(c) could cover an omission to act.

Item 26 – Section 139

This item repeals section 139 of the BSA and substitutes a new section 139. Section 139 of the BSA relates to offences for breaches of conditions of licences and class licences.

The current subsections 139(1) to (5) may be interpreted so that ‘breach of a condition’ forms part of the conduct element of the offences. This amendment has rephrased the offences to ensure that the contravention of the conditions of the particular licence is part of the physical element of ‘result’. This means that it will attract the default fault element of recklessness.

While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision for the following reason. Under the *Criminal Code* the fault element of intention applies to the physical element of conduct. If the offence were not restructured prior to the Code coming into operation this could give rise to difficulties in the prosecution of these offences as the prosecution may be required to prove that the defendant has specific intention to breach a particular condition. This could be extremely difficult if the defendant had knowledge of the conditions but does not have a specific intention to breach a particular condition. The defendant could merely intend to breach the conditions generally whilst being reckless as to the particular condition breached.

In addition a new subsection 139(7) is inserted. This new subsection introduces a definition of ‘engage in conduct’ which applies to section 139 of the BSA. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the BSA with the *Criminal Code*. However, it is desirable to clarify that the offence in section 139 covers both acts and omissions. As a licence condition may require a positive action from a person, a breach of a licence condition under subsections 139(1) to (6) could cover an omission to act.

Item 27 – Paragraph 139(2)(c)

This item omits the reference to sections 103ZM and 103ZN from paragraph 139(2)(c). This amendment to omit references in subsection 139(2) to sections 103ZM and 103ZN was proposed in item 21 of Schedule 1 to the *Broadcasting Services Act (No. 3) 1999*. See the discussion above at subclauses 2(3) to (5) for the commencement of this item.

Item 28 – Subsection 202(1)

This item removes the defence ‘without reasonable excuse’ from subsection 202(1) of the BSA and this defence becomes a new subsection under item 31. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 29 – Subsection 202(1)

This item inserts a penalty of imprisonment for one year after subsection 202(1). This amendment is intended to clarify that subsection 202(1) is an offence provision that carries the same penalty as subsection 202(2) of the BSA.

Subsection 202(1) of the BSA currently provides that a person required to give evidence or produce documents at a hearing must not fail to attend or appear and report. Further, subsection 202(2) makes it an offence not to comply with a requirement to give evidence or produce documents. A penalty of one year is provided at the foot of subsection 202(2). However, it appears that the original intention was that failure to comply with either subsections 202(1) or 202(2) amount to an offence carrying a penalty of 12 months imprisonment. While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision to correct this oversight.

Item 30 – Subsection 202(2)

This item removes the defence ‘without reasonable excuse’ from subsection 202(2) of the BSA and this defence becomes a new subsection under item 31. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 31 – New subsection 202(2A)

New subsection 202(2A) is consequential upon items 28 and 30. It provides that subsections (1) and (2) do not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (2A). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

Item 32 – Paragraph 82(b) of Schedule 5

This item repeals paragraph 82(b) of Schedule 5 to the BSA and substitutes new paragraphs 82(b) and 82(c) of Schedule 5.

This amendment has rephrased the offence to ensure that the contravention of an online provider rule under subsection (1) is a physical element of result of the defendant’s conduct

to which the default fault element of recklessness will apply. While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision to more clearly identify the physical elements of conduct and result in the offence.

Item 33– New subclause 82(2) of Schedule 5

This item inserts a new subclause 82(2) of Schedule 5 into the BSA, which introduces a definition of ‘engage in conduct’ which applies to clause 82 of Schedule 5. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the BSA with the *Criminal Code*. However, it is desirable to ensure that the offence in clause 82 of Schedule 5 to the BSA covers both acts and omissions. As an online provider rule may require a positive action from a person, a breach of an online provider rule under paragraph 82(c) of Schedule 5 could cover an omission to act.

Item 34 – Paragraph 83(4)(b) of Schedule 5

This item repeals paragraph 83(4)(b) of Schedule 5 to the BSA and substitutes paragraphs 83(4)(b) and 83(4)(c) of Schedule 5.

This amendment has rephrased the offence to ensure that the contravention of a direction relating to an online provider rule under subsection (2) is a physical element of result of the defendant’s conduct to which the default fault element of recklessness will apply. While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision to more clearly identify the physical elements of conduct and result in the offence.

Item 35 – Subclause 83(4) of Schedule 5 (penalty)

This item, consequential upon item 36, omits reference to the words ‘for contravention of this subclause’. This is a technical amendment necessary as a result of the penalty no longer being at the foot of the clause.

Item 36 – New subclause 83(5) of Schedule 5

This item inserts a new subclause 83(5) of Schedule 5 into the BSA which introduces a definition of ‘engage in conduct’ which applies to clause 83 of Schedule 5 to the BSA. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the BSA with the *Criminal Code*. However, it is desirable to ensure that the offence in clause 83 of Schedule 5 to the BSA covers both acts and omissions. As a direction relating to an online provider rule may require a positive action from a person, a breach of a direction under paragraph 83(c) of Schedule 5 could cover an omission to act.

Item 37 – Subclause 87(9) of Schedule 5

This item amends subclause 87(9) of Schedule 5 to the BSA to omit the reference to ‘section 5, 6, 7 or 7A or subsection 86(1) of the *Crimes Act 1914*’ and substitute a reference to ‘section 6 of the *Crimes Act 1914* or Part 2.4 of the *Criminal Code*.’

Sections 5, 7, 7A and 86(1) of the *Crimes Act 1914* are concerned with the offences of aiding, abetting, counselling or procuring, attempt, inciting or urging and conspiracy. These sections of the *Crimes Act 1914* are repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*. These ancillary offences are replaced by equivalent provisions in Part 2.4 of the *Criminal Code*, which is referred to in the new subclause 87(9) of Schedule 5.

Item 38 – New subclause 10(2A) of Schedule 6

This item inserts a new subclause 10(2A) of Schedule 6 into the BSA. Schedule 6 to the BSA is to be inserted by item 140 of Schedule 1 to the *Broadcasting Services Amendment (Digital Television and Datacasting) Act 2000* (see subclause 2(6) for commencement of this item).

This item makes it clear that an offence under subclause 10(2) is a strict liability offence. Subclause 10(2) of Schedule 6 provides that if a datacasting licensee transfers the licence to another qualified entity, the transferee must, within 7 days after the transfer, notify the Australian Broadcasting Authority (the ABA) of the transfer. A penalty of 50 penalty units is provided.

This amendment is likely to have been interpreted as a strict liability offence before this amendment because of the relatively low penalty attached to this offence (50 penalty units or \$5,500) and for the policy reasons of the difficulties the prosecution would have in proving that the defendant intentionally failed to notify the ABA of the transfer.

Therefore this new subclause should not alter the way a court would interpret this offence. If the amendment were not made then, after the application of the *Criminal Code*, the offence would no longer be interpreted in the same way as it could currently be interpreted. After the *Criminal Code* comes into operation it is necessary to expressly state that an offence is one of strict liability if the provision is to attract strict liability (sections 6.1 and 6.2 of the Code). If it is not specified a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require proof of fault elements in relation to the physical elements.

Film Licensed Investment Company Act 1998

Item 39 – Section 35

This item repeals section 35. This section is no longer necessary as it is similar to the general false or misleading provisions which Schedule 1 to the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* inserts into the *Criminal Code* as new Part 7.4.

Protection of Movable Cultural Heritage Act 1986

Item 40 – Paragraphs 3(3)(a) and (b)

This item repeals paragraphs 3(3)(a) and (b) of the *Protection of Movable Cultural Heritage Act 1986* (PMCH Act) and substitutes new paragraphs 3(3)(a) and (b).

Currently paragraphs 3(3)(a) and (b) refer to ‘(a) section 6, 7 or 7A of the *Crimes Act 1914*; or (b) subsection 86(1) of that Act by virtue of paragraph (a) of that subsection’. This reference will be replaced with a reference to ‘section 6 of the *Crimes Act 1914* or an ancillary offence (within the meaning of the *Criminal Code*).’

Sections 7, 7A and 86(1) of the *Crimes Act 1914* are concerned with the offences of attempt, inciting or urging and conspiracy. These sections of the *Crimes Act 1914* are repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*. These ancillary offences are replaced by equivalent provisions in Part 2.4 of the *Criminal Code*. The ancillary offences within the Code are referred to in the new paragraph 3(3)(b).

Item 41 – New section 6A – Application of the *Criminal Code*

This item inserts a new section 6A into the PMCH Act which provides that Chapter 2 of the *Criminal Code* applies to all offences against the PMCH Act. It also inserts a note that says that Chapter 2 of the Code sets out the general principles of criminal responsibility.

Item 42 – Subsection 9(3)

This item repeals subsection 9(3) of the PMCH Act and substitutes new subsections 9(3), 9(3A) and 9(3B). Subsection 9(3) is concerned with the unlawful export of Australian protected objects.

Section 9(3) currently provides two separate offences of ‘exporting, or attempting to export, an Australian protected object otherwise than in accordance with a permit or certificate’ (paragraph 9(3)(a)) and ‘contravening, or attempting to contravene, a condition of a permit or certificate’ (paragraph 9(3)(b)). For clarity these offences have been separated into two separate subsections. Subsection 9(3) replaces the former offence and subsection 9(3A) replaces the latter offence.

The current paragraph 9(3)(a) includes ‘otherwise than in accordance with a permit or certificate’ as part of the conduct element of the offence. This amendment has rephrased the offence to ensure that the ‘otherwise than in accordance with a permit or certificate’ is part of

the physical element of ‘result’. This means that it will attract the default fault element of recklessness.

Currently paragraph 9(3)(b) may be interpreted so that ‘contravention of a condition of a permit or certificate’ forms part of the physical element of conduct. This amendment has rephrased the offence to ensure that the ‘contravention of the condition of a permit or certificate’ is part of the physical element of ‘result’. This means that it will attract the default fault element of recklessness.

While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision for the following reason. Under the *Criminal Code* the fault element of intention applies to the physical element of conduct. If the offences were not restructured prior to the Code coming into operation this could give rise to difficulties in the prosecution of these offences as the prosecution may be required to prove that the defendant has specific intention to breach a particular condition. This could be extremely difficult if the defendant had knowledge of the conditions but does not have a specific intention to breach a particular condition. The defendant could merely intend to breach the conditions generally whilst being reckless as to the particular condition breached.

The restructured subsections also remove the reference to the word ‘knowingly’. This is intended to make the provision consistent with the principles of the *Criminal Code*. This amendment is necessary because following application of the Code, it will not be possible to apply a fault element of ‘knowingly’ to a physical element consisting of conduct (see Division 5 of Part 2.2 of the *Criminal Code* generally). The fault element of knowingly can only be applied to physical elements of circumstance or result. Accordingly this provision is amended to remove the word ‘knowingly’ as in its present operation it will have no effect following application of the *Criminal Code*.

New subsection 9(3B) replaces the current paragraphs 9(3)(c) and (d), which set out the penalty for the above offences. The penalties have been amended to refer to penalty units rather than dollar figures (1,000 penalty units or imprisonment for a period not exceeding 5 years, replaces the penalty of \$100,000 or imprisonment for a period not exceeding 5 years for individuals, and a fine not exceeding 2,000 penalty units replaces the fine not exceeding \$200,000 for a body corporate). This provides consistency with other penalty provisions, which refer to penalty units rather than dollar penalties. It does not alter the penalty that is applied for these offences as section 4AB of the *Crimes Act 1914* has the effect of converting references to dollar amounts to equivalent penalty units.

Item 43 – New subsection 9(7)

This item inserts a new subsection 9(7) into the PMCH Act, which provides a definition of ‘engage in conduct’ which applies to section 9. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the PMCH Act with the *Criminal Code*. However, it is desirable to ensure that a reference to ‘engage in conduct’ in section 9 covers both acts and omissions. As a condition of a permit or certificate may require a positive action from a person, a breach of a permit or certificate condition under subsections 9(3) or 9(3A) could cover an omission to act.

Item 44 – New subsection 29(4)

This item inserts a new subsection 29(4) into the PMCH Act. This item makes it clear that an offence under subsection 29(3) is a strict liability offence. Subsection 29(3) provides that a person who ceases to be an inspector must not fail to return his or her identity card to the Minister forthwith. A penalty of \$100 is provided.

This amendment is likely to have been interpreted as a strict liability offence before this amendment because of the relatively low penalty attached to this offence (\$100) and for the policy reasons that an identity card must be returned as soon as the cardholder stops being an inspector, so that false representations cannot be made about the scope of the person's powers and authority.

Therefore this new subsection should not alter the way a court would interpret this offence. If the amendment were not made then, after the application of the *Criminal Code*, the offence would no longer be interpreted in the same way as it could currently be interpreted. After the *Criminal Code* comes into operation it is necessary to expressly state that an offence is one of strict liability if the provision is to attract strict liability (sections 6.1 and 6.2 of the Code). If it is not specified a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require proof of fault elements in relation to the physical elements.

Item 45 – Subsection 39(2)

This item omits from subsection 39(2) of the PMCH Act the defence 'without reasonable excuse'. This defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 46 – New subsections 39(3) and (4)

This item inserts new subsections 39(3) and (4) into the PMCH Act. New subsection 39(3) is consequential upon item 45. It provides that subsection (2) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matters in subsection (3). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean 'the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist'.

New subsection 39(4) makes it clear that an offence under subsection 39(2) is a strict liability offence. Subsection 39(2) provides that a person must not, without reasonable excuse, fail to comply with a requirement of an inspector to produce a permit or certificate or evidence of such, where the inspector suspects on reasonable grounds that the person is intending to export, or having exported an Australian protected object. A penalty of \$1,000 is provided.

This amendment is likely to have been interpreted as a strict liability offence before this amendment because of the relatively low penalty attached to this offence (\$1,000), the nature

of the offence, and because it contains a defence of without reasonable excuse which is an indication that an offence is one of strict liability.

Therefore this new subsection should not alter the way a court would interpret this offence. If the amendment were not made then, after the application of the *Criminal Code*, the offence would no longer be interpreted in the same way as it could currently be interpreted. After the *Criminal Code* comes into operation it is necessary to expressly state that an offence is one of strict liability if the provision is to attract strict liability (sections 6.1 and 6.2 of the Code). If it is not specified a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require proof of fault elements in relation to the physical elements.

Item 47 – Section 42

This item repeals section 42 of the PMCH Act. This section is no longer necessary as it is similar to the general false or misleading provisions which Schedule 1 to the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* inserts into the *Criminal Code* as new Part 7.4.

Item 48 – Subsection 46(1)

This item amends subsection 46(1) of the PMCH Act to omit a reference to the words ‘subsection 9(3), 14(2) or 42(1)’ and substitute a reference to the words ‘subsection 9(3), 9(3A) or 14(2)’. This amendment is consequential upon items 42 and 47.

Item 49 – Subsection 46(4)

This item repeals subsection 46(4) of the PMCH Act and substitutes a new subsection 46(4). This item is a penalty provision. It makes amendments consequential upon items 47 and 48.

In addition the penalties have been amended to refer to penalty units rather than dollar figures (50 penalty units or imprisonment for a period not exceeding 2 years, replaces the penalty of \$5,000 or imprisonment for a period not exceeding 2 years for individuals, and a fine not exceeding 200 penalty units replaces the fine not exceeding \$20,000 for a body corporate). This provides consistency with other penalty provisions, which refer to penalty units rather than dollar penalties. It does not alter the penalty, which is applied for this offence as section 4AB of the *Crimes Act 1914* has the effect of converting references to dollar amounts to equivalent penalty units.

Radiocommunications Act 1992

Item 50 – Subsection 11(1)

This item amends subsection 11(1) of the *Radiocommunications Act 1992* (RA) so as to omit the reference to ‘section 6, 7 or 7A or subsection 86(1) of the *Crimes Act 1914*’ and substitute a reference to ‘section 6 of the *Crimes Act 1914* or an ancillary offence (within the meaning of the *Criminal Code*).’

Sections 7, 7A and 86(1) of the *Crimes Act 1914* are concerned with the offences of attempt, inciting or urging and conspiracy. These sections of the *Crimes Act 1914* are repealed by the

Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000. These ancillary offences are replaced by equivalent provisions in Part 2.4 of the *Criminal Code*. The new subsection 11(1) refers to these ancillary offences within the Code.

Item 51 – Section 46

This item removes the references to the words ‘without reasonable excuse, knowingly or recklessly’ in section 46 of the RA.

This item removes the defence ‘without reasonable excuse’ and this defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

This item also removes reference to the words ‘knowingly or recklessly’. This is intended to make the provision consistent with the principles of the *Criminal Code*. This amendment is necessary because following application of the Code, it will not be possible to apply the fault elements of ‘knowingly or recklessly’ to a physical element consisting of conduct (see Division 5 of Part 2.2 of the *Criminal Code* generally). The fault elements of knowingly or recklessly can only be applied to physical elements of circumstance or result. Accordingly this provision is amended to remove the word ‘knowingly or recklessly’ as in its present operation the word ‘knowingly’ will have no effect following application of the *Criminal Code*. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* supplying a default fault element of recklessly to a physical element of circumstance or result in an offence.

Item 52 – New subsection 46(2)

New subsection 46(2) of the RA is consequential upon item 51. It provides that subsection (1) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matters in subsection (2). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

Item 53 – Section 47

This item removes the defence ‘without reasonable excuse’ from section 47 of the RA. This defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 54 – New subsection 47(2)

New subsection 47(2) of the RA is consequential upon item 53. It provides that subsection (1) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (2). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by

law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

Item 55 – Section 113

This item repeals section 113 of the RA and substitutes a new section 113. Section 113 relates to the contravention of an apparatus licence condition.

The current subsection 113 may be interpreted so that ‘breach of a condition’ forms part of the conduct element of the offence. This amendment has rephrased the offence to ensure that the contravention of the conditions of the licence is part of the physical element of ‘result’. This means that it will attract the default fault element of recklessness.

While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision for the following reason. Under the *Criminal Code* the fault element of intention applies to the physical element of conduct. If the offence were not restructured prior to the Code coming into operation this could give rise to difficulties in the prosecution of this offence as the prosecution may be required to prove that the defendant has specific intention to breach a particular condition. This could be extremely difficult if the defendant had knowledge of the conditions but does not have a specific intention to breach a particular condition. The defendant could merely intend to breach the conditions generally whilst being reckless as to the particular condition breached.

This item also removes the defence ‘without reasonable excuse’ from the offence provision. This defence becomes a new subsection under subsection 113(2). It provides that subsection (1) does not apply if a person has a reasonable excuse. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

The note to the subsection provides that the defendant bears an evidential burden in relation to the matters in subsection (2). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

In addition a new subsection 113(3) is inserted. This new subsection introduces a definition of ‘engage in conduct’ which applies to section 113. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the RA with the *Criminal Code*. However, it is desirable to clarify that the offence in subsection 113(1) covers both acts and omissions. As a licence condition may require a positive action from a person, a breach of a licence condition under subsection 113(1) could cover an omission to act.

Item 56 – New subsection 117(2)

This item inserts a new subsection 117(2) into the RA. This item makes it clear that an offence under subsection 117(1) is a strict liability offence. Subsection 117(1) provides that a licensee of an apparatus licence who authorises a person under section 114 must keep records of authorisations. A penalty of 20 penalty units is provided.

This amendment is likely to have been interpreted as a strict liability offence before this amendment because of the relatively low penalty attached to this offence (20 penalty units or \$2,200) and because of the nature of the offence (which does not involve dishonesty or other serious imputation affecting the offender's reputation).

Therefore this new subsection should not alter the way a court would interpret this offence. If the amendment were not made then, after the application of the *Criminal Code*, the offence would no longer be interpreted in the same way as it could currently be interpreted. After the *Criminal Code* comes into operation it is necessary to expressly state that an offence is one of strict liability if the provision is to attract strict liability (sections 6.1 and 6.2 of the Code). If it is not specified a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require proof of fault elements in relation to the physical elements.

Item 57 – New subsection 118(1A)

This item inserts a new subsection 118(1A) into the RA. This item makes it clear that an offence under subsection 118(1) is a strict liability offence. Subsection 118(1) provides that licensees must notify authorised persons of certain matters (such as suspension of a licence, licence cancellation, change in licence conditions etc) as soon as practicable. A penalty of 20 penalty units is provided.

This amendment is likely to have been interpreted as a strict liability offence before this amendment because of the relatively low penalty attached to this offence (20 penalty units or \$2,200) and for the policy reasons of trying to ensure that apparatus licensees are aware of whether or not their licences have been cancelled or the conditions changed.

Therefore this new subsection should not alter the way a court would interpret this offence. If the amendment were not made then, after the application of the *Criminal Code*, the offence would no longer be interpreted in the same way as it could currently be interpreted. After the *Criminal Code* comes into operation it is necessary to expressly state that an offence is one of strict liability if the provision is to attract strict liability (sections 6.1 and 6.2 of the Code). If it is not specified a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require proof of fault elements in relation to the physical elements.

Item 58 – Subsection 124(4)

This item removes the defence 'without reasonable excuse' from subsection 124(4) of the RA. This defence becomes a new subsection under item 60. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 59 – Subsection 124(4) (penalty)

This item omits reference to the words ‘for contravention of this subsection’. This is a technical amendment necessary as a result of the penalty no longer being at the foot of the clause (consequential upon item 60).

Item 60 – New subsections 124(5) and (6)

This item inserts new subsections 124(5) and (6) into the RA.

New subsection 124(5) is consequential upon item 58. It provides that subsection (4) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matters in subsection (5). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

New subsection 124(6) makes it clear that an offence under subsection 124(4) is a strict liability offence. Subsection 124(4) provides that if the ACA cancels a certificate of proficiency, the person must not, without reasonable excuse, fail to return the certificate to the ACA within 7 days after receiving notification of the cancellation. A penalty of 20 penalty units is provided.

This amendment is likely to have been interpreted as a strict liability offence before this amendment because of the relatively low penalty attached to this offence (20 penalty units or \$2,200), because the defence of reasonable excuse is provided which is an indication of a strict liability offence, and because of the policy reason that a certificate of proficiency must be returned as soon as it is cancelled so that false representations cannot be made about the qualification of an operator of a transmitter.

Therefore this new subsection should not alter the way a court would interpret this offence. If the amendment were not made then, after the application of the *Criminal Code*, the offence would no longer be interpreted in the same way as it could currently be interpreted. After the *Criminal Code* comes into operation it is necessary to expressly state that an offence is one of strict liability if the provision is to attract strict liability (sections 6.1 and 6.2 of the Code). If it is not specified a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require proof of fault elements in relation to the physical elements.

Item 61 – Subsection 157(1)

This item removes the defence ‘without reasonable excuse’ from subsection 157(1) of the RA. This defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 62 – New subsection 157(1A)

New subsection 157(1A) of the RA is consequential upon item 61. It provides that subsection (1) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (1A). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

Item 63 – Subsection 158(1)

This item removes the defence ‘without reasonable excuse’ from subsection 158(1) of the RA. This defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 64 – New subsection 158(1A)

New subsection 158(1A) of the RA is consequential upon item 63. It provides that subsection (1) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (1A). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

Item 65 – Subsection 160(1)

This item removes the defence ‘without reasonable excuse’ from subsection 160(1) of the RA. This defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 66 – New subsection 160(1A)

New subsection 160(1A) of the RA is consequential upon item 65. It provides that subsection (1) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matters in subsection (1A). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

Item 67 – Section 170

This item repeals section 170 of the RA and substitutes a new section 170.

The current subsection 170 could be interpreted so that ‘contravention of a condition’ forms part of the conduct element of the offence. This amendment has rephrased the offence to ensure that the contravention of the conditions of the permit is part of the physical element of ‘result’. This means that it will attract the default fault element of recklessness.

While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision for the following reason. Under the *Criminal Code* the fault element of intention applies to the physical element of conduct. If the offence were not restructured prior to the Code coming into operation this could give rise to difficulties in the prosecution of this offence as the prosecution may be required to prove that the defendant has specific intention to breach a particular condition. This could be extremely difficult if the defendant had knowledge of the conditions but does not have a specific intention to breach a particular condition. The defendant could merely intend to breach the conditions generally whilst being reckless as to the particular condition breached.

The new subsection 170(1) also removes the reference to the word ‘knowingly’. This is intended to make the provision consistent with the principles of the *Criminal Code*. This amendment is necessary because following application of the Code, it will not be possible to apply the fault element of ‘knowingly’ to a physical element consisting of conduct (see Division 5 of Part 2.2 of the *Criminal Code* generally). The fault element of knowingly can only be applied to physical elements of circumstance or result.

This item also removes the defence ‘without reasonable excuse’ from the offence provision. This defence becomes a new subsection under subsection 170(2). It provides that subsection (1) does not apply if a person has a reasonable excuse. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

The note to the subsection provides that the defendant bears an evidential burden in relation to the matters in subsection (2). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

In addition a new subsection 170(3) is inserted. This new subsection introduces a definition of ‘engage in conduct’ which applies to section 170. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the RA with the *Criminal Code*. However, it is desirable to ensure that the offence in section 170 covers both acts and omissions. As a permit condition may require a positive action from a person, a breach of a licence condition under subsection 170(1) could cover an omission to act.

Item 68 – Section 178

This item omits reference to the words ‘subsection 157(1), 158(1) or 160(1) and substitutes ‘subsection 157(1A), 158(1A) or 160(1A)’. This is a consequential amendment as a result of items 60 to 65.

Item 69 – Subsection 186(1)

This item amends subsection 186(1) of the RA by removing the defence ‘without reasonable excuse’ from subsection 186(1). This defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 70 – New subsection 186(1A)

New subsection 186(1A) of the RA is consequential upon item 69. It provides that subsection (1) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (1A). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

Item 71 – Subsection 187(1)

This item removes the defence ‘without reasonable excuse’ from subsection 187(1) of the RA. This defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 72 – New subsection 187(1A)

New subsection 187(1A) of the RA is consequential upon item 71. It provides that subsection (1) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matters in subsection (1A). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

Item 73 – Subsection 187A(1)

This item removes the defence ‘without reasonable excuse’ from subsection 187A(1) of the RA. This defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 74 – New subsections 187A(1A) and (1B)

This item inserts new subsections 187A(1A) and (1B) into the RA.

New subsection 187(1A) is consequential upon item 73. It provides that subsection (1) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matters in subsection (1A). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean 'the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist'.

New subsection 187A(1B) makes it clear that an offence under subsection 187A(1) is a strict liability offence. Subsection 187A(1) provides that if the ACA publishes a certain notice that specifies requirements to be met after a label has been applied, a manufacturer or importer, must not, without reasonable excuse, fail to comply with the requirements specified in the notice. A penalty of 20 penalty units is provided.

This amendment is likely to have been interpreted as a strict liability offence before this amendment because of the relatively low penalty attached to this offence (20 penalty units or \$2,200) and because the defence of reasonable excuse is provided which is an indication of a strict liability offence.

Therefore this new subsection should not alter the way a court would interpret this offence. If the amendment were not made then, after the application of the *Criminal Code*, the offence would no longer be interpreted in the same way as it could currently be interpreted. After the *Criminal Code* comes into operation it is necessary to expressly state that an offence is one of strict liability if the provision is to attract strict liability (sections 6.1 and 6.2 of the Code). If it is not specified a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require proof of fault elements in relation to the physical elements.

Item 75 – Subsection 188A(2)

This item amends subsection 188A(2) of the RA by omitting the reference to the words 'intentionally or recklessly'. This is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* supplying the default fault element of recklessly to a physical element of circumstance or result in an offence (for example that a symbol is a protected symbol).

Item 76 – Subsection 189(1)

This item removes the defence 'without reasonable excuse' from subsection 189(1) of the RA. This defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 77 – New subsection 189(1A)

New subsection 189(1A) of the RA is consequential upon item 76. It provides that subsection (1) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (1A). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

Item 78 – Section 197

This item repeals section 197 of the RA and substitutes a new section 197.

The current subsection 197 may be interpreted so that ‘interfere substantially with radiocommunications, or otherwise substantially disrupt or disturb radiocommunications’ forms part of the conduct element of the offence. This amendment has rephrased the offence to ensure that the ‘substantial interference with radiocommunications, or substantial disruption or disturbance of radiocommunications’ is part of the physical element of ‘result’. This means that it will attract the default fault element of recklessness. While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision to more clearly identify the physical elements of conduct and result in the offence.

The new subsection 170(1) also removes the reference to the word ‘knowingly’. This is intended to make the provision consistent with the principles of the *Criminal Code*. This amendment is necessary because following application of the Code, it will not be possible to apply the fault element of ‘knowingly’ to a physical element consisting of conduct (see Division 5 of Part 2.2 of the *Criminal Code* generally). The fault element of knowingly can only be applied to physical elements of circumstance or result.

This item also inserts a new subsection 197(2), which inserts a definition of ‘engage in conduct’ which applies to section 197. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the RA with the *Criminal Code*. However, it is desirable to ensure that the offence in section 197 covers both acts and omissions. As a substantial interference with radiocommunications may occur as a result of an omission, an offence under subsection 197(1) could cover an omission to act.

Item 79 – Section 199

This item removes the defence ‘without reasonable excuse’ from section 199 of the RA. This defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 80 – New subsection 199(2)

New subsection 199(2) of the RA is consequential upon item 79. It provides that subsection (1) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (2). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

Item 81 – Subsection 210(5)

This item removes the defence ‘without reasonable excuse’ from subsection 210(5) of the RA. This defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 82 – New subsection 210(5A)

New subsection 210(5A) of the RA is consequential upon item 81. It provides that subsection (5) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (5A). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

Item 83 – Section 214

This item repeals section 214 of the RA and substitutes a new section 214.

This amendment has rephrased the offence to ensure that the contravention of a direction under section 212 is a physical element of result of the defendant’s conduct to which the default fault element of recklessness will apply. While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision to more clearly identify the physical elements of conduct and result in the offence.

The new subsection 214(1) also removes the reference to the word ‘knowingly’. This is intended to make the provision consistent with the principles of the *Criminal Code*. This amendment is necessary because following application of the Code, it will not be possible to apply the fault element of ‘knowingly’ to a physical element consisting of conduct (see Part 2.2 of Division 5 of the *Criminal Code* generally). The fault element of ‘knowingly’ can only be applied to physical elements of circumstance or result.

New subsection 214(2) inserts a definition of ‘engage in conduct’ which applies section 214. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the *Radiocommunications Act 1992* with the *Criminal Code*. However, it is desirable to ensure that the reference to engage in conduct in the section 214 covers both acts and omissions.

Item 84 – Subsection 227(1)

This item removes the defence ‘without reasonable excuse’ from subsection 227(1) of the RA. This defence becomes a new subsection under the next item. This amendment has been

made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 85 – New subsection 227(1A)

New subsection 227(1A) of the RA is consequential upon item 84. It provides that subsection (1) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (1A). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

Item 86 – Subsection 227(4)

This item, consequential upon items 84 and 85, amends subsection 227(4) of the RA by omitting a reference to ‘subsection (1)’ and substituting ‘subsection (1A)’.

Item 87 – Subsection 261B(3)

This item removes the defence ‘without reasonable excuse’ from subsection 261B(3) of the RA. This defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 88 – Subsection 261B(4)

This item repeals subsection 261B(4) of the RA and substitutes new subsections 261B(4), (5) and (6).

This amendment has rephrased the offence to ensure that the contravention of an order under subsection (2) is a physical element of result of the defendant’s conduct to which the default fault element of recklessness will apply. While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision to more clearly identify the physical elements of conduct and result in the offence.

New subsection 261B(5) is consequential upon item 87. It provides that subsections (3) and (4) do not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (5). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

New subsection 261B(6) inserts a definition of ‘engage in conduct’ which applies to section 261B. The definition covers doing an act and omitting to perform an act. This is consistent

with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the *Radiocommunications Act 1992* with the *Criminal Code*. However, it is desirable to ensure that the reference to engage in conduct in the section 261B covers both acts and omissions.

Item 89 – Subsection 261C(3)

This item removes the defence ‘without reasonable excuse’ from subsection 261C(3) of the RA. This defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 90 – Subsection 261C(4)

This item repeals subsection 261C(4) of the RA and substitutes new subsections 261B(4), (5), (6) and (7).

Subsection 261C(4) currently provides two separate offences of ‘contravening a direction under paragraph (2)(1)’ (paragraph 261C(4)(a)) and ‘contravening a direction under paragraph (2)(b)’ (paragraph 261C(4)(b)). For clarity these offences have been separated into two separate subsections. Subsection 261C(4) replaces the former offence and 261C(5) replaces the latter offence.

This amendment has rephrased the offences to ensure that the contravention of an order under paragraph (2)(a) and paragraph (2)(b) is a physical element of result of the defendant’s conduct to which the default fault element of recklessness will apply. While these amendments are not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision to more clearly identify the physical elements of conduct and result in the offences.

The new subsections 261C(4) and (5) also remove the reference to the word ‘recklessly’. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* supplying the default fault element of recklessly to a physical element of circumstance or result in an offence.

New subsection 261C(6) is consequential upon item 89. It provides that subsections (3), (4) and (5) do not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (6). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

New subsection 261C(7) inserts a definition of ‘engage in conduct’ which applies to section 261C. The definition covers doing an act and omitting to perform an act. This is consistent

with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the *Radiocommunications Act 1992* with the *Criminal Code*. However, it is desirable to clarify that the reference to engage in conduct in the section 261C covers both acts and omissions.

Item 91 – Subsection 268(3)

This item removes the defence ‘without reasonable excuse’ from subsection 268(3) of the RA. This defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 92 – New subsections 268(4) and (5)

This item inserts new subsections 268(4) and (5) into the RA.

New subsection 268(4) is consequential upon item 91. It provides that subsection (3) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (4). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

New subsection 268(5) makes it clear that an offence under subsection 268(3) is a strict liability offence. Subsection 268(3) provides that a person who ceases to be an inspector must not, without reasonable excuse, fail to return his or her identity card to the Australian Communications Authority (ACA) as soon as practicable. A penalty of 5 penalty units is provided.

This amendment is likely to have been interpreted as a strict liability offence before this amendment because of the relatively low penalty attached to this offence (5 penalty units or \$550), because a defence of reasonable excuse is provided, and for the policy reasons that an identity card must be returned as soon as the cardholder stops being an inspector, so that false representations cannot be made about the scope of the person’s powers and authority.

Therefore this new subsection should not alter the way a court would interpret this offence. If the amendment were not made then, after the application of the *Criminal Code*, the offence would no longer be interpreted in the same way as it could currently be interpreted. After the *Criminal Code* comes into operation it is necessary to expressly state that an offence is one of strict liability if the provision is to attract strict liability (sections 6.1 and 6.2 of the Code). If it is not specified a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require proof of fault elements in relation to the physical elements.

Item 93 – Subsection 278(4)

This item removes the defence ‘without reasonable excuse’ from subsection 278(4) of the RA. This defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 94 – New subsections 278(5) and (6)

This item inserts new subsections 278(5) and (6) into the RA.

New subsection 278(5) is consequential upon item 93. It provides that subsection (4) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (5). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

New subsection 278(6) makes it clear that an offence under subsection 278(4) is a strict liability offence. Subsection 278(4) provides that a person must not, without reasonable excuse, refuse to comply with a direction from an inspector to operate a transmitter where the inspector has reasonable grounds to believe that a transmitter has been, or is being or may be operated so as to cause interference to radiocommunications. A penalty of 20 penalty units is provided.

This amendment is likely to have been interpreted as a strict liability offence before this amendment because of the relatively low penalty attached to this offence (20 penalty units or \$2,200), because a defence of reasonable excuse is provided, and for the policy reasons that a person must operate a transmitter to enable an inspector to investigate the interference or risk of interference to radiocommunications.

Therefore this new subsection should not alter the way a court would interpret this offence. If the amendment were not made then, after the application of the *Criminal Code*, the offence would no longer be interpreted in the same way as it could currently be interpreted. After the *Criminal Code* comes into operation it is necessary to expressly state that an offence is one of strict liability if the provision is to attract strict liability (sections 6.1 and 6.2 of the Code). If it is not specified a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require proof of fault elements in relation to the physical elements.

Item 95 – Subsection 279(2)

This item removes the defence ‘without reasonable excuse’ from subsection 279(2) of the RA. This defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 96 – New subsections 279(3) and (4)

This item inserts new subsections 279(3) and (4) into the RA.

New subsection 279(3) is consequential upon item 95. It provides that subsection (2) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (3). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

New subsection 279(4) makes it clear that an offence under subsection 279(2) is a strict liability offence. Subsection 279(1) provides general powers of inspectors relating to requiring a person to show a permit, or evidence of certain matters and produce records that the person is required to hold. Subsection 279(2) provides that a person must not, without reasonable excuse, fail to comply with a requirement under subsection (1). A penalty of 20 penalty units is provided.

This amendment is likely to have been interpreted as a strict liability offence before this amendment because of the relatively low penalty attached to this offence (20 penalty units or \$2,200) and because a defence of reasonable excuse is provided which is an indication of a strict liability offence.

Therefore this new subsection should not alter the way a court would interpret this offence. If the amendment were not made then, after the application of the *Criminal Code*, the offence would no longer be interpreted in the same way as it could currently be interpreted. After the *Criminal Code* comes into operation it is necessary to expressly state that an offence is one of strict liability if the provision is to attract strict liability (sections 6.1 and 6.2 of the Code). If it is not specified a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require proof of fault elements in relation to the physical elements.

Item 97 – Subsection 301(1)

This item removes the defence ‘without reasonable excuse’ from subsection 301(1) of the RA. This defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 98 – New subsections 301(1A) and 301(1B)

This item inserts new subsection 301(1A) and (1B) into the RA.

New subsection 301(1A) is consequential upon item 97. It provides that subsection (1) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (1A). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by

law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

New subsection 301(1B) makes it clear that an offence under subsection 301(1) is a strict liability offence. Subsection 301(1) relates to supplying radiocommunications devices to unlicensed persons. A penalty of 20 penalty units is provided.

This amendment is likely to have been interpreted as a strict liability offence before this amendment because of the relatively low penalty attached to this offence (20 penalty units or \$2,200) and because a defence of reasonable excuse is provided which is an indication of a strict liability offence.

Therefore this new subsection should not alter the way a court would interpret this offence. If the amendment were not made then, after the application of the *Criminal Code*, the offence would no longer be interpreted in the same way as it could currently be interpreted. After the *Criminal Code* comes into operation it is necessary to expressly state that an offence is one of strict liability if the provision is to attract strict liability (sections 6.1 and 6.2 of the Code). If it is not specified a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require proof of fault elements in relation to the physical elements.

Item 99 – New subsection 301(3A)

New subsection 301(3A) of the RA makes it clear that an offence under subsection 301(3) is a strict liability offence. Subsection 301(3) makes it an offence for a supplier of radiocommunications devices to fail to keep documents in which certain particulars of the supply were recorded for at least 2 years after the supply. A penalty of 20 penalty units is provided.

This amendment is likely to have been interpreted as a strict liability offence before this amendment because of the relatively low penalty attached to this offence (20 penalty units or \$2,200) and because a defence of reasonable excuse is provided which is an indication of a strict liability offence.

Therefore this new subsection should not alter the way a court would interpret this offence. If the amendment were not made then, after the application of the *Criminal Code*, the offence would no longer be interpreted in the same way as it could currently be interpreted. After the *Criminal Code* comes into operation it is necessary to expressly state that an offence is one of strict liability if the provision is to attract strict liability (sections 6.1 and 6.2 of the Code). If it is not specified a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require proof of fault elements in relation to the physical elements.

Item 100 – New section 313A – Application of the *Criminal Code*

This item inserts a new section 313A into the RA. It provides that Chapter 2 (other than Part 2.5) of the *Criminal Code* applies to all offences against the RA. It also inserts a note that says that Chapter 2 of the Code sets out the general principles of criminal liability.

Part 2.5 of the *Criminal Code* relates to corporate criminal responsibility. Part 2.5 of the *Criminal Code* is the only Part of Chapter 2 which does not apply automatically to offences. When the Criminal Code Bill was introduced into the Senate on 30 June 1994 it was stated that Part 2.5 would be the basis of liability if no other basis was provided. Since the RA contains section 306, which deals with corporate criminal responsibility, Part 2.5 of the *Criminal Code* has not been applied to offences against the Act.

Telecommunications Act 1997

Item 101 – Paragraph 2(1)(e)

This item, which is consequential upon item 162, repeals paragraph 2(1)(e), which refers to Part 33.

Item 102 – Section 5

This item, which is consequential upon item 162, amends the simplified outline in section 5 by omitting the last dot point relating to ancillary matters and substitutes a dot point relating to ancillary matters that omits the reference to provisions which deal with the prohibition of false or misleading statements.

Item 103 – Section 6 (table item 31)

This item, which is consequential upon item 162, repeals item 31 from the table in section 6. Item 31 refers to false or misleading statements.

Item 104 – New section 11A – Application of the *Criminal Code*

This item inserts a new section 11A into the *Telecommunications Act 1997* (TA). It provides that Chapter 2 (other than Part 2.5) of the *Criminal Code* applies to all offences against the Act. It also inserts a note that says that Chapter 2 of the Code sets out the general principles of criminal liability.

Part 2.5 of the *Criminal Code* relates to corporate criminal responsibility. Part 2.5 of the *Criminal Code* is the only Part of Chapter 2, which does not apply automatically to offences. When the Criminal Code Bill was introduced into the Senate on 30 June 1994 it was stated that Part 2.5 would be the basis of liability if no other basis was provided. Since the TA contains section 576, which deals with corporate criminal responsibility, Part 2.5 of the *Criminal Code* has not been applied to offences against the Act.

Item 105 – Subsection 42(5)

This item amends subsection 42(5) of the TA by omitting the reference to the words ‘intentionally or recklessly’. This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* supplying the default fault element of recklessly to a physical element of circumstance or result in an

offence. It ensures that the appropriate fault element of intention applies to the physical element of conduct in the offence and the fault element of recklessness applies to the physical element of circumstance or result in the offence.

Item 106 – Subsection 276(3)

This item amends subsection 276(3) of the TA by omitting the reference to the words ‘intentionally or recklessly’. This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* supplying the default fault element of recklessly to a physical element of circumstance or result in an offence. It ensures that the appropriate fault element of intention applies to the physical element of conduct in the offence and the fault element of recklessness applies to the physical element of circumstance or result in the offence.

Item 107 – Subsection 277(3)

This item amends subsection 277(3) of the TA by omitting the reference to the words ‘intentionally or recklessly’. This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* supplying the default fault element of recklessly to a physical element of circumstance or result in an offence. It ensures that the appropriate fault element of intention applies to the physical element of conduct in the offence and the fault element of recklessness applies to the physical element of circumstance or result in the offence.

Item 108 – Subsection 278(3)

This item amends subsection 278(3) of the TA by omitting the reference to the words ‘intentionally or recklessly’. This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* supplying the default fault element of recklessly to a physical element of circumstance or result in an offence. It ensures that the appropriate fault element of intention applies to the physical element of conduct in the offence and the fault element of recklessness applies to the physical element of circumstance or result in the offence.

Item 109 – Section 303

This item amends section 303 of the TA by omitting the reference to the words ‘intentionally or recklessly’. This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly

from an offence does not prevent the *Criminal Code* supplying the default fault element of recklessly to a physical element of circumstance or result in an offence. It ensures that the appropriate fault element of intention applies to the physical element of conduct in the offence and the fault element of recklessness applies to the physical element of circumstance or result in the offence.

Item 110 – Subsection 306(7)

This item amends subsection 306(7) of the TA by omitting the reference to the words ‘intentionally or recklessly’. This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* supplying the default fault element of recklessly to a physical element of circumstance or result in an offence. It ensures that the appropriate fault element of intention applies to the physical element of conduct in the offence and the fault element of recklessness applies to the physical element of circumstance or result in the offence.

Item 111 – Subsection 307(2)

This item amends subsection 307(2) of the TA by omitting the reference to the words ‘intentionally or recklessly’. This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* supplying the default fault element of recklessly to a physical element of circumstance or result in an offence. It ensures that the appropriate fault element of intention applies to the physical element of conduct in the offence and the fault element of recklessness applies to the physical element of circumstance or result in the offence.

Item 112 – Section 399

This item repeals section 399 of the TA and substitutes a new section 399.

The current subsection 399 may be interpreted so that ‘contravention of a condition’ forms part of the conduct element of the offence. This amendment has rephrased the offence to ensure that the contravention of a permit condition is part of the physical element of ‘result’. This means that it will attract the default fault element of recklessness.

While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend these provisions for the following reason. Under the *Criminal Code* the fault element of intention applies to the physical element of conduct. If the offence were not restructured prior to the Code coming into operation this could give rise to difficulties in the prosecution of this offence as the prosecution may be required to prove that the defendant has specific intention to breach a particular condition. This could be extremely difficult if the defendant had knowledge of the conditions but does not have a specific intention to breach a particular condition. The defendant could merely intend to breach the conditions generally whilst being reckless as to the particular condition breached.

New subsection 399(2) inserts a definition of ‘engage in conduct’ which applies to section 399. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the *Telecommunications Act 1992* with the *Criminal Code*. However, it is desirable to ensure that the reference to engage in conduct in the section 399 covers both acts and omissions. The offence of contravening a permit condition could clearly involve omitting to do an act. The inclusion of a definition of ‘engage in conduct’ ensures that such offences are covered.

Item 113 – Subsection 411(2)

This item omits the reference to the words ‘without reasonable excuse, intentionally or recklessly’ in subsection 411(2) of the TA.

This item removes the defence ‘without reasonable excuse’ and this defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

This item also removes reference to the words ‘intentionally or recklessly’. This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* applying the default fault element of recklessly to a physical element of circumstance or result in an offence.

Item 114 – New subsection 411(2A)

New subsection 411(2A) of the RA is consequential upon item 113. It provides that subsection (2) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (2A). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

Item 115 – Subsection 412(2)

This item omits the reference to the words ‘without reasonable excuse, intentionally or recklessly’ in subsection 412(2) of the TA.

This item removes the defence ‘without reasonable excuse’ and this defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

This item also removes reference to the words ‘intentionally or recklessly’. This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* applying the default fault element of recklessly to a physical element of circumstance or result in an offence.

Item 116 – New subsection 412(2A)

New subsection 412(2A) is consequential upon item 115. It provides that subsection (2) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (2A). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

Item 117 – Subsection 413(2)

This item omits the reference to the words ‘without reasonable excuse, intentionally or recklessly’ in subsection 413(2) of the TA.

This item removes the defence ‘without reasonable excuse’ and this defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

This item also removes reference to the words ‘intentionally or recklessly’. This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* applying the default fault element of recklessly to a physical element of circumstance or result in an offence.

Item 118 – New subsection 413(2A)

New subsection 413(2A) of the RA is consequential upon item 117. It provides that subsection (2) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (2A). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

Item 119 – Subsection 414(2)

This item omits the reference to the words ‘without reasonable excuse, intentionally or recklessly’ in subsection 414(2) of the TA.

This item removes the defence ‘without reasonable excuse’ and this defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

This item also removes reference to the words ‘intentionally or recklessly’. This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* applying the default fault element of recklessly to a physical element of circumstance or result in an offence.

Item 120 – New subsection 414(3)

New subsection 414(3) is consequential upon item 119. It provides that subsection (2) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (3). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

Item 121 – Subsection 415(2)

This item repeals section 415 of the TA and substitutes a new section 415.

This amendment has rephrased the offence to ensure that the contravention of a requirement under subsection (1) is a physical element of result of the defendant’s conduct to which the default fault element of recklessness will apply. While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision to more clearly identify the physical elements of conduct and result in the offence.

This item also removes the defence of ‘without reasonable excuse’ from the offence provision. This defence becomes a new subsection, namely subsection 415(3). This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence. New subsection 415(3) provides that subsection (1) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (3). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or

pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

New subsection 414(4) inserts a definition of ‘engage in conduct’ which applies to section 415. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the *Telecommunications Act 1992* with the *Criminal Code*. However, it is desirable to clarify that the reference to engage in conduct in the section 415 covers both acts and omissions as a requirement may require a positive action.

Item 122 – Subsection 416(2)

This item omits the reference to the words ‘intentionally or recklessly’ in subsection 416(2) of the TA.

This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* applying the default fault element of recklessly to a physical element of circumstance or result in an offence.

Item 123 – Subsection 417(2)

This item omits the reference to the words ‘intentionally or recklessly’ in subsection 417(2) of the TA.

This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* applying the default fault element of recklessly to a physical element of circumstance or result in an offence.

Item 124 – Subsection 420(2)

This item omits the reference to the words ‘intentionally or recklessly’ in subsection 420(2) of the TA.

This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* applying the default fault element of recklessly to a physical element of circumstance or result in an offence.

Item 125 – Subsection 421(4)

This item omits the reference to the words ‘intentionally or recklessly’ in subsection 421(4) of the TA.

This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* applying the default fault element of recklessly to a physical element of circumstance or result in an offence.

Item 126 – Section 434

This item repeals section 434 of the TA and substitutes a new section 434.

Subsection 434(3) currently provides two separate offences, namely contravening subsection (1) or contravening subsection (2). For clarity these offences have been separated into two separate subsections. Subsection 434(1) replaces the former offence and subsection 434(2) replaces the latter offence.

This amendment has rephrased the offences to ensure that the contravention of a licence condition under subsection 434(1), and failure to take all reasonable steps to ensure that cabling work of a certain type performed under a person's supervision does not contravene the licence conditions under subsection 434(2), is a physical element of result of the defendant's conduct to which the default fault element of recklessness will apply.

While these amendments are not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision for the following reason. Under the *Criminal Code* the fault element of intention applies to the physical element of conduct. If the offences were not restructured prior to the Code coming into operation this could give rise to difficulties in the prosecution of these offences as the prosecution may be required to prove that the defendant has specific intention to breach a particular condition. This could be extremely difficult if the defendant had knowledge of the conditions but does not have a specific intention to breach a particular condition. The defendant could merely intend to breach the conditions generally whilst being reckless as to the particular condition breached.

The new subsections 434(1) and 434(2) also remove the reference to the word 'recklessly'. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* supplying the default fault element of recklessly to a physical element of circumstance or result in an offence.

New subsection 434(3) inserts a definition of 'engage in conduct' which applies to section 434. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the *Radiocommunications Act 1992* with the *Criminal Code*. However, it is desirable to clarify that the reference to engage in conduct in the section 434 covers both acts and omissions. As a licence condition may require a positive action from a person, a breach of an offence under subsections 434(1) or 434(2) could cover an omission to act.

Item 127 – Subsection 452(2)

This item omits the reference to the words ‘intentionally or recklessly’ in subsection 452(2) of the TA.

This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* applying the default fault element of recklessly to a physical element of circumstance or result in an offence.

Item 128 – subsection 475(7)

This item repeals subsection 475(7) of the TA and substitutes a new subsection 475(7).

This amendment has rephrased the offence to ensure that the contravention of a direction under this section is a physical element of result of the defendant’s conduct to which the default fault element of recklessness will apply. While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision to more clearly identify the physical elements of conduct and result in the offence.

Item 129 – New subsection 475(9)

New subsection 475(9) of the TA inserts a definition of ‘engage in conduct’ which applies to section 475. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the TA with the *Criminal Code*. However, it is desirable to clarify that the reference to engage in conduct in the section 475 covers both acts and omissions. As a direction may require a positive action from a person, an offence under subsection 475(7) could cover an omission to act.

Item 130 – Subsection 476(7)

This item repeals subsection 476(7) of the TA and substitutes a new subsection 476(7).

This amendment has rephrased the offence to ensure that the contravention of a direction under this section is a physical element of result of the defendant’s conduct to which the default fault element of recklessness will apply. While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision to more clearly identify the physical elements of conduct and result in the offence.

Item 131 – New subsection 476(9)

New subsection 476(9) of the TA inserts a definition of ‘engage in conduct’ which applies to section 476. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the *Telecommunications Act 1997* with the *Criminal Code*. However, it is desirable to ensure that the reference to engage in conduct in the section 476 covers both acts and omissions. As a direction may require a positive action from a person, an offence under subsection 476(7) could cover an omission to act.

Item 132 – Subsection 493(3)

This item omits the reference to the words ‘without reasonable excuse’ from subsection 493(3) of the TA. This removes the defence ‘without reasonable excuse’ and this defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 133 – Subsection 493(4)

This item repeals subsection 493(4) of the TA and substitutes new subsections 493(4), (5) and (6).

This amendment has rephrased the offence to ensure that the contravention of an ACA order under subsection (2) is a physical element of result of the defendant’s conduct to which the default fault element of recklessness will apply. While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision to more clearly identify the physical elements of conduct and result in the offence.

It also removes the defence of ‘without reasonable excuse’ from the offence provision. New subsection 493(5) provides that subsections (3) and (4) do not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (5). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

New subsection 493(6) inserts a definition of ‘engage in conduct’ which applies to section 493. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the *Telecommunications Act 1997* with the *Criminal Code*. However, it is desirable to ensure that the reference to engage in conduct in the section 493 covers both acts and omissions. As an ACA order may require a positive action from a person, an offence under subsection 493(4) could cover an omission to act.

Item 134 – Subsection 494(3)

This item omits the reference to the words ‘without reasonable excuse’ from subsection 494(3) of the TA. This removes the defence ‘without reasonable excuse’ and this defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 135 – Subsection 494(4)

This item repeals subsection 494(4) of the TA and substitutes new subsections 494(4), (5), (6) and (7).

Subsection 494(4) currently provides two separate offences of ‘contravening a direction under paragraph (2)(a)’ (paragraph 494(4)(a)) and ‘contravening a direction under paragraph (2)(b)’ (paragraph 494(4)(b)). For clarity these offences have been separated into two separate subsections. Subsection 494(4) replaces the former offence and subsection 494(5) replaces the latter offence.

This amendment has rephrased the offences to ensure that the contravention of a direction under paragraph (2)(a) and paragraph (2)(b) is a physical element of result of the defendant’s conduct to which the default fault element of recklessness will apply. While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision to more clearly identify the physical elements of conduct and result in the offence.

The new subsections 494(4) and (5) also remove the reference to the word ‘recklessly’. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* supplying the default fault element of recklessly to a physical element of circumstance or result in an offence.

It also removes the defence of ‘without reasonable excuse’ from the offence provision. This defence becomes a new subsection under the new subsection 494(6). New subsection 494(6) provides that subsections (3), (4) and (5) do not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (6). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

New subsection 494(7) inserts a definition of ‘engage in conduct’ which applies to section 494. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the *Telecommunications Act 1997* with the *Criminal Code*. However, it is desirable to clarify that the reference to engage in conduct in the section 494 covers both acts and omissions. As

a direction may require a positive action from a person, an offence under subsections 494(4) or (5) could cover an omission to act.

Item 136 – Subsection 503(3)

This item omits the reference to the words ‘without reasonable excuse’ from subsection 503(3) of the TA. This removes the defence ‘without reasonable excuse’ and this defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 137 – Subsection 503(4)

This item repeals subsection 503(4) of the TA and substitutes new subsections 503(4), (5) and (6).

This amendment has rephrased the offence to ensure that the contravention of an order of the Australian Competition and Consumer Commission (ACCC) under subsection (2) is a physical element of result of the defendant’s conduct to which the default fault element of recklessness will apply. While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision to more clearly identify the physical elements of conduct and result in the offence.

It also removes the defence of ‘without reasonable excuse’ from the offence provision, which is consequential upon item 136. This defence becomes a new subsection under the new subsection 503(5). New subsection 503(5) provides that subsections (3) and (4) do not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (5). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

New subsection 503(6) inserts a definition of ‘engage in conduct’ which applies to section 503. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the *Telecommunications Act 1997* with the *Criminal Code*. However, it is desirable to clarify that the reference to engage in conduct in the section 503 covers both acts and omissions. As an order may require a positive action from a person, an offence under subsection 503(4) could cover an omission to act.

Item 138 – Subsection 504(3)

This item omits the reference to the words ‘without reasonable excuse’ from subsection 504(3) of the TA. This removes the defence ‘without reasonable excuse’ and this defence

becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

Item 139 – Subsection 504(4)

This item repeals subsection 504(4) of the TA and substitutes new subsections 504(4), (5), (6) and (7).

Subsection 503(4) currently provides two separate offences of ‘contravening a direction under paragraph (2)(a)’ and ‘contravening a direction under paragraph (2)(b)’. For clarity these offences have been separated into two separate subsections. Subsection 504(4) replaces the former offence and subsection 504(5) replaces the latter offence.

This amendment has rephrased the offences to ensure that the contravention of a direction under paragraph (2)(a) and paragraph (2)(b) is a physical element of result of the defendant’s conduct to which the default fault element of recklessness will apply. While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision to more clearly identify the physical elements of conduct and result in the offence.

The new subsections 504(4) and (5) also remove the reference to the word ‘recklessly’. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* supplying the default fault element of recklessly to a physical element of circumstance or result in an offence.

This item also removes the defence of ‘without reasonable excuse’ from the offence provisions, which is consequential upon item 138. This defence becomes a new subsection under the new subsection 504(6). New subsection 504(6) provides that subsections (3), (4) and (5) do not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (6). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

New subsection 504(7) inserts a definition of ‘engage in conduct’ which applies to section 504. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the *Telecommunications Act 1997* with the *Criminal Code*. However, it is desirable to clarify that the reference to engage in conduct in the section 504 covers both acts and omissions. As an ACCC direction may require a positive action from a person, an offence under subsections 504(4) and 504(5) could cover an omission to act.

Item 140 – Paragraphs 521(4)(e) and (f)

This item repeals paragraphs 521(4)(e) and (f) of the TA and substitutes paragraph 521(4)(e). This is a consequential amendment as a result of item 145.

Item 141 – Paragraphs 521(5)(e) and (f)

This item, which is consequential upon item 145, repeals paragraphs 521(5)(e) and (f) of the TA and substitutes paragraph 521(5)(e). Paragraph 521(f) refers to section 526.

Item 142 – Subsections 522(4) and (5)

This item repeals subsections 522(4) and (5) of the TA and substitutes new subsections 522(4), (5) and (6).

This amendment has rephrased the offence to ensure that the contravention of a notice requirement is a physical element of result of the defendant's conduct to which the default fault element of recklessness will apply. While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision to more clearly identify the physical elements of conduct and result in the offence.

New subsection 522(6) inserts a definition of 'engage in conduct' which applies to section 522. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the TA with the *Criminal Code*. However, it is desirable to clarify that the reference to engage in conduct in the section 522 covers both acts and omissions. As an ACA notice may require a positive action from a person, an offence under subsection 522(4) could cover an omission to act

Item 143 – Paragraph 524(2)(c)

This item, which is consequential upon item 145, omits the reference to 'or 526'.

Item 144 – Section 525

This item omits the reference to the words ‘intentionally or recklessly’ in section 525 of the TA.

This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* applying the default fault element of recklessly to a physical element of circumstance or result in an offence.

Item 145 – Section 526

This item repeals section 526. This section is no longer necessary as it is similar to the general false or misleading provisions which Schedule 1 to the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* inserts into the *Criminal Code* as new Part 7.4.

Item 146 – Subsection 531(2)

This item omits the reference to the words ‘intentionally or recklessly’ in subsection 531(2) of the TA.

This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* applying the default fault element of recklessly to a physical element of circumstance or result in an offence.

Item 147 – Subsection 534(3)

This item omits the reference to the words ‘without reasonable excuse, intentionally or recklessly’ in subsection 534(3) of the TA.

This item removes the defence ‘without reasonable excuse’ and this defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

This item also removes reference to the words ‘intentionally or recklessly’. This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* applying the default fault element of recklessly to a physical element of circumstance or result in an offence.

Item 148 – New subsections 534(4) and (5)

This item inserts new subsections 534(4) and (5) into the TA.

New subsection 534(4) is consequential upon item 147. It provides that subsection (3) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (4). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

New subsection 534(5) specifies that an offence under subsection 534(3) is a strict liability offence. Subsection 534(3) provides that a person who ceases to be an inspector must not, without reasonable excuse, fail to return his or her identity card to the ACA as soon as practicable. A penalty of 5 penalty units is provided.

This amendment alters the current provision, which could not currently be interpreted as a strict liability offence because it applies default elements of ‘intentionally or recklessly’ to the offence. This amendment has additional authority. However, it is desirable that this offence be an offence of strict liability because of the relatively low penalty attached to this offence (5 penalty units or \$550), because a defence of reasonable excuse is provided, and for the policy reasons that an identity card must be returned as soon as the cardholder stops being an inspector, so that false representations cannot be made about the scope of the person’s powers and authority. In addition, this offence is similar to offence provisions in other portfolio legislation, which are specified to be strict liability offences (see items 44 and 92).

Item 149 – Subsection 535(2)

This item amends subsection 535(2) of the TA so as to omit the reference to ‘section 6, 7 or 7A or subsection 86(1) of the *Crimes Act 1914*’ and replace it with a reference to ‘section 6 of the *Crimes Act 1914* or Part 2.4 of the *Criminal Code*.’

Sections 7, 7A and 86(1) of the *Crimes Act 1914* are concerned with the offences of attempt, inciting or urging and conspiracy. These sections of the *Crimes Act 1914* are repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*. These ancillary offences are replaced by equivalent provisions in Part 2.4 of the *Criminal Code*, which is referred to in the new subsection 535(2).

Item 150 – Subsection 542(4)

This item amends subsection 542(4) of the TA so as to omit the reference to ‘section 6, 7 or 7A or subsection 86(1) of the *Crimes Act 1914*’ and replace it with a reference to ‘section 6 of the *Crimes Act 1914* or Part 2.4 of the *Criminal Code*.’

Sections 7, 7A and 86(1) of the *Crimes Act 1914* are concerned with the offences of attempt, inciting or urging and conspiracy. These sections of the *Crimes Act 1914* are repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*. These

ancillary offences are replaced by equivalent provisions in Part 2.4 of the *Criminal Code*, which is referred to in the new subsection 542(4).

Item 151 – Subsection 544(2)

This item amends subsection 544(2) of the TA so as to omit the reference to ‘section 6, 7 or 7A or subsection 86(1) of the *Crimes Act 1914*’ and replace it with a reference to ‘section 6 of the *Crimes Act 1914* or Part 2.4 of the *Criminal Code*.’

Sections 7, 7A and 86(1) of the *Crimes Act 1914* are concerned with the offences of attempt, inciting or urging and conspiracy. These sections of the *Crimes Act 1914* are repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*. These ancillary offences are replaced by equivalent provisions in Part 2.4 of the *Criminal Code*, which is referred to in the new subsection 544(2).

Item 152 – Subsection 545(4)

This item amends subsection 545(4) of the TA so as to omit the reference to ‘section 6, 7 or 7A or subsection 86(1) of the *Crimes Act 1914*’ and replace it with a reference to ‘section 6 of the *Crimes Act 1914* or Part 2.4 of the *Criminal Code*.’

Sections 7, 7A and 86(1) of the *Crimes Act 1914* are concerned with the offences of attempt, inciting or urging and conspiracy. These sections of the *Crimes Act 1914* are repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*. These ancillary offences are replaced by equivalent provisions in Part 2.4 of the *Criminal Code*, which is referred to in the new subsection 545(4).

Item 153 – Subsection 548(2)

This item omits the reference to the words ‘without reasonable excuse, intentionally or recklessly’ in subsection 548(2) of the TA.

This item removes the defence ‘without reasonable excuse’ and this defence becomes a new subsection under the next item. This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence.

This item also removes reference to the words ‘intentionally or recklessly’. This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* applying the default fault element of recklessly to a physical element of circumstance or result in an offence.

Item 154 – New subsections 548(2A) and (2B)

This item inserts new subsections 548(2A) and (2B) into the TA.

New subsection 548(2A) is consequential upon item 153. It provides that subsection (2) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matters in subsection (2A). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

New subsection 548(2B) specifies that an offence under subsection 548(2) is a strict liability offence. Subsection 548(2) provides general powers of inspectors relating to requiring a person to show a permit, or evidence of certain matters and produce records they’re required to hold. Subsection 548(2) provides that a person must not, without reasonable excuse, fail to comply with a requirement under subsection (1). A penalty of 20 penalty units is provided.

This amendment alters the current provision, which could not currently be interpreted as a strict liability offence because it applies default elements of ‘intentionally or recklessly’ to the offence. However, it is desirable that this offence be an offence of strict liability because of the relatively low penalty attached to this offence (20 penalty units or \$2,200), because a defence of reasonable excuse is provided. In addition, this offence is similar to offence provisions in other portfolio legislation, which specify that similar offences are strict liability offences (see items 46 and 96).

Item 155 – Subsection 548(3)

New subsection 548(3) of the TA inserts a definition of ‘engage in conduct’ which applies to section 548. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the *Telecommunications Act 1997* with the *Criminal Code*. However, it is desirable to clarify that the reference to engage in conduct in the section 548 covers both acts and omissions.

Item 156 – Subsection 549(3)

This item repeals subsection 549(3) of the TA and substitutes new subsections 549(3) and (3A).

This amendment has rephrased the offence to ensure that the contravention of a requirement under subsection (1) is a physical element of result of the defendant’s conduct to which the default fault element of recklessness will apply. While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to

amend this provision to more clearly identify the physical elements of conduct and result in the offence.

This item removes the defence ‘without reasonable excuse’ from the offence provision and this defence becomes a new subsection, namely subsection 549(3A). This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence. New subsection 549(3A) provides that subsection (3) does not apply if a person has a reasonable excuse. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter in subsection (3A). It also refers to subsection 13.3(3) of the Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by law creating an offence bears an evidential burden in relation to that matter. An evidential burden is defined in subsection 13.3(6) of the *Criminal Code* to mean ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist’.

Item 157 – New subsection 549(5)

New subsection 549(5) of the TA inserts a definition of ‘engage in conduct’ which applies to section 549. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the *Telecommunications Act 1997* with the *Criminal Code*. However, it is desirable to clarify that the reference to engage in conduct in the section 549 covers both acts and omissions. As a requirement under subsection (1) may require a positive action from a person, an offence under subsection 549(3) could cover an omission to act.

Item 158 – Subsection 551(2)

This item amends subsection 551(2) of the TA so as to omit the reference to ‘section 6, 7 or 7A or subsection 86(1) of the *Crimes Act 1914*’ and replace it with a reference to ‘section 6 of the *Crimes Act 1914* or Part 2.4 of the *Criminal Code*.’

Sections 7, 7A and 86(1) of the *Crimes Act 1914* are concerned with the offences of attempt, inciting or urging and conspiracy. These sections of the *Crimes Act 1914* are repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*. These ancillary offences are replaced by equivalent provisions in Part 2.4 of the *Criminal Code*, which is referred to in the new subsection 551(2).

Item 159 – Subsection 553(2)

This item amends subsection 553(2) of the TA so as to omit the reference to ‘section 6, 7 or 7A or subsection 86(1) of the *Crimes Act 1914*’ and replace it with a reference to ‘section 6 of the *Crimes Act 1914* or Part 2.4 of the *Criminal Code*.’

Sections 7, 7A and 86(1) of the *Crimes Act 1914* are concerned with the offences of attempt, inciting or urging and conspiracy. These sections of the *Crimes Act 1914* are repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*. These

ancillary offences are replaced by equivalent provisions in Part 2.4 of the *Criminal Code*, which is referred to in the new subsection 553(2).

Item 160 – Subparagraph 574(b)(ii)

This item amends subparagraph 574(b)(ii) of the TA so as to omit the reference to ‘section 6, 7 or 7A or subsection 86(1) of the *Crimes Act 1914*’ and replace it with a reference to ‘section 6 of the *Crimes Act 1914* or Part 2.4 of the *Criminal Code*.’

Sections 7, 7A and 86(1) of the *Crimes Act 1914* are concerned with the offences of attempt, inciting or urging and conspiracy. These sections of the *Crimes Act 1914* are repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*. These ancillary offences are replaced by equivalent provisions in Part 2.4 of the *Criminal Code*, which is referred to in the new subparagraph 574(b)(ii).

Item 161 – Paragraph 576(1)(b)

This item amends paragraph 576(1)(b) of the TA so as to omit the reference to ‘section 6, 7 or 7A or subsection 86(1) of the *Crimes Act 1914*’ and replace it with a reference to ‘section 6 of the *Crimes Act 1914* or Part 2.4 of the *Criminal Code*.’

Sections 7, 7A and 86(1) of the *Crimes Act 1914* are concerned with the offences of attempt, inciting or urging and conspiracy. These sections of the *Crimes Act 1914* are repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*. These ancillary offences are replaced by equivalent provisions in Part 2.4 of the *Criminal Code*, which is referred to in the new paragraph 576(1)(b).

Item 162 – Part 33

This item repeals Part 33 of the TA, which consists of section 577 (a simplified outline) and section 578. Section 578 is no longer necessary as it is similar to the general false or misleading provisions which Schedule 1 to the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* inserts into the *Criminal Code* as new Part 7.4.

Telecommunications (Consumer Protection and Service Standards) Act 1999

Item 163 – New section 7A – Application of the *Criminal Code*

This item inserts a new section 7A into the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (TCPSS Act). It provides that Chapter 2 (other than Part 2.5) of the *Criminal Code* applies to all offences against the Act. It also inserts a note that says that Chapter 2 of the Code sets out the general principles of criminal liability.

Part 2.5 of the *Criminal Code* relates to corporate criminal responsibility. Part 2.5 of the *Criminal Code* is the only Part of Chapter 2 which does not apply automatically to offences. When the Criminal Code Bill was introduced into the Senate on 30 June 1994 it was stated that Part 2.5 would be the basis of liability if no other basis was provided. Since the TCPSS Act incorporates section 575 of the *Telecommunications Act 1997* (see section 574A of the *Telecommunications Act 1997*), which deals with corporate criminal responsibility, Part 2.5 of the *Criminal Code* has not been applied to offences against the Act.

Item 164 – Section 20 (note)

This item, which is consequential upon item 162, omits a reference in the note to section 20 of the words ‘(see section 578 of the *Telecommunications Act 1997*)’ and substitutes a reference to ‘(see Part 7.4 of the *Criminal Code*).’

Section 20 is inserted in the *Telecommunications (Consumer Protection and Service Standards) Act 1999* by item 1 of Schedule 1 to the *Telecommunications (Consumer Protection and Service Standards) Amendment Act (No. 2) 2000* (see subclause 2(8) for the commencement of this item).

Item 165 – Section 20J (note)

This item, which is consequential upon item 162, omits a reference in the note to section 20J of the words ‘(see section 578 of the *Telecommunications Act 1997*)’ and substitutes a reference to ‘(see Part 7.4 of the *Criminal Code*).’

Section 20J is inserted in the TCPSS Act by item 1 of Schedule 1 to the *Telecommunications (Consumer Protection and Service Standards) Amendment Act (No. 2) 2000* (see subclause 2(8) for the commencement of this item).

Telstra Corporation Act 1991**Item 166 – New section 6A – Application of the *Criminal Code***

This item inserts new section 6A into the *Telstra Corporation Act 1991* (TC Act). It provides that Chapter 2 of the *Criminal Code* applies to all offences against the Act, subject to subsection 6A(2). It also inserts a note that says that Chapter 2 of the Code sets out the general principles of criminal liability.

New subsection 6A(2) provides that despite subsection (1), Part 2.5 of the *Criminal Code* does not apply to an offence against Part 2 or 2A (within the meaning of section 8CI). Part 2.5 of the *Criminal Code* deals with corporate criminal responsibility. Part 2.5 of the *Criminal Code* is the only Part of Chapter 2 which does not apply automatically to offences. When the Criminal Code Bill was introduced into the Senate on 30 June 1994 it was stated that Part 2.5 would be the basis of liability if no other basis was provided. Since section 8CI of the *Telstra Corporation Act 1991*, which refers to offences against Part 2 or 2A, deals with corporate criminal responsibility, Part 2.5 of the *Criminal Code* has not been applied to offences against these Parts of the Act.

Item 167 – Subsection 8AC(2)

This item repeals subsection 8AC(2) of the TC Act and substitutes new subsections 8AC(2) and (3).

This amendment has rephrased the offence to ensure that the contravention of subsection (1) is a physical element of result of the defendant’s conduct to which the default fault element of recklessness will apply. While this amendment is not strictly necessary to harmonise the

offence provisions with the *Criminal Code* it is desirable to amend this provision to more clearly identify the physical elements of conduct and result in the offence.

New subsection 8AC(3) inserts a definition of ‘engage in conduct’ which applies to section 8AC. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the TC Act with the *Criminal Code*. However, it is desirable to clarify that the reference to engage in conduct in section 8AC covers both acts and omissions.

Item 168 – Subsection 8BI(2)

This item repeals subsection 8BI(2) of the TC Act and substitutes new subsections 8BI(2) and (3).

This amendment has rephrased the offence to ensure that the contravention of subsection (1) is a physical element of result of the defendant’s conduct to which the default fault element of recklessness will apply. While this amendment is not strictly necessary to harmonise the offence provisions with the *Criminal Code* it is desirable to amend this provision to more clearly identify the physical elements of conduct and result in the offence.

New subsection 8BI(3) inserts a definition of ‘engage in conduct’ which applies to section 8BI. The definition covers doing an act and omitting to perform an act. This is consistent with the definition of conduct in the *Criminal Code*, which covers both acts and omissions (see subsection 4.1(2) of the Code).

This amendment is not strictly necessary to harmonise the offence provisions in the *Telstra Corporation Act 1991* with the *Criminal Code*. However, it is desirable to clarify that the reference to engage in conduct in the section 8BI covers both acts and omissions.

Item 169 – Subsection 8BO(2)

This item omits removes the references to the words ‘intentionally or recklessly’ in subsection 8BO(2) of the TC Act.

This amendment is intended to provide clarity to the interpretation of the offence and to give consistency as to how criminal offences are to be interpreted by the courts. The current wording of the offence appears to apply an alternative fault element of recklessly to the physical element of conduct. Repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* applying the default fault element of recklessly to a physical element of circumstance or result in an offence.

Item 170 – Section 8BP

This item repeals section 8BP of the TC Act. This section is no longer necessary as it is similar to the general false or misleading provisions which Schedule 1 to the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* inserts into the *Criminal Code* as new Part 7.4.

Item 171 – Subsection 8CI(6)

This item amends subsection 8CI(6) of the TC Act so as to omit the reference to ‘section 6, 7 or 7A or subsection 86(1) of the *Crimes Act 1914*’ and replace it with a reference to ‘section 6 of the *Crimes Act 1914* or Part 2.4 of the *Criminal Code*.’

Sections 7, 7A and 86(1) of the *Crimes Act 1914* are concerned with the offences of attempt, inciting or urging and conspiracy. These sections of the *Crimes Act 1914* are repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*. These ancillary offences are replaced by equivalent provisions in Part 2.4 of the *Criminal Code*, which is referred to in the new subsection 8CI(6).

Item 172 – Subsection 8CI(6)

This item adds a reference to ‘of this Act’, which is technical amendment to clarify that the reference to ‘Parts 2 or 2A’ refers to Parts 2 or 2A of the *Telstra Corporation Act 1991*.

Item 173 – Subsection 8CJ(6)

This item amends subsection 8CJ(6) of the TC Act so as to omit the reference to ‘section 6, 7 or 7A or subsection 86(1) of the *Crimes Act 1914*’ and replace it with a reference to ‘section 6 of the *Crimes Act 1914* or Part 2.4 of the *Criminal Code*.’

Sections 7, 7A and 86(1) of the *Crimes Act 1914* are concerned with the offences of attempt, inciting or urging and conspiracy. These sections of the *Crimes Act 1914* are repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*. These ancillary offences are replaced by equivalent provisions in Part 2.4 of the *Criminal Code*, which is referred to in the new subsection 8CJ(6).

Item 174 – Subsection 8CJ(6)

This item adds a reference to ‘of this Act’, which is technical amendment to clarify that the reference to ‘Parts 2 or 2A’ refers to Parts 2 or 2A of the *Telstra Corporation Act 1991*.