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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**ENVIRONMENT AND HERITAGE LEGISLATION AMENDMENT
(APPLICATION OF *CRIMINAL CODE*) BILL 2000**

EXPLANATORY MEMORANDUM

**(Circulated by authority of the Minister for Environment and Heritage,
Senator the Hon Robert Hill)**

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ENVIRONMENT AND HERITAGE LEGISLATION AMENDMENT (APPLICATION OF *CRIMINAL CODE*) BILL 2000

GENERAL OUTLINE

The purpose of this Bill is to make consequential amendments to certain offence provisions in legislation administered by the Department of the Environment and Heritage. These amendments are intended to ensure that when Chapter Two of the *Criminal Code Act 1995* (the *Criminal Code*) is applied to pre-existing portfolio offence provisions, 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 in the ways proposed by this Bill, the *Criminal Code* might have altered the interpretation of existing offence provisions. The *Criminal Code* is contained in the Schedule to the *Criminal Code Act 1995*. Chapter Two of the *Criminal Code* contains the General Principles of Criminal Responsibility. Chapter Two has been applied to new offences since 1 January 1997 and it will apply to all Commonwealth offences from 15 December 2001.

Chapter Two of the *Criminal Code* 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 circumstances of conduct. The fault elements specified in the 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. These default fault elements are intention for a physical element of conduct, and recklessness for a physical element of circumstances 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). In the absence of express reference to the fact that an offence is either a strict or absolute liability offence, after the application of the *Criminal Code*, the offence would not be interpreted in the same way as it would before the application of the Code. In other words a court would be obliged to interpret an offence provision as a fault offence and no longer as a strict liability offence, and would require the proof of fault elements in relation to the physical elements.

Amendments arising from this Bill

This Bill amends the following Acts: the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, the *Antarctic Marine Living Resources Conservation Act 1981*, the *Antarctic Treaty (Environment Protection) Act 1980*, the *Environment Protection (Alligator Rivers Region) Act 1978*, the *Great Barrier Reef Marine Park Act 1975*, the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*, the *Historic Shipwrecks Act 1976*, the *National Environment Protection Measures (Implementation) Act 1998*, and the *Ozone Protection Act 1989*, the *Sea Installations Act 1987*, and the *Wildlife Protection (Regulation of Exports and Imports) Act 1982*.

FINANCIAL IMPACT STATEMENT

The Bill will have no financial impact, and a Regulation Impact Statement is not required.

NOTES ON INDIVIDUAL CLAUSES

Clause 1 – Short title

This clause provides that the short title by which the Act may be cited is the *Environment and Heritage Legislation Amendment (Application of Criminal Code) Act 2000*.

Clause 2 – Commencement

Subclause 2(1) provides that most of the Act commences on the latest of the following days:

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

Subclause (2) provides that if Schedule 1 to the *Aboriginal and Torres Strait Islander Heritage Protection Act 2000* commences before the time applicable under subclause (1), items 1 – 11 of Schedule 1 to this Act do not commence.

Subclause (3) provides that items 28, 29 and 30 of Schedule 1 commence on the latest of the following times: the time applicable under subclause (1), or when subsection 17(4) of the *Antarctic (Environment Protection) Legislation Amendment Act 1992* commences. Subsection 17(4) of that Act commences on a date to be fixed by Proclamation, which may be on or after a day on which Annex V to the Protocol on Environmental Protection to the Antarctic Treaty becomes effective. Annex V relates to protected areas. If the provision has not commenced within 6 months of the Annex becoming effective it will commence on the expiry of 6 months from when Annex V becomes effective.

Clause 3 – Schedule(s)

This clause makes it clear that any Act specified in a Schedule to the Act is amended or repealed as set out in the relevant Schedule. It also provides that Schedules may contain other provisions that have effect according to their terms.

Clause 4 – Application of amendments

Subclause (1) provides that each amendment made by this Act applies to acts and omissions that occur after the amendment commences.

Subclause (2) provides that if an act or omission is alleged to have occurred on two dates, one of which occurs before and one which occurs either on or after the date on which a particular amendment commences, then the act or omission will be alleged to have occurred before the amendment commences.

SCHEDULE 1 – AMENDMENT OF ACTS

Aboriginal and Torres Strait Islander Heritage Protection Act 1984

Item 1 – After section 6

This item inserts a new section 6A which provides that Chapter Two of the *Criminal Code* (other than Part 2.5) applies to all offences against the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. It also inserts a note that says that Chapter Two of the Code sets out the general principles of criminal responsibility. Part 2.5 of the *Criminal Code* is the only Part of Chapter Two that 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 the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* contains section 25 which deals with corporate criminal responsibility Part 2.5 of the *Criminal Code* has not been applied to offences against the Act.

Item 2 – Subsection 7(3)

This item includes the *Criminal Code* as one of the Federal Acts under which a person may be prosecuted and convicted for offences concerning Aboriginal and Torres Strait Islander heritage.

Item 3 – Subparagraph 21Y(1)(b)(i)

This item omits the reference to sections 7 and 7A of the *Crimes Act 1914* in subparagraph 21Y(1)(b)(i) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. Sections 7 and 7A of the Crimes Act, which are concerned with the offences of attempt and inciting or urging the commission of an offence, are repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*. Equivalent provisions in the *Criminal Code* operate in place of sections 7 and 7A. The equivalent provisions (sections 11.1 and 11.4 *Criminal Code*) are referred to in the replacement subparagraph 21Y(1)(b)(ii) which item 4 substitutes for the existing subparagraph.

Item 4 – Subparagraph 21Y(1)(b)(ii)

This item replaces the reference to subsection 86(1) of the *Crimes Act 1914* in subparagraph 21Y(1)(b)(ii) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, with a reference to equivalent provision 11.5 in the *Criminal Code* because the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000* repeals subsection 86(1). The substituted subparagraph 21Y(1)(b)(ii) also inserts references to the *Criminal Code* equivalents to sections 7 and 7A of the Crimes Act (the equivalents being sections 11.1 and 11.4 *Criminal Code*) which formerly appeared in subparagraph 21Y(1)(b)(i).

Item 5 – Subsection 21G(3)

This item replaces subsection 21G(3) with a provision that 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 or damage is a physical element of result of the defendant's conduct to which the default fault element of recklessness will apply.

'Engage in conduct' is defined to mean to do an act, or to omit to perform an act. The maximum penalty under these subsections is \$500 if the person is a natural person and \$2,500 if the person is a body corporate.

Item 6 –Section 21H

This item replaces section 21H with a provision that more accurately identifies the physical elements of conduct and result. "Engage in conduct" is defined to mean to do an act, or to omit to perform an act. The new subsection 21H(1) proscribes the actions of a person whose conduct contravenes the terms of a declaration relating to an Aboriginal place under Part IIA of the Act. This amendment has rephrased the offence to clarify that the contravention of the terms of a declaration is a physical element of result of the defendant's conduct to which the default fault element of recklessness will apply.

The maximum penalty under this subsection is \$10,000 or imprisonment for five years, or both, if the person is a natural person, and \$50,000 if the person is a body corporate.

The new subsection 21H(2) proscribes conduct that contravenes the terms of a declaration under Part IIA of the Act relating to an Aboriginal object. This amendment has rephrased the offence to clarify that the contravention of the terms of a declaration is a physical element of result of the defendant's conduct to which the default fault element of recklessness will apply.

The maximum penalty under this subsection for a natural person is \$5,000 or imprisonment for 2 years, or both; or \$25,000 if the person is a body corporate.

Item 7 – Subsection 21U(1)

This item replaces subsection 21U(1) with a provision that more accurately identifies the physical elements of conduct and result. The new subsection 21U(1) proscribes the actions of a person who does an act and the act causes damage to, the defacing of, or interference with, an Aboriginal object or an Aboriginal place; or the person does an act that is likely to endanger an Aboriginal object or Aboriginal place. This amendment has rephrased the offence to clarify that the act that does, or is likely to cause damage, defacing or interference is a physical element of result of the defendant's conduct to which the default fault element of recklessness will apply.

The maximum penalty under this subsection for a natural person is \$10,000 or imprisonment for 5 years, or both; or \$50,000 if the person is a body corporate

Item 8 – Subsections 22(1) and (2)

This item replaces subsections 21(1) and (2) with provisions that more accurately identify the physical elements of conduct and result. The new subsection 22(1) creates an offence where a person engages in conduct and the conduct contravenes a

provision of a declaration made under Part II in relation to a significant Aboriginal area. This amendment has rephrased the offence to clarify that the contravention of a declaration is a physical element of result of the defendant's conduct to which the default fault element of recklessness will apply.

The maximum penalty under this subsection for a natural person is \$10,000 or imprisonment for 5 years, or both; or \$50,000 if the person is a body corporate.

The new subsection 22(2) creates an offence where a person engages in conduct and the conduct contravenes a provision of a declaration made under Part II in relation to one or more significant Aboriginal objects. The maximum penalty under this subsection for a natural person is \$5,000 or imprisonment for 2 years, or both; or \$25,000 if the person is a body corporate.

Item 9 – At the end of sections 22

This item inserts a new subsection (5) into section 22. It defines "engage in conduct" to mean to do an act, or to omit to perform an act.

Item 10 – Subparagraph 23(1)(b)(i)

This item omits the reference to sections 7 and 7A of the Crimes Act 1914 in subparagraph 23(1)(b)(i) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. Sections 7 and 7A of the Crimes Act, which are concerned with the offences of attempt and inciting or urging the commission of an offence, are repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*. Equivalent provisions in the *Criminal Code* operate in place of sections 7 and 7A. The equivalent provisions (sections 11.1 and 11.4 *Criminal Code*) are referred to in the replacement subparagraph 23(1)(b)(ii) which item 10 substitutes for the existing subparagraph.

Item 11 – Subparagraph 23(1)(b)(ii)

This item replaces the reference to subsection 86(1) of the *Crimes Act 1914* in subparagraph 23(1)(b)(ii) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, with a reference to equivalent provision 11.5 in the *Criminal Code* because the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000* repeals subsection 86(1). The substituted subparagraph 23(1)(b)(ii) also inserts references to the *Criminal Code* equivalents to sections 7 and 7A of the Act (the equivalents being sections 11.1 and 11.4 *Criminal Code*) which formerly appeared in subparagraph 23(1)(b)(i).

Antarctic Marine Living Resources Conservation Act 1981

Item 12– After section 4

This item inserts a new section 4A which provides that Chapter Two of the *Criminal Code* applies to all offences against the *Antarctic Marine Living Resources Conservation Act 1981*. It also inserts a note that says that Chapter Two of the Code sets out the general principles of criminal responsibility.

Item 13 – Before subsection 8(1)

This item inserts a new subsection 8(1A) before subsection 8(1) which 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 item provides that if a person in the Convention area, otherwise than in accordance with a permit, engages in conduct, and the conduct causes the harvesting of marine organisms, the person is guilty of an offence. Harvesting is defined in the Act to include amongst other things, 'catch, capture, kill'.

The maximum penalty for an offender who is a natural person is \$50,000, and for an offender that is a body corporate, \$100,000.

Item 14 – Subsection 8(1)

This item replaces the phrase "harvests, or carries out research with respect to," with the phrase "carries out research with respect to". This is a consequential amendment that was made necessary by the insertion of the new subsection 8(1A) effected by item 13.

Item 15 – Subsection 8(2)

This item is consequential upon item 13, and inserts a reference to the new subsection (1A).

This item also makes the burden of proof in subsection 8(2) an evidential and not a legal burden, by omitting the words "if it is proved that". Policy approval has been obtained for this amendment which will change the burden on the defendant to an evidential burden. The policy adopted in the *Criminal Code* is that defendants should bear an evidential and not a legal burden. This amendment therefore harmonises the Act with the Code.

Item 16 – At the end of subsection 8(2)

This item inserts a note at the end of subsection 8(2), which states that the defendant bears an evidential burden and refers to subsection 13.3(3) of the *Criminal 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 such circumstances. 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 17 – At the end of section 8

This item inserts a new subsection 8(3), which defines the phrase 'engage in conduct' for the purposes of section 8. It is defined to mean either to do an act or to omit to perform an act.

Item 18 – Section 10

This item replaces section 10 with section that more accurately identifies the physical elements of conduct and result, each of which has an attaching fault element. This structure of the offence provision is intended to provide clarity in relation to the scope and effect of each offence and to give consistency as to how criminal offences are to be interpreted by the courts. Subsection (1) provides that a person is guilty of an offence if a condition of a permit is applicable to the person and the person engages in conduct, and the conduct contravenes the condition. The term ‘engage in conduct’ is defined in subsection (2) to mean to do an act or to omit to perform an act. The penalty for this offence is \$5,000 if the offender is a natural person or \$10,000 if the person is a body corporate.

Item 19 – Subsection 16(6)

This item amends subsection 16(6) to delete the term ‘without reasonable excuse’. This defence becomes a new subsection under the next item. This amendment has been made to ensure that the defence would not mistakenly be taken to be one of the elements of the offence.

Item 20 – After subsection 16(6)

This item inserts new subsections 16(6A) and (6B). Section 16 of the *Antarctic Marine Living Resources Conservation Act 1981* provides for powers of inspectors. Until amended, subsection (6) provided that it is an offence not to comply with a requirement of an inspector unless the person has a reasonable excuse. This offence is a strict liability offence and the new subsection 16(6A) which provides that an offence under subsection 6 is a strict liability offence, ensures that subsection 6 will remain a strict liability offence after the application of the *Criminal Code*. The note to subsection 16(6A) refers to section 6.1 of the *Criminal Code*. That section defines "strict liability" to mean that there are no fault elements for any of the physical elements of the offence and says that the defence of mistake of fact under section 9.2 of the Code is available.

The new subsection (6B) provides that subsection (6) does not apply if the person has a reasonable excuse. A new note to the subsection says that the defendant bears an evidential burden, and it refers to subsection 13.3(3) of the *Criminal 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 such circumstances. 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 21 – Subsections 18(1), (2) and (3)

This item is a consequential amendment that replaces a reference to subsection 8(1) with a reference to subsections 8(1A) or (1). This takes account of the amendment effected by item 13.

Antarctic Treaty (Environment Protection) Act 1980

Item 22 – After section 6

This item inserts a new section 6A which provides that Chapter Two of the *Criminal Code* applies to all offences against the *Antarctic Treaty (Environment Protection) Act 1980*. It also inserts a note that says that Chapter Two of the Code sets out the general principles of criminal responsibility.

Item 23 – Subsection 17(7)

This item amends subsection 17(7) to omit the defence 'without reasonable excuse' from the terms of the offence. This defence becomes a new subsection under the next item. This amendment has been made to ensure that the defence would not mistakenly be taken to be part of the elements of the offence.

Item 24 – After subsection 17(7)

This item inserts new subsections 17(7A) and (7B). Section 17 of the *Antarctic Treaty (Environment Protection) Act 1980* provides for powers of inspectors. Until amended, subsection (7) provided that it is an offence not to comply with a requirement of an inspector unless the person has a reasonable excuse. This offence is a strict liability offence and the new subsection 17(7A), which provides that an offence under subsection (7) is a strict liability offence, ensures that subsection 7 will remain a strict liability offence after the application of the Code. The note to subsection 17(7A) refers to section 6.1 of the *Criminal Code*. That section defines "strict liability" to mean that there are no fault elements for any of the physical elements of the offence and says that the defence of mistake of fact under section 9.2 of the Code is available.

The item also inserts a new subsection 17(7B) which provides that subsection (7) does not apply if the person has a reasonable excuse. This item is consequential upon the item which omitted the defence of without reasonable excuse from the offence in subsection 7. A note to the subsection says that the defendant bears an evidential burden, and it refers to subsection 13.3(3) of the *Criminal 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 such circumstances. 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 25 – Before subsection 19(1)

This item inserts a new subsection 19(1A) into the *Antarctic Treaty (Environment Protection) Act 1980*. The subsection makes it an offence to perform an action that results in the death of or injury to, the taking of, or other interference with indigenous fauna, or that results in injury or interference with indigenous flora in the Antarctic. This amendment ensures that there is no doubt as to the content of the physical element of conduct and result, and therefore no doubt as to the wording to which the default fault elements apply. The penalty under this subsection is \$2,000 or imprisonment for 12 months, or both.

Item 26 – Paragraph 19(1)(a)

This item repeals paragraph 19(1)(a). This is a consequential amendment arising out of the restructuring of the offence effected by item 25.

Item 27 – Paragraph 19(1)(b)

This item replaces the phrase "collect, injure or otherwise interfere with", with the phrase "or collect". This is a consequential amendment arising out of the restructuring of the offence effected by item 25.

Item 28 – At the end of paragraph 19(1)(d)

This item add the word "or" at the end of paragraph 19(1)(d). This is a consequential amendment resulting from item 30. This item will commence in accordance with subclause 2(3).

Item 29 – Paragraphs 19(1)(f) and (g)

This item repeals paragraphs 19(1)(f) and 19(1)(g). This is a consequential amendment arising out of the restructuring of the offence effected by item 30. This item will commence in accordance with subclause 2(3).

Item 30 – After subsection 19(1)

This amendment replaces paragraphs 19(1)(f) and (g), which are provisions that have not yet commenced and will only commence after Annex V becomes effective. The replacement 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 that will be supplied by the *Criminal Code*. The new subsection 19(1B) proscribes the actions of a person whose conduct results in damage to or in an historic site; or whose conduct destroys, or causes damage to, or results in the removal of an historic monument. This amendment has rephrased the offence to clarify that the destruction or damage is a physical element of result of the defendant's conduct to which the default fault element of recklessness will apply.

The maximum penalty under these subsections is \$2,000 or imprisonment for 12 months, or both.

This item will commence in accordance with subclause 2(3).

Item 31 – Paragraph 19(2)(e)

This item amends paragraph 19(2)(e) to delete the alternative fault elements of "knowingly or recklessly" which currently appear to apply to the physical element of conduct in the offence. Under the *Criminal Code* the fault elements of knowingly or recklessly can only apply to physical elements of circumstances of conduct, or result of conduct (Division 5 of Part 2.2 Chapter Two of the *Criminal Code*). Upon their repeal the default fault element of intention will apply to the physical element of conduct in the offence and the default fault element of recklessness will apply to physical elements of circumstances in the offence (section 5.6 *Criminal Code*). Section 5.4 of the *Criminal Code* provides that where recklessness is the fault element

for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element. Thus the actions of an accused who either had the requisite knowledge or recklessness will be criminalised.

Item 32 – Subsection 19(3)

This item is a consequential amendment resulting from the amended numbering in section 19. It replaces the phrase "Subsections (1) and (2) do", with the phrase, "This section does", in order to clarify that any or all of the subsections in section 19 may be relevant to the operation of the section.

Item 33 – Section 20

This item repeals section 20 and replaces it with a provision that 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*. Subsection 20(1) provides that a person is guilty of an offence if a condition of a permit applies to them and they engage in conduct that results in the contravention of that condition. Paragraph 20(1)(a) is a circumstance element to which the default element of recklessness applies. Paragraph 20(1)(b) is a conduct element to which the default fault element of intention applies. Paragraph 20(1)(c) is a physical element of result. The new subsection 20(2) defines "engage in conduct" to mean to do an act or to omit to perform an act. This amendment 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 element that will be supplied by the *Criminal Code*. The contravention of a condition of a permit is a physical element of result of the defendant's conduct to which the default element of recklessness will apply.

The maximum penalty under these subsections is \$1,000 or imprisonment for 6 months, or both.

Item 34 – After subsection 21(1)

This item inserts new subsection 21(1A) to ensure that subsection 21(1) remains an offence of strict liability following the commencement of the amendments made by this Bill. The offence under subsection 21(1) is the failure to give notice of activities that have been undertaken in accordance with a permit or management plan to the Minister or an authorised officer. The purpose of giving notice is to enable the monitoring of the fauna, flora and environment as well as provide information that can be used for granting future permits and in relation to the management of the area.

The note to subsection 21(1A) refers to section 6.1 of the *Criminal Code*. That section defines "strict liability" to mean that there are no fault elements for any of the physical elements of the offence and says that the defence of mistake of fact under section 9.2 of the Code is available.

Item 35 – Subsection 21A(2)

This item amends paragraph 21A(2) to delete the alternative fault elements of "knowingly or recklessly" which currently apply to the physical element of conduct in the offence. Under the *Criminal Code* the fault elements of knowingly or recklessly

can only apply to physical elements of circumstances of conduct, or result of conduct (Division 5 of Part 2.2 Chapter Two of the *Criminal Code*). Upon their repeal the default fault element of intention will apply to the physical element of conduct in the offence and the default fault element of recklessness will apply to physical elements of circumstances in the offence (section 5.6 *Criminal Code*). Section 5.4 of the *Criminal Code* provides that where recklessness is the fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element. Thus the actions of an accused who either had the requisite knowledge or recklessness will be criminalised.

Item 36 – Paragraph 21A(3)(b)

This item amends paragraph 21A(3)(b) to delete the alternative fault elements "knowingly or recklessly", for the same reasons specified in item 35.

Item 37 – Subsection 21A(4)

This item amends subsection 21A(4) by omitting the phrase "the person proves". At present the defendant has a legal burden in relation to the defence in subsection (4). Policy approval has been obtained for this amendment, and the associated amendments in items 38 – 9, which will change the burden on the defendant to an evidential burden. The policy adopted in the *Criminal Code* is that defendants should bear an evidential and not a legal burden. This amendment therefore harmonises the Act with the Code.

Item 38 – Paragraphs 21A(4)(a) and (b)

This item omits the word "that" from paragraphs 21A(4)(a) and (b) for grammatical reasons consequential to the amendment made by item 37.

Item 39 – At the end of subsection 21A(4)

This item inserts a note at the end of subsection 21A(4) that provides that the defendant bears an evidential burden in relation to the matters in subsection (4). It also refers to subsection 13.3(3) of the *Criminal 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 such circumstances. 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".

Environment Protection (Alligator Rivers Region) Act 1978

Item 40 – At the end of Part 1

This item inserts a new section 3A into the *Environment Protection (Alligator Rivers Region) Act 1978*. Section 3A provides that chapter two of the *Criminal Code* applies to all offences against the Act. It also inserts a note that says that Chapter Two of the Code sets out the general principles of criminal responsibility.

Item 41 – Subsection 31(2)

This item omits from the terms of the offence in subsection 31(2) the defence "except in the performance of a function or duty under or in connexion with this Act,". 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 42 – After subsection 31(2)

This item, which is consequential upon item 41, inserts a new subsection (2A) in section 31 of the Act. It provides that subsection (2) does not apply to acts done in the performance of a function or duty under or in connection with this Act.

This item also inserts a note to the subsection that 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 such circumstances. 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 43 – At the end of subsection 31(3)

This item inserts a note at the end of subsection 31(3), which 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 such circumstances. 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 44 – Subsection 31(4)

This item omits from the terms of the offence in subsection 31(4) the phrase "except for the purpose of advising the Minister in connexion with this Act,". 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 45 – After subsection 31(4)

This item, which is consequential upon item 44, inserts a new subsection (4A) after subsection 31(4), which provides that subsection (4) does not apply to acts done for the purpose of advising the Minister in connection with the Act.

This item also inserts a note to the subsection, which provides that the defendant bears an evidential burden in relation to this defence. It 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 such circumstances. 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".

Great Barrier Reef Marine Park Act 1975

Item 46 – Subsection 3(4)

This item replaces subsection 3(4) with a new subsection that provides, in effect, that an offence against a provision of the *Great Barrier Reef Marine Park Act 1975*, includes a reference to an offence against section 6 of the *Crimes Act 1914* or section 11.1, 11.4 or 11.5 of the *Criminal Code* that relates to an offence against a provision of the Act. This amendment removes the previous reference to sections 7, 7A and 86(1) of the *Crimes Act 1914* in subsection 3(4).

Sections 7, 7A and 86(1) of the *Crimes Act*, which are concerned with offences of attempt and inducing, urging the commission of an offence, and conspiracy, respectively, are repealed by the *Law and Justice Legislation Amendment (Application of the Criminal Code) Act 2000*. Sections 11.1, 11.4 and 11.5 of the *Criminal Code* deal with attempt, incitement and conspiracy, respectively. These offences are equivalent to those in the *Crimes Act* that have been repealed.

Item 47 – After section 4

This item inserts a new section 4A, which provides that Chapter Two of the *Criminal Code* applies to all offences against the *Great Barrier Reef Marine Park Act 1975*. It also inserts two notes. The first note says that Part 2.5 does not apply to an offence against this Act and refers to subsection 64(8) of the Act, which so provides. Part 2.5 of the *Criminal Code* is the only part of Chapter Two that 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.

This item also inserts a note that says that Chapter Two of the Code sets out the general principles of criminal responsibility.

Item 48 – Section 38C

This item replaces section 38C with a provision that 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 that will be supplied by the *Criminal Code*. This amendment has rephrased the offence to clarify that a person is guilty of an offence if a condition attached to a permission or authority issued under section 38B applies to the person and the person engages in conduct that contravenes the condition. "Engage in conduct" is defined to mean to do an act or omit to perform an act. The maximum penalty attached to this section is 200 penalty units.

This item also inserts a new subsection (2) that provides that the fault element for paragraph (1)(d) is negligence. A note refers to the definition of negligence in section 5.5 of the *Criminal Code*.

Item 49 – Section 38G

This item replaces section 38G with a provision that 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 that will be supplied by the *Criminal Code*. The structure of the offence provision is intended to provide clarity in relation to the scope and effect of each offence and to give consistency as to how criminal offences are to be interpreted by the courts. This amendment has rephrased the offence to clarify that a person is guilty of an offence if a condition attached to a permission or authority referred to in section 38F is applicable to the person, and the person engages in conduct that contravenes the condition. "Engage in conduct" is defined to mean to do an act or omit to perform an act. The maximum penalty attached to this section is 200 penalty units.

This item also inserts a new subsection (2) that provides that the fault element for paragraph (1)(d) is negligence. A note refers to the definition of negligence in section 5.5 of the *Criminal Code*.

Item 50 – Subsection 38J(2)

This item replaces subsection 38J(2) with a provision that 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 that will be supplied by the *Criminal Code*. The structure of the offence provision is intended to provide clarity in relation to the scope and effect of each offence and to give consistency as to how criminal offences are to be interpreted by the court. This amendment has rephrased the offence to clarify that a person is guilty of an offence if a condition attached to a permission referred to in subsection (1) is applicable to the person, and the person engages in conduct that contravenes the condition. "Engage in conduct" is defined to mean to do an act or omit to perform an act. The maximum penalty attached to this section is 200 penalty units.

This item also inserts a new subsection (2A) that provides that the fault element for paragraph (2)(d) is negligence. A note refers to the definition of negligence in section 5.5 of the *Criminal Code*.

Item 51 – Section 39Q

This item deletes the alternative fault elements "intentionally or recklessly" wherever it occurs in section 39Q of the *Great Barrier Reef Marine Park Act 1975*. 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 the alternative fault element of recklessly to the physical element of conduct. The repeal of a specific fault element of recklessly from an offence does not prevent the *Criminal Code* supplying the default fault element of recklessness to a physical element of circumstance, or result, in an offence.

Item 52 – Subsection 45(2)

This item omits from the terms of the offence in subsection 45(2) the defence "without reasonable excuse". This defence becomes a new subsection under the next item. This amendment has been made to ensure that the defence would not mistakenly be taken to be one of the elements of the offence.

Item 53 – After subsection 45(2)

This item inserts a new subsection (2A) in section 45 of the *Great Barrier Reef Marine Park Act 1975*. This amendment makes it clear that an offence under subsection 45(2) is an offence of strict liability. Subsection 45(2) provides that a person who ceases to be an inspector must not fail to return his or her identity card to the Authority as soon as practicable after ceasing to be an inspector. This subsection is likely to have been interpreted as a strict liability offence before this amendment because of the relatively low penalty attached to it (1 penalty unit or \$110), and for the policy reason 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 a person's powers and authority. Therefore, the new subsection 45(2A) should not alter the way that 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; in other words a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require the proof of fault elements in relation to the physical elements.

This item, which is consequential upon item 52, also inserts a new subsection (2B) in section 45 of the *Great Barrier Reef Marine Park Act 1975*. It provides that subsection (2) does not apply if the person has a reasonable excuse. The note to the subsection provides that the defendant bears the evidential burden in relation to the matters in subsection (2B). It also refers to subsection 13.3(3) of the *Criminal 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 such circumstances. 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 54 – Subsection 45A(4)

This item omits from the terms of the offence in subsection 45A(4) the defence "without reasonable excuse". This defence becomes a new subsection under the next item. This amendment has been made to ensure that the defence would not mistakenly be taken to be one of the elements of the offence.

Item 55 – At the end of section 45A

This item, which is consequential upon item 54, inserts a new subsection 45A(5) in the *Great Barrier Reef Marine Park Act 1975*. It provides that subsection (4) does not apply if the person has a reasonable excuse. The note to the subsection provides that the defendant bears the evidential burden in relation to the matters in subsection (4). It

also refers to subsection 13.3(3) of the *Criminal 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 such circumstances. 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 56 – Section 47A

This item omits from the terms of the offence in section 47A the defence "without reasonable excuse". This defence becomes a new subsection under the next item. This amendment has been made to ensure that the defence would not mistakenly be taken to be one of the elements of the offence.

Item 57 – At the end of section 47A

This item, which is consequential upon item 56, inserts a new subsection 47A(2) in the *Great Barrier Reef Marine Park Act 1975*. It provides that subsection (1) does not apply if the person has a reasonable excuse. The note to the subsection provides that the defendant bears the evidential burden in relation to the matters in subsection (4). It also refers to subsection 13.3(3) of the *Criminal 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 such circumstances. 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 58 – Subsection 47B(2)

This item omits from the terms of the offence in subsection 47B(2) the defence "without reasonable excuse". This defence becomes a new subsection under the next item. This amendment has been made to ensure that the defence would not mistakenly be taken to be one of the elements of the offence.

Item 59 – After subsection 47B(2)

This item, which is consequential upon item 58, inserts a new subsection 47B(2A) in the *Great Barrier Reef Marine Park Act 1975*. It provides that subsection (2) does not apply if the person has a reasonable excuse. The note to the subsection provides that the defendant bears the evidential burden in relation to the matters in subsection (2A). It also refers to subsection 13.3(3) of the *Criminal 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 such circumstances. 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 60 – Subsection 48(5)

This item omits from the terms of the offence in subsection 48(5) the defence "without reasonable excuse". This defence becomes a new subsection under the next

item. This amendment has been made to ensure that the defence would not mistakenly be taken to be one of the elements of the offence.

Item 61 – After subsection 48(5)

This item, which is consequential upon item 60, inserts a new subsection 48(5A) in the *Great Barrier Reef Marine Park Act 1975*. It provides that subsection (5) does not apply if the person has a reasonable excuse. The note to the subsection provides that the defendant bears the evidential burden in relation to the matters in subsection (5A). It also refers to subsection 13.3(3) of the *Criminal 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 such circumstances. 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 62 – At the end of section 59B

This item inserts a new subsection 59B(2) in the *Great Barrier Reef Marine Park Act 1975*, which provides that an offence under subsection (1) is an offence of strict liability. The note to the subsection refers to section 6.1 of the *Criminal Code*. That section defines "strict liability" to mean that there are no fault elements for any of the physical elements of the offence and says that the defence of mistake of fact under section 9.2 of the Code is available. Section 59B provides that if a regulated ship navigates without a pilot in the compulsory pilotage area, the master and the owner of the ship are each guilty of an offence punishable on conviction by a fine of not more than 500 penalty units. Although the penalty for an offence of that provision is 500 penalty units, it is considered necessary in order to protect and conserve the World Heritage values of the Great Barrier Reef. Further, as the provision creates natural person vicarious criminal responsibility (which is a variant of strict liability), the new subsection should not alter the way that 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; in other words a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require the proof of fault elements in relation to the physical elements.

Item 63 – At the end of sections 59C and 59D

This item inserts a new subsection (2) in sections 59C and 59D. Each of these subsections provides that an offence under subsection (1) is an offence of strict liability. The note to the subsections refers to section 6.1 of the *Criminal Code*. That section defines "strict liability" to mean that there are no fault elements for any of the physical elements of the offence and says that the defence of mistake of fact under section 9.2 of the Code is available. Section 59C provides that if a regulated ship navigates without a pilot in the compulsory pilotage areas and the ship enters an Australian port under the command of the master who was in command of the ship during the navigation the master and owner of the ship are each guilty of an offence punishable on conviction by a fine of not more than 500 penalty units. Section 59D provides that if a regulated ship navigates without a pilot in the compulsory pilotage area and the ship enters an Australian port under the command of a master other than

the master who was in command of the ship during the navigation the owner of the ship is guilty of an offence punishable on conviction by a fine of not more than 500 penalty units.

Although the penalty for an offence of those provisions is 500 penalty units, it is considered necessary in order to protect and conserve the World Heritage values of the Great Barrier Reef. Further, as the provision creates natural person vicarious criminal responsibility (which is a variant of strict liability), the new subsections should not alter the way that the court would interpret these offences. 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; in other words a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require the proof of fault elements in relation to the physical elements.

Item 64 – At the end of subsection 59H(1)

This item inserts a new note at the end of subsection 59H(1). It provides that the defendant bears a legal burden in relation to the matter in subsection (1). It also refers to section 13.4 of the *Criminal Code*, which is concerned with the legal burden of proof.

Item 65 – Subsection 59H(2)

This item amends subsection 59H(2) with a provision that more accurately reflects the provisions of the *Criminal Code*. It removes the references to "aid, abet, counsel or procure" as such acts are dealt with in section 2.4 of the *Criminal Code*. This item also inserts a note at the end of the subsection, which provides that the defendant bears a legal burden in relation to the matter in subsection (2). It also refers to section 13.4 of the *Criminal Code*, which is concerned with the legal burden of proof.

Item 66 – Subsection 59H(3)

This item repeals subsection 59H(3) of the *Great Barrier Reef Marine Park Act 1975*. This ensures consistency between the *Criminal Code* and the operation of section 59H, as section 13.5 of the *Criminal Code* provides that a legal burden of proof on the defendant must be discharged on the balance of probabilities.

Item 67 – Subsection 59L(7)

This item omits from the terms of the offence in subsection 59L(7) the defence of "without reasonable excuse". This defence becomes a new subsection in the next item. This amendment has been made to ensure that the defence would not mistakenly be taken to be one of the elements of the offence.

Item 68 – At the end of section 59L

This item, which is consequential upon item 67, inserts a new subsection 59L(8) in the *Great Barrier Reef Marine Park Act 1975*. It provides that subsection (7) does not apply if the person has a reasonable excuse. The note to the subsection provides that the defendant bears the evidential burden in relation to the matters in subsection (7). It also refers to subsection 13.3(3) of the *Criminal 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 such circumstances. 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 69 – Paragraph 61B(7)(a)

This item replaces paragraph 61B(7)(a) and its references to sections 6, 7A and 86(1) of the *Crimes Act 1914*. Sections 7A and 86 of the Crimes Act, which are concerned with inciting or urging the commission of an offence and conspiracy, will be repealed by the *Law and Justice Legislation Amendment (Application of the Criminal Code) Act 2000*. The new subsection 61B(7)(a) refers to section 6 of the Crimes Act, which has not been repealed by the *Law and Justice Legislation Amendment (Application of the Criminal Code) Act 2000*. Their equivalent provisions in the *Criminal Code* replace sections 7A and 86 of the Crimes Act 1914: sections 11.4 (incitement) and 11.5(conspiracy).

Item 70 – Subsection 61B(8)

This item replaces the reference to section 5 of the *Crimes Act 1914* in subsection 61B(8) of the *Great Barrier Reef Marine Park Act 1975*. Section 5 of the Crimes Act, which is concerned with aiding and abetting, is repealed by the *Law and Justice Legislation Amendment (Application of the Criminal Code) Act 2000*. A reference to the equivalent provision in the *Criminal Code*, section 11.2, is included in subsection 61B(8).

Item 71 – Paragraph 61B(8)(b)

This item is consequential upon item 70 which replaced the reference to section 5 *Crimes Act 1914* with a reference to section 11.2 *Criminal Code*. The item removes reference in the subsection to the phrases "knowingly concerned in" and "party to". These phrases have been removed, as they are not contained within section 11.2. They do not appear in section 11.2 because they do not add anything to the wording that does appear in section 11.2. Their removal from subsection 61B(8)(b) should ensure consistency of interpretation between section 11.2 and subsection 61B(8)(2) of the Act.

Item 72 – At the end of section 62

This item inserts a new note at the end of section 62. The note provides that the prosecutor cannot make an averment in prosecuting for an offence that is directly punishable by imprisonment. It also refers to section 13.6 of the *Criminal Code*, which is the section in the *Criminal Code* that prevents averments in prosecutions for such offences. Paragraph 13.6(a) also prohibits averments in relation to any fault element in an offence. The note does not need to refer to this aspect of section 13.6 because section 62 already complies with that aspect since it only relates to physical elements of an offence.

Hazardous Waste (Regulation of Exports and Imports) Act 1989

Item 73 – Paragraph 8(a)

This amendment omits the references to sections 7 and 7A, and subsection 86(1) of the *Crimes Act 1914* in paragraph 8(a) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*. The *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000* repeals these sections of the Crimes Act. Reference to the equivalent *Criminal Code* sections that replace the omitted Crimes Act sections is inserted by item 74.

Item 74 – Paragraph 8(a)

This item is consequential upon the repeal by item 73 of the references in paragraph 8(a) to sections 7, 7A and 86(1) Crimes Act and inserts into paragraph 8(a) of the Act a reference to sections 11.1, 11.4 and 11.5 of the *Criminal Code*. These sections, which deal with attempt, incitement, and conspiracy respectively, will fulfil the functions of the Crimes Act sections 7, 7A and 86(1) that have been repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*.

Item 75 – Paragraph 8(b)

This item omits the references in paragraph 8(b) to sections 7, 7A and 86(1) Crimes Act. The *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000* has repealed these sections. Reference to the equivalent *Criminal Code* sections which replace the omitted Crimes Act sections, is inserted by item 76.

Item 76 – Paragraph 8(b)

This item inserts into paragraph 8(b) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* a reference to sections 11.1, 11.4 and 11.5 of the *Criminal Code*. These sections, which deal with attempt, incitement, and conspiracy respectively, will fulfil the functions of the Crimes Act sections 7, 7A and 86(1) that have been repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*.

Item 77 – After section 10

This item inserts a new section 10A into the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*. It provides that Chapter Two (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 Two of the Code sets out the general principles of criminal responsibility. Part 2.5 of the *Criminal Code* is the only Part of Chapter Two that 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 the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* contains section 59 which deals with corporate criminal responsibility Part 2.5 of the *Criminal Code* has not been applied to offences against the Act.

Item 78 – Subsection 39(4)

This item replaces the fault element "knowingly" with "intentionally" in subsection 39(4) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*, to make the provision consistent with the principles of the *Criminal Code*. This amendment is necessary because following application of the *Criminal Code*, it will not be possible to apply a fault element of "knowledge" or "knowingly" to a physical element consisting of conduct: see Part 2.2, Division 5 of the *Criminal Code* generally. The fault element of knowledge can only be applied to physical elements of circumstance or result. Accordingly, such provisions are amended to delete the fault element "knowingly".

This item also inserts a note that provides that the heading to subsection 39(4) is amended by replacing the fault element "knowledge" with "intention".

Item 79 – Paragraph 39(6)(a)

This item replaces the fault element "knowingly" with "intentionally" in paragraph 39(6)(a) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*, for the same reasons outlined in item 78.

This item also inserts a note that provides that the heading to subsection 39(6) is amended by replacing the fault element "knowledge" with "intention".

Item 80 – Subsection 40(3)

This item replaces the fault element "knowingly" with "intentionally" in subsection 40(3) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*, for the same reasons outlined in item 78.

This item also inserts a note that provides that the heading to subsection 40(3) is amended by replacing the fault element "knowledge" with "intention".

Item 81 – Paragraph 40(5)(a)

This item replaces the fault element "knowingly" with "intentionally" in paragraph 40(5)(a) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*, for the same reasons outlined in item 78.

This item also inserts a note that provides that the heading to subsection 40(5) is amended by replacing the fault element "knowledge" with "intention".

Item 82 – Subsection 40A(3)

This item replaces the fault element "knowingly" with "intentionally" in paragraph 40(5)(a) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*, for the same reasons outlined in item 78.

This item also inserts a note that provides that the heading to subsection 40A(3) is amended by replacing the fault element "knowledge" with "intention".

Item 83 – Paragraph 40A(5)(a)

This item replaces the fault element "knowingly" with "intentionally" in paragraph 40A(5)(a) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*, for the same reasons outlined in item 78.

This item also inserts a note that provides that the heading to subsection 40(5) is amended by replacing the fault element "knowledge" with "intention".

Item 84 – Subsection 41A(2)

This item replaces the fault element "knowingly" with "intentionally" in subsection 41(A)(2) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*, to make the provision consistent with the principles of the *Criminal Code*. This amendment is necessary because following application of the *Criminal Code*, it will not be possible to apply a fault element of "knowledge" or "knowingly" to a physical element consisting of conduct: see Part 2.2, Division 5 of the *Criminal Code* generally. The fault element of knowledge can only be applied to physical elements of circumstance or result. Accordingly, such provisions are amended to delete the fault element "knowingly", as in its present operation it will have no effect following application of the *Criminal Code*.

Item 85 – At the end of section 43

This item inserts a new subsection (4) in section 43 of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* that provides that an offence under subsection (3) is an offence of strict liability. Subsection 43(3) provides that a person who stops being an inspector must, as soon as practicable, return his or her identity card to the Minister. This subsection is likely to have been interpreted as a strict liability offence before this amendment because of the relatively low penalty attached to it (up to a \$100 fine), and for the policy reason 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 a person's powers and authority. Therefore the new note in this section should not alter the way that a court would interpret this offence.

This item also inserts a new note in the section that refers to the definition "strict liability" in subsection 6.1(1) of the *Criminal Code*. That section defines "strict liability" to mean that there are no fault elements for any of the physical elements of the offence and says that the defence of mistake of fact under section 9.2 of the Code is available.

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; in other words a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require the proof of fault elements in relation to the physical elements.

Item 86 – Subsection 45(5)

This item omits from the terms of the offence in subsection 45(5) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* the defence ", without reasonable excuse,". This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence. The defence of having a reasonable excuse is addressed in the next item.

Item 87 – After subsection 45(5)

This item, which is consequential upon item 86, inserts after subsection 45(5) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* a new subsection (5A), which provides that subsection (5) does not apply if the person has a reasonable excuse. It also inserts a new note to the section, which 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 *Criminal 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 such circumstances. 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 88 – Subsection 48(3)

This item omits from the terms of the offence in subsection 48(3) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* the defence ", without reasonable excuse,". This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence. The defence of having a reasonable excuse is addressed in the next item.

Item 89 – After subsection 48(3)

This item, which is consequential upon item 88, inserts after subsection 48(3) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* a new subsection (3A) which provides that subsection 3 does not apply if the person has a reasonable excuse. It also inserts a new note to the section, which 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 *Criminal 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 such circumstances. 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 90 – Subsection 52(3)

This item omits from the terms of the offence in subsection 52(3) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* the defence ", without reasonable excuse,". This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence. The defence of having a reasonable excuse is addressed in the next item

Item 91 – At the end of section 52

This item, which is consequential upon item 90, inserts at the end of section 52 of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* a new subsection (4), which provides that subsection (3) does not apply if the person has a reasonable excuse. It also inserts a new note to the section, which 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 *Criminal 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 such circumstances. 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 92 – Subsection 53(2)

This item omits from the terms of the offence in subsection 53(2) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* the defence ", without reasonable excuse," This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence. The defence of having a reasonable excuse is addressed in the next item

Item 93 – At the end of section 53

This item, which is consequential upon item 92, inserts at the end of section 53 of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* a new subsection (3), which provides that subsection (2) does not apply if the person has a reasonable excuse. It also inserts a new note to the section, which 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 *Criminal 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 such circumstances. 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 94 – Section 54

This item omits from the terms of the offence in subsection 54 of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* the defence ", without reasonable excuse," This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence. The defence of having a reasonable excuse is addressed in the next item

Item 95 – At the end of section 54

This item, which is consequential upon item 94, inserts at the end of section 54 of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* a new subsection (2), which provides that subsection (1) does not apply if the person has a reasonable excuse. It also inserts a new note to the section, which 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 *Criminal 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 such circumstances. 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".

Historic Shipwrecks Act 1976

Item 96 – Subsection 3(1) (paragraphs (b) and (c) of the definition of *offence against this Act*)

This item repeals paragraphs (b) and (c) of subsection 3(1) of the *Historic Shipwrecks Act 1976*. Those paragraphs define "offence against this Act" to include (b) an offence against this Act that is deemed to have been committed by virtue of section 5 of the *Crimes Act 1914*; and (c) an offence against section 7 or 7A of the *Crimes Act 1914*. The *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000* repeals sections 5, 7 and 7A. The replacement paragraph (b) refers to section 11.2 of the *Criminal Code* (complicity and common purpose). The replacement paragraph (c) refers to sections 11.1 (attempt) and 11.4 (incitement) of the *Criminal Code*.

Item 97 – At the end of Part 1

This item inserts a new section 4AA into the *Historic Shipwrecks Act 1976*. It provides that Chapter Two of the *Criminal Code* applies to all offences against the Act. It also inserts a note that says that Chapter Two of the Code sets out the general principles of criminal responsibility.

Item 98 – Subsection 13(1)

This item replaces subsection 13(1) with a provision that more accurately identifies the physical elements of conduct, circumstance 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*. It inserts new subsections that provide that a person contravenes this section if: they engage in conduct; and the conduct destroys or causes damage to a historic shipwreck or historic relic; or causes interference with a historic shipwreck or historic relic; or causes the disposal of a historic shipwreck or historic relic; or causes a historic shipwreck or historic relic to be removed from Australia (including State waters), from Australian waters or from waters above the continental shelf of Australia. This amendment has rephrased the offence to clarify that the destruction or damage is a physical element of result of the defendant's conduct to which the default fault element of recklessness will apply. In the new subsection (1B) "engage in conduct" is defined to mean to do an act, or to omit to perform an act.

This item also inserts a new subsection 98(1A), which provides that subsection (1), does not apply if the conduct engaged in is in accordance with a permit. This subsection includes a note 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 *Criminal*

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 such circumstances. 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 99 – Subsection 15(5)

This item replaces subsection 15(5) of the *Historic Shipwrecks Act 1976* with a provision that more accurately identifies the physical elements of conduct, circumstance 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*. It inserts a new subsection that provides that a person is guilty of an offence if a permit has been granted to the person or is otherwise applicable to the person, and the person engages in conduct that contravenes a condition imposed in respect of the permit. This amendment has rephrased the offence to clarify that the contravention of the permit condition is a physical element of result of the defendant's conduct to which the default fault element of recklessness will apply. In the new subsection (5A) "engage in conduct" is defined to mean to do an act, or to omit to perform an act.

This item also inserts a new subsection (5A) in the Act, which defines "engage in conduct" to mean to do an act, or to omit to perform an act. The maximum penalty under this subsection is \$2,000 or imprisonment for 2 years, or both. These amendments are intended to more accurately identify the physical elements of conduct, circumstance and result, each of which has an attaching fault element. This structure of the offence provision is intended to provide clarity in relation to the scope and effect of each offence and to give consistency as to how criminal offences are to be interpreted by the courts.

Item 100 – Paragraph 23(5)(a)

This item omits from the terms of the offence in paragraph 23(5)(a) of the *Historic Shipwrecks Act 1976* the defence ", without reasonable excuse," This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence. The defence of having a reasonable excuse is addressed in the next item.

Item 101 – After subsection 23(5)

This item, which is consequential upon item **, inserts after subsection 23(5) a new subsection (5A), which provides that paragraph (7)(a) does not apply if the person has a reasonable excuse. It also inserts a note that 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 *Criminal 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 such circumstances. 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 102 – Paragraph 23(7)(a)

This item omits from the terms of the offence in paragraph 23(7)(a) of the *Historic Shipwrecks Act 1976* the defence "without reasonable excuse," This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence. The defence of having a reasonable excuse is addressed in the next item.

Item 103 – After subsection 23(7)

This item, which is consequential upon item **, inserts after subsection 23(7) a new subsection (7A), which provides that paragraph (7)(a) does not apply if the person has a reasonable excuse. It also inserts a note that 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 *Criminal 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 such circumstances. 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".

National Environment Protection Measures (Implementation) Act 1998

Item 104 – After section 6

This item inserts a new section 6A after section 6 of the *National Environment Protection Measures (Implementation) Act 1998*. It provides that Chapter Two of the *Criminal Code* applies to all offences against the Act. It also inserts a note that says that Chapter Two of the Code sets out the general principles of criminal responsibility.

Item 105 – Subsection 29(2)

This item repeals subsection 29(2) of the *National Environment Protection Measures (Implementation) Act 1998*. That subsection is similar to the proposed general false or misleading offence provisions which Schedule 1 of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* inserts into the *Criminal Code* as new Part 7.4].

Ozone Protection Act 1989

The offence provisions in the Act were designed to ensure the integrity of the licensing system established to control the manufacture, import and export of certain ozone depleting substances. There are only a small number of industries that still use Ozone Depleting Substances (ODS). These industries and their industry sector consultative bodies have been involved in comprehensive consultation to ensure that compliance with the phase-out timetable, though onerous, is applied fairly to all participants. Breaches of the licensing provisions of the OPA undermine the controls

established to phase-out ODS and to replace them with more benign substances. Any breaches of the import controls tend to disadvantage those sectors of the industry that are cooperating with the phase out. Many of the amendments to this Act are intended to ensure that the offence provisions in the Act continue to operate as "strict liability" offences.

Item 106 – At the end of Part 1

This item inserts a new section 6A, which provides that Chapter Two of the *Criminal Code* (other than Part 2.5) applies to all offences against the *Ozone Protection Act 1989*. It also inserts a note that says that Chapter Two of the Code sets out the general principles of criminal responsibility. Part 2.5 of the *Criminal Code* is the only Part of Chapter Two that 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 the *Ozone Protection Act 1989* contains section 65 which deals with corporate criminal responsibility Part 2.5 of the *Criminal Code* has not been applied to offences against the Act.

Item 107 – Subsection 13(6) (penalty)

This item repeals the penalty in subsection 13(6) of the *Ozone Protection Act 1989*. The penalty provision is re-inserted by item 108.

Item 108 – At the end of section 13

This item inserts at the end of section 13 two new subsections. Subsection (7) provides that a person who contravenes section 13 is guilty of an offence punishable on conviction by a fine not exceeding 500 penalty units.

The new subsection (8) provides that an offence under section 13 is an offence of strict liability. A note to the subsection provides refers to section 6.1 of the *Criminal Code*. That section defines "strict liability" to mean that there are no fault elements for any of the physical elements of the offence and says that the defence of mistake of fact under section 9.2 of the Code is available. 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; in other words a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require the proof of fault elements in relation to the physical elements.

Item 109 – Subsection 18(7)

This item omits from the terms of the offence in subsection 18(7)(a) of the *Ozone Protection Act 1989* the defence "without reasonable excuse," This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence. The defence of having a reasonable excuse is addressed in the next item.

Item 110 – After subsection 18(7)

This item inserts after subsection 18(7) a new subsection (7A), which provides that the offence under subsection (7) is an offence of strict liability. A note to the subsection provides refers to section 6.1 of the *Criminal Code*. That section defines

"strict liability" to mean that there are no fault elements for any of the physical elements of the offence and says that the defence of mistake of fact under section 9.2 of the Code is available. 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; in other words a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require the proof of fault elements in relation to the physical elements.

This item also inserts a new subsection (7B) that provides that subsection (7) does not apply if the person has a reasonable excuse. This amendment is consequential upon item 109. It also inserts a note that 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 *Criminal 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 such circumstances. 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".

Items 111 – 115 After subsections 38(2), 44(1), 44(5), 45(1), 45(3A)

These items insert new subsections 38(2A), 44(1A), 44(5A), 45(1A) and 45(3AA) that provide that an offence under the section is an offence of strict liability. The note to these subsections refers to section 6.1 of the *Criminal Code*. That section defines "strict liability" to mean that there are no fault elements for any of the physical elements of the offence and says that the defence of mistake of fact under section 9.2 of the Code is available. If these amendments were not made, then after the application of the *Criminal Code*, the offences would no longer be interpreted in the same way as they would currently be interpreted. A court would be obliged to interpret these offences as fault offences and no longer as strict liability offences and would require the proof of fault elements in relation to the physical elements of the offences.

Item 116 – Subsection 46(2)

This item omits from the terms of the offence in subsection 46(2) of the *Ozone Protection Act 1989* the defence ", without reasonable excuse," This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence. The defence of having a reasonable excuse is addressed in the next item.

Item 117 – After subsection 46(2)

This item inserts after subsection 46(2) of the *Ozone Protection Act 1989* a new subsection (2A), which provides that an offence under subsection (2) is an offence of strict liability. The note to the subsection refers to section 6.1 of the *Criminal Code*. That section defines "strict liability" to mean that there are no fault elements for any of the physical elements of the offence and says that the defence of mistake of fact under section 9.2 of the Code is available.

This item also inserts a new subsection (2B) that provides that subsection (2) does not apply if the person has a reasonable excuse. This amendment is consequential upon item 116. It also inserts a note that provides that the defendant bears an evidential burden in relation to the matter in subsection (2B). It also refers to subsection 13.3(3) of the *Criminal 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 such circumstances. 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 118 – At the end of section 50

This item inserts a new subsection 50(4) that provides that an offence under subsection (3) is an offence of strict liability. The note to the subsection refers to section 6.1 of the *Criminal Code*. That section defines "strict liability" to mean that there are no fault elements for any of the physical elements of the offence and says that the defence of mistake of fact under section 9.2 of the Code is available. That section defines "strict liability" to mean that there are no fault elements for any of the physical elements of the offence and says that the defence of mistake of fact under section 9.2 of the Code is available. 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; in other words a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require the proof of fault elements in relation to the physical elements.

Item 119 – Subsection 60(1)

This item replaces subsection 60(1) in the *Ozone Protection Act 1989* with a provision more accurately identifies the physical elements of conduct, circumstance 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*. It inserts new subsection 60(1) that provide that a person is guilty of an offence if the person engages in conduct; and the conduct causes goods to be moved, altered or interfered with; and the goods are the subject of a notice under subsection 59(2). The maximum penalty attached to this offence provision is imprisonment for 2 years. "Engage in conduct" is defined in the new subsection (1B) inserted by this item, to mean to do an act, or to omit to perform an act. This structure of the offence provision is intended to provide clarity in relation to the scope and effect of each offence and to give consistency as to how criminal offences are to be interpreted by the courts.

This items also inserts a new subsection (1A) that provides that subsection (1) does not apply if the conduct engaged is in accordance with a direction given to the person by the Minister. This item also inserts a note that 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 *Criminal 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 such circumstances. 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".

Items 120 – 122 – Subsections 62(1), 62(2), 62(3) and 62(4)

These items delete the alternative fault elements "knowingly or recklessly" from subsections 62(1), 62(2), 62(3) and (4) of the *Ozone Protection Act 1989* to make the provisions consistent with the principles of the *Criminal Code*. These amendments are necessary because following the application of the *Criminal Code*, it will not be possible to apply a fault element of "knowledge" or "knowingly" to a physical element consisting of conduct: see Part 2.2, Division 5 of the *Criminal Code* generally. The fault element of knowledge can only be applied to physical elements of circumstance or result. Accordingly, these provisions are amended to delete the alternative fault elements "knowingly or recklessly" as they will have no effect following the application of the *Criminal Code*.

Item 123 – At the end of Section 62

This item adds at the end of section 62 a new subsection (5), which provides that the alternative fault elements in relation to the making of a statement that is false or misleading in a material particular in the circumstances referred to in paragraphs (1)(a), (2)(a) or subsections (3) or (4) of section 62, are knowledge and recklessness. Paragraph (b) of the new subsection 62(5) provides that the alternative fault elements for the circumstance that the document mentioned in paragraph (1)(b) or (2)(b) contains information that is false or misleading in a material particular, are knowledge and recklessness. Under the *Criminal Code*, a person has knowledge of a circumstance if he or she is aware that it exists or will exist in the ordinary course of events (Section 5.3). A person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist and having regard to the circumstances known to him or her, it is unjustifiable to take the risk. This structure of the offence provision is intended to provide clarity in relation to the scope and effect of each offence and to give consistency as to how criminal offences are to be interpreted by the courts.

Item 124 – Section 63

This item omits the defence ", without reasonable excuse". This defence is reinserted by item 125.

This item also replaces the fault element "wilfully" with "intentionally". Under the *Criminal Code* a person has intention with respect to conduct if he or she means to engage in that conduct (section 5.2). This is equivalent to the fault element "wilfully". This amendment is intended to ensure that the interpretation of section 63 is not changed when the *Criminal Code* is applied to it.

Item 125 – At the end of section 63

This item, which is consequential upon item 124, inserts a new subsection 63(2), which provides that subsection (1) does not apply if the person has a reasonable excuse. This item also inserts a note that 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 *Criminal 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 such circumstances. 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 126 – Subsection 64(1)

This item omits from the terms of the offence in subsection 64(1) the defence ", without reasonable excuse," This defence becomes a new subsection under the next item. This amendment has been made to ensure that the defence would not mistakenly be taken to be one of the elements of the offence.

Item 127 – After subsection 64(1)

This item, which is consequential upon item 126, inserts a new subsection (1A) after subsection 64(1). It provides that subsection (1) does not apply if the 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 *Criminal 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 such circumstances. 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 128 – Subsections 64(2) and (9)

This item replaces the reference to subsection (1) in subsections 64(2) and 64(9) with a reference to subsection (1A)". This amendment is consequential upon item 127.

Sea Installations Act 1987

Item 129 – At the end of Part 1

This item inserts a new section 13A, which provides that Chapter Two of the *Criminal Code* (other than Part 2.5) applies to all offences against the *Sea Installations Act 1987*. Part 2.5 of the *Criminal Code* is the only Part of Chapter Two that 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 the *Sea Installations Act 1987* contains provisions which deal with corporate criminal responsibility Part 2.5 of the *Criminal Code* has not been applied to offences against the Act.

Item 130 – After subsection 14(1)

This item inserts a new subsection 14(1A), which provides that an offence under subsection (1) is an offence of strict liability. Section 14 prohibits the installation of a sea installation otherwise than in accordance with a permit and both the owner and the occupier of the installation are potentially liable for prosecution under the section, subject to section 44. The existence and nature of the defence in subsection 14(2) is a strong indication that Parliament intended this offence to be one of strict liability. In

addition, the offences are of regulatory type nature and proscribe certain conduct that is not in accordance with a permit or notice under the Act, which is another indication that strict liability was intended. 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; in other words a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require the proof of fault elements in relation to the physical elements.

The note to subsection (1A) refers to section 6.1 of the *Criminal Code*. That section defines "strict liability" to mean that there are no fault elements for any of the physical elements of the offence and says that the defence of mistake of fact under section 9.2 of the Code is available.

Item 131 – 2 At the end of sections 15 and 16

These items insert new subsections at the end of sections 15 and 16, which provide that offences under subsection 15(1) and section 16(1) are offences of strict liability. Section 15 provides that the owner or operator of a sea installation installed in an adjacent area shall not use the installation, or allow the installation to be used, for any environment related activity otherwise than in accordance with a permit. Both the owner and the occupier of the installation are potentially liable for prosecution under the section, subject to sections 44 and 78. Section 16 provides that the owner or operator of a sea installation installed in an adjacent area shall not carry out environment related work, or allow such work to be carried out, on the installation otherwise than in accordance with a permit. Both the owner and the occupier of the installation are potentially liable for prosecution under the section, subject to sections 44 and 78.

If these amendments were not made then after the application of the *Criminal Code*, the offences would no longer be interpreted in the same way as they could currently be interpreted; in other words a court would be obliged to interpret them as a fault offence and no longer as strict liability offences and would require the proof of fault elements in relation to the physical elements.

The note to both subsections (2) refers to section 6.1 of the *Criminal Code*. That section defines "strict liability" to mean that there are no fault elements for any of the physical elements of the offence and says that the defence of mistake of fact under section 9.2 of the Code is available.

Item 133 – After subsection 51(5)

This item inserts a new subsection 51(5A) that provides that strict liability applies to paragraphs (1)(b) and (c), (2)(b) and (c) and (3)(b) and (c). Section 51 prohibits direct journeys between sea installations and external places, and various persons are identified as potentially liable to be found guilty of an offence against the section. As the provision creates natural person vicarious criminal responsibility (which is a variant of strict liability), the new subsection should not alter the way that the 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; in other words a court would be obliged

to interpret it as a fault offence and no longer as a strict liability offence and would require the proof of fault elements in relation to the physical elements.

The note to subsection (5A) refers to section 6.1 of the *Criminal Code*. That section defines "strict liability" to mean that there are no fault elements for any of the physical elements of the offence and says that the defence of mistake of fact under section 9.2 of the Code is available.

Item 134 – Subparagraph 56(2)(a)(ii)

This item omits the reference to sections 5 and 7 of the *Crimes Act 1914*, and inserts the words "against section 11.1 or 11.2 of the *Criminal Code*" in subparagraph 56(2)(a)(ii) of the *Sea Installations Act 1987*. Section 5 of the Crimes Act is concerned with aiding, abetting, counselling or procuring an offence. Section 7 is concerned with the crime of attempt. The *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000* repeals these sections. The equivalent replacement sections of the *Criminal Code* that are inserted by this item are section 11.2, which deals with complicity and common purpose, and section 11.1, which deals with attempt.

Item 135 – After subsection 57(3)

This item inserts a new subsection 57(3A), which provides that an offence under subsection (3) is an offence of strict liability. Section 57 prohibits specified vessels from entering or remaining in a specified safety zone surrounding the installation without the consent in writing of the Minister. Both the owner and the person in charge of the offending vessel are potentially liable for prosecution under the section. As the provision creates natural person vicarious criminal responsibility (which is a variant of strict liability), the new subsection should not alter the way that the 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; in other words a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require the proof of fault elements in relation to the physical elements.

The note to subsection (3A) refers to section 6.1 of the *Criminal Code*. That section defines "strict liability" to mean that there are no fault elements for any of the physical elements of the offence and says that the defence of mistake of fact under section 9.2 of the Code is available.

Item 136 – Section 58

This item replaces subsection 58 with a provision that more accurately identifies the physical elements of conduct, circumstance, and result, each of which has an attaching fault element. The new subsection provides that a person is guilty of an offence if they hold a permit, and the person engages in conduct that contravenes a condition to which the permit is subject. "Engage in conduct" is defined to mean to do an act, or to omit to perform an act. The maximum penalty under section 58 is \$50,000 in the case of a natural person or \$250,000 in the case of a body corporate.

Item 137 – At the end of section 61

This item inserts a new subsection 61(3), which provides that an offence under subsection (2) is an offence of strict liability. Subsection 61(2) provides that where a person in possession of an identity card issued to the person ceases to be an inspector, the person shall forthwith return the identity card to the Minister. The penalty under the subsection is \$100.

This subsection is likely to have been interpreted as a strict liability offence before this amendment because of the relatively low penalty attached to it, and for the policy reason 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 a person's powers and authority. 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; in other words a court would be obliged to interpret it as a fault offence and no longer as a strict liability offence and would require the proof of fault elements in relation to the physical elements.

Item 138 – Subsection 62(14)

This item omits from subsection 62(14) of the *Sea Installations Act 1987*, the references to sections 5, 7 and subsection 89(1) of the *Crimes Act 1914*, and inserts the words "against section 11.1, 11.2 or 11.5 of the *Criminal Code*" in. Section 5 of the Crimes Act is concerned with aiding, abetting, counselling or procuring an offence. Section 7 is concerned with the crime of attempt. Section 89(1) was a drafting error, as it should have referred to section 86(1), which deals with conspiracy. These sections are repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*. Section 11.2 of the *Criminal Code* deals with complicity and common purpose; section 11.1 with attempt; and section 11.5 with conspiracy.

Item 139 – Subsection 63(2)

This item omits from the terms of the offence in subsection 63(2) the defence "without reasonable excuse". This defence becomes a new subsection under the next item. This amendment has been made to ensure that the defence would not mistakenly be taken to be one of the elements of the offence.

Item 140 – After subsection 63(2)

This item, which is consequential upon item 139, inserts a new subsection 63(2A) which provides that subsection (2) does not apply if the person proves that the person has a reasonable excuse. The note to the subsection specifies that the burden of proof in relation to the matters in subsection (2A) is an evidential burden, and refers to subsection 13.3(3) of the *Criminal 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 such circumstances. 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 141 – Subsection 63(3)

This item replaces the reference to "subsection 64(2)" with a reference to "Division 137 of the *Criminal Code*". This amendment is necessary because section 64 is repealed by item 142.

Item 142 – Section 64

This item repeals section 64, which deals with offences concerned with the making of false statement. The making of a false statement continues to be an offence by virtue of the operation of Division 137 of the *Criminal Code*.

Item 143 – Subsection 65(1)

This item is consequential upon item 142. It omits the reference to subsection 64(1).

Item 144 – Subparagraph 65(4)(b)(ii)

This item is consequential upon item 145. It deletes the "or" at the end of paragraph 65(4)(b)(ii) and inserts a new full stop after "\$25,000" because paragraph 65(4)(c) is repealed by the next item.

Item 145 – Paragraph 65(4)(c)

This item is consequential upon item 142. It repeals paragraph 65(4)(c), which refers to the penalty attached to section 64, which was repealed by item 142.

Wildlife Protection (Regulation of Exports and Imports) Act 1982

Item 146 – Subsection 4(1) (definition of offence against this Act)

This item repeals the definition of "offence against this Act" in subsection 4(1) of the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* and replaces it with a new definition. The amendment has the effect of omitting the references to sections 7, 7A and 86(1) of the *Crimes Act 1914* in the former definition. Sections 7, 7A and 86(1) of the *Crimes Act*, which are concerned with ancillary offences of attempt and inducing, urging the commission of an offence, and conspiracy, respectively, are repealed by the *Law and Justice Legislation Amendment (Application of the Criminal Code) Act 2000*, because Part 2.4 of the *Criminal Code* provides ancillary offence provisions that will apply to all Commonwealth offences after application of the *Criminal Code*. Sections 11.1, 11.4 and 11.5 of the *Criminal Code* deal with attempt, incitement and conspiracy, respectively. These offences are equivalent to those in the *Crimes Act* that have been repealed.

Item 147 – After section 7

This item inserts a new section 7A into the *Wildlife Protection (Regulation of Exports and Imports) Act 1982*, which provides that Chapter Two of the *Criminal Code* applies to all offences against the Act. It also inserts a note that says that Chapter Two of the Code sets out the general principles of criminal responsibility.

Item 148 – Section 21

This item omits the defence ", otherwise than in accordance with a permit or authority..." from the terms of the offence in section 21 to avoid the possibility of it being mistakenly interpreted as part of the elements of the offence. The defence of doing something in accordance with a permit or authority is addressed in the next item. This item also deletes the alternative fault elements of "intentionally or recklessly" so that the interpretation of the offence will not change following the application of the Criminal Code. This means that the default fault element of intention will apply to the physical element of conduct in the offence.

Item 149 – At the end of section 21

This item is consequential upon the previous item. It inserts a new subsection (2) which provides that subsection (1) does not apply if the specimen is exported in accordance with a permit or authority. This defence has been placed in a separate subsection so that it is not mistakenly interpreted as an element of the offence. A note to the subsection provides that the defendant bears an evidential burden in relation to this matter. It also refers to subsection 13.3(3) of the *Criminal 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 such circumstances. 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 150 – Section 22

This item omits from the terms of the offence in section 22 the defence ", otherwise than in accordance with a permit or authority". This amendment is intended to avoid the possibility that the defence will be mistakenly interpreted as part of the elements of the offence. This defence becomes a new subsection under the next item. The alternative fault elements "intentionally or recklessly" have been omitted so that the interpretation of the offence will not change following the application of the *Criminal Code*. The amendment will result in the default fault element of intention applying to the physical element of conduct in the offence.

Item 151 – At the end of section 22

This item is consequential upon item 150. It inserts a new subsection (2) which provides that subsection (1) does not apply if the specimen is imported in accordance with a permit or authority. This defence has been placed in a separate subsection so that it is not mistakenly interpreted as an element of the offence.

Item 152 – Section 48

This item replaces section 48 with a provision that more accurately identifies the physical elements of conduct and result, to which the *Criminal Code* supplies the default fault elements of intention and recklessness respectively. The new section provides that a person is guilty of an offence if they hold a permit or an authority (circumstances element to which the fault element of recklessness will attach), and the person engages in conduct (conduct element to which the fault element of intention

will attach) that contravenes a condition imposed under subsection 47(1) in respect of the permit or authority, or in the case of an authority under section 43, the condition to which the authority is subject under subsection 43(8) (circumstance element to which recklessness attaches). "Engage in conduct" is defined to mean to do an act, or to omit to perform an act. The maximum penalty under this section is 120 penalty units.

Item 153 – Subsection 50(4)

This item replaces subsection 50(4) with a provision that more accurately identifies the physical elements of conduct and result, each of which has an attaching fault element. The new subsection 50(4) provides that a person is guilty of an offence if they hold a permit or an authority (circumstances element to which the fault element of recklessness will attach), and the person engages in conduct (conduct element to which the fault element of intention will attach) that contravenes a condition to which the permit or authority is subject by virtue of section 50. "Engage in conduct" is defined to mean to do an act, or to omit to perform an act. The maximum penalty under subsection (4) is 600 penalty units.

Item 154 – Subsection 51(4)

This item replaces subsection 51(4) with a provision that more accurately identifies the physical elements of conduct and result, each of which has an attaching fault element. The new section provides that a person is guilty of an offence if they hold a permit or an authority (circumstances element to which the fault element of recklessness will attach), and the person engages in conduct (conduct element to which the fault element of intention will attach) that contravenes a condition to which the permit or authority is subject by virtue of section 51. "Engage in conduct" is defined to mean to do an act, or to omit to perform an act. The maximum penalty under subsection (4) is 600 penalty units.

Item 155 – Subsection 51E(2)

This item replaces subsection 51E(2) with a provision that more accurately identifies the physical elements of conduct, circumstance and result, each of which has an attaching fault element. The new subsection 51E(2) provides that a person contravenes the subsection if a specimen is marked in accordance with a determination under section 51D, and the person engages in conduct, and the conduct causes the removal of the mark or interference with the mark, or renders the mark unusable. This structure of the offence provision is intended to provide clarity in relation to the scope and effect of each offence and to give consistency as to how criminal offences are to be interpreted by the courts.

The replacement subsection does not include the defence "except in accordance with a determination under that section". Item 157 reinserts this defence as a separate subsection. This has been done to avoid the mistaken interpretation that the defence is part of the element of the offence.

Item 156 – Subsection 51E(3)

This item amends subsection 51E(3) to delete the alternative fault elements of "intentionally or recklessly". Under the *Criminal Code* (Division 5 of Part 2.2 Chapter

Two *Criminal Code*) the default fault element of intention will apply to the physical element of conduct in the offence and the default fault element of recklessness will apply to physical elements of circumstances in the offence (section 5.6 *Criminal Code*). Section 5.4 of the *Criminal Code* provides that where recklessness is the fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element. Thus the actions of an accused who either had the requisite intention or recklessness will be criminalised.

Item 157 – At the end of section 51E

This item inserts new subsections 51E(4) and (5). Subsection (4) is consequential upon item 155, which substituted a new subsection (2). The original subsection (2) contained this defence but it has been reinserted in the new subsection (4) as a separate subsection to avoid the mistaken interpretation that the defence was part of the elements of the offence. A note to the subsection provides that the defendant bears the evidential burden in relation to the matter in subsection (4). It also refers to subsection 13.3(3) of the *Criminal 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 such circumstances. 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".

Subsection 51E(5) defines "engage in conduct" to mean to do an act, or to omit to perform an act. This term has been used in the substituted subsection (2), which has been inserted by item 155.

Item 158 – Paragraphs 53(1)(a) and (b)

This item omits from the terms of the offence in paragraphs 53(1)(a) and (b) the defence "without reasonable excuse (proof of which lies upon the person)". This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence. This defence, and the onus of proof, is inserted as a separate subsection and notes by item 159 – 161.

Item 159 – After subsection 53(1)

This item, which is consequential upon item 158, inserts a new subsection 53(1B) which provides that subsection (1) does not apply if the person proves that the person has a reasonable excuse. The note to the subsection expressly specifies that the burden of proof in relation to the matters in subsection (1B) is a legal burden. Section 13.5 of the *Criminal Code* provides that a legal burden of proof on the defendant must be discharged on the balance of probabilities.

Item 160 – After subsection 53(2)

This item inserts a note that specifies that the burden of proof in relation to the matters in subsection (2) is a legal burden. Section 13.5 of the *Criminal Code* provides that a legal burden of proof on the defendant must be discharged on the balance of probabilities. This note confirms the way that the defence currently operates.

Item 161 – After subsection 53(3)

This item inserts a note that provides that the burden of proof in relation to the matters in subsection (3) is a legal burden. Section 13.5 of the *Criminal Code* provides that a legal burden of proof on the defendant must be discharged on the balance of probabilities. This amendment does not alter the way that the subsection operates as the use of the word "proves" indicates a legal burden. This note confirms the way that the defence currently operates.

Item 162 – Subsection 53(4)

This item is a consequential amendment that takes account of the new subsection inserted by item 159. It replaces the phrase "subsection (2) or (3)" with "this section".

Item 163 – Paragraphs 53A(2)(c) and (3)(c)

This item amends paragraphs 53A(2)(c) and (3)(c) by omitting the alternative fault elements of "intentionally or recklessly" which appear to apply to the physical elements of conduct in the offence. The elements of the offences are obtained from sections 21 and 22 respectively which are referred to in the terms of the amended paragraphs. Under Division 5 of Part 2.2, Chapter Two of the *Criminal Code* the default fault element of intention will apply to the physical element of conduct in the offence, and the default fault element of recklessness will apply to any physical elements of circumstance and result. Section 5.4 of the *Criminal Code* provides that where recklessness is the fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element. Thus the actions of an accused who either had the requisite intention or recklessness will be criminalised.

Item 164 – Section 57N

This item replaces section 57N with a provision that more accurately identifies the physical elements of conduct and result, to each of which the *Criminal Code* supplies the default elements of intention and recklessly. The new subsection 57N provides that a person is guilty of an offence if the person is the holder, or one of the holders, of a registration certificate, and the person engages in conduct and the conduct contravenes a condition of the certificate. This amendment has rephrased the offence to clarify that the contravention of a condition is a physical element of result of the defendant's conduct to which the default fault element of recklessness will apply. "Engage in conduct" is defined to mean to do an act, or to omit to perform an act. The maximum penalty under this section is 120 penalty units.

Item 165 – Section 57S

This item replaces section 57S with a provision that omits the references to the ancillary offence terms in the replaced provision of "aided, abetted, counselled or procured the relevant act or omission" and "was in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of the partner)." On application of the *Criminal Code*, Part 2.4 of the *Criminal Code* will provide ancillary offence provisions (such as section 11.2

(complicity and common purpose) which will apply to all Commonwealth offence in place of these provisions.

The replacement section 57S provides that Divisions 2 and 3 apply to a partnership as if the partnership were a person, except that obligations that would be imposed on the partnership are imposed instead on each partner, but may be discharged by any of the partners.

Item 166 – Subsection 61(3)

This item omits from the terms of the offence in subsection 61(3) the defence "without reasonable excuse". This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence. This defence becomes a new subsection under the next item.

Item 167 –At the end of section 61

This item inserts new subsections (4) and (5) in section 61 of the *Wildlife Protection (Regulation of Exports and Imports) Act 1982*. Subsection (4) provides that an offence under subsection (3) is an offence of strict liability. The note to subsection (4) refers to section 6.1 of the *Criminal Code*. That section defines "strict liability" to mean that there are no fault elements for any of the physical elements of the offence and says that the defence of mistake of fact under section 9.2 of the Code is available.

This item also inserts a new subsection (5). It provides that that subsection (3) does not apply if the person has a reasonable excuse. The note to subsection (5) provides that the defendant bears the evidential burden in relation to the matters in subsection (5). It also refers to subsection 13.3(3) of the *Criminal 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 such circumstances. 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 168 – Subsection 62(9)

This item omits from the terms of the offence in subsection 62(9) the defence ", without reasonable excuse". This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence. This defence becomes a new subsection under the next item.

Item 169 – After subsection 62(9)

This item, which is consequential upon item 168, inserts a new subsection 62(9A), which provides that subsection (9) does not apply if the person has a reasonable excuse. This defence has been put in a separate subsection so that it is not mistakenly interpreted as being an element of an offence. The note to the subsection provides that the defendant bears the evidential burden in relation to the matters in subsection (9A). It also refers to subsection 13.3(3) of the *Criminal 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 such circumstances. 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 170 – Subsection 67(3)

This item omits from the terms of the offence in subsection 67(3) the defence ", without reasonable excuse". This amendment has been made to avoid the defence being mistakenly interpreted as being part of the elements of the offence. This defence becomes a new subsection under the next item.

Item 171 – After subsection 67(3)

This item, which is consequential upon item 170, inserts a new subsection 67(3A) that provides that subsection (9) does not apply if the person has a reasonable excuse. The note to the subsection provides that the defendant bears the evidential burden in relation to the matters in subsection (9A). It also refers to subsection 13.3(3) of the *Criminal 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 such circumstances. 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 172 – Subsection 69(3)

The effect of this item is to insert a reference to a new subsection (8), which is inserted under item 176.

Item 173 – Subsection 69(3)

This item omits in subsection 69(3) the defence "to the extent that the person is capable of doing so, "from the terms of the offence. Item 176 reinserts the defence as a new subsection (8). This removes the possibility that the defence could be mistakenly interpreted as an element of the offence.

Item 174 – After subsection 69(6)

This item relates to the previous item. It inserts a note to subsection 69(6) that provides that the defendant bears the evidential burden in relation to the matters in subsection (6). It also refers to subsection 13.3(3) of the *Criminal 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 such circumstances. 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 175 – After subsection 69(7)

This item inserts a note after subsection 69(7), which provides that the defendant bears the evidential burden in relation to the matters in subsection (7). It also refers to

subsection 13.3(3) of the *Criminal 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 such circumstances. 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 176 – At the end of section 69

This item, which is consequential upon item 173, inserts a new subsection 69(8) that provides the defence that the person is only required to answer the question to the extent that they are capable of doing so. This defence was previously in subsection 69(3) and has been reinserted as a separate subsection to remove the possibility that the defence could be mistakenly interpreted as an element of the offence.

This item also inserts a note to the subsection, which provides that the defendant bears the evidential burden in relation to the matters in subsection (8). It also refers to subsection 13.3(3) of the *Criminal 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 such circumstances. 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 177 – Subsection 71A(1)

This item replaces subsection 71A(1) of the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* with provisions that more accurately identify the physical elements of conduct and result in the offence. The default fault elements of intention will apply to the physical element of conduct, and the default element of recklessness will apply to the physical elements of result. The new subsection 71A(1) proscribes the actions of a person whose conduct causes the rescue of any goods that have been, or are about to be, seized under the Act. The new subsection 71A(1A) proscribes the actions of a person whose conduct causes any goods to be staved, broken or destroyed, or any documents relating to any goods to be destroyed, and the conduct hinders or prevents the seizure of goods, the securing of goods, or the proof of any offence under the Act. This item has rephrased the offence in subsection (1) to clarify that the rescue of goods is a result element to which the fault element of recklessness will apply. Subsection (1A) clarifies that as well as the physical element of conduct (to which the fault element of intention will apply) there are two result elements to which the fault element of recklessness will apply; namely conduct which causes goods to be staved, broken or destroyed, and also that that conduct must result in the hindrance or prevention of the seizure of goods.

The maximum penalty under these subsections is imprisonment for a term not exceeding two years.

Item 178 – At the end of section 71A

This item defines "engage in conduct" to mean to do an act, or to omit to perform an act. This term has been used in replacement subsections 71A(1) and 71A(1A).