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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

**INDUSTRY, SCIENCE AND RESOURCES LEGISLATION AMENDMENT
(APPLICATION OF CRIMINAL CODE) BILL 2001**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Industry, Science and Resources,
Senator the Hon Nick Minchin)

INDUSTRY, SCIENCE AND RESOURCES LEGISLATION AMENDMENT (APPLICATION OF THE CRIMINAL CODE) ACT 2001

GENERAL OUTLINE

The purpose of this bill is to make consequential amendments to certain offence provisions in legislation administered within the Industry, Science and Resources portfolio to reflect the application of the *Criminal Code Act 1995* (the Code).

The Code is Commonwealth legislation, which will alter the way in which criminal offence provisions are interpreted, including offences contained in legislation for which the Industry, Science and Resources portfolio is responsible. While the Code was passed in 1995, it commenced to apply to new offences from 1 January 1997. All new offences are now drafted according to the requirements of the Code. Staggered implementation was considered necessary in relation to existing offences to provide departments with sufficient time to assess the effect of the Code on their offence provisions, and to make any amendments necessary to their legislation. The Code is scheduled to apply to existing offences from 15 December 2001.

If legislation containing offence provisions is not amended to have regard to the Code, the Code may alter the interpretation of existing offence provisions. The Code contains subjective, fault-based principles of criminal responsibility. The defendant's guilt will depend on what he or she thought or intended at the time of the offence, rather than what a 'reasonable person' would have thought or intended in the defendant's circumstances. The changes to be brought about by the Code reflect the view that proof of a 'guilty mind' is generally necessary before a person can be found guilty of an offence.

The most significant effect of the Code is that it clarifies the traditional distinction between the *actus reus* (the physical act, now referred to as the 'physical element') and the *mens rea* (what the defendant thought or intended, now referred to as the 'fault element') and sets out this distinction in the Code.

The prosecution bears the onus of proving each of the physical elements. The physical elements provided in the Code are the conduct, the circumstance in which it occurs, and the result of the conduct. Each offence must contain at least one of these physical elements, but any combination of physical elements may be present in an offence provision. For every physical element of an offence, the prosecution must also prove a corresponding fault element. The Code does not prevent an offence from specifying an alternative fault element, but the Code indicates that the default fault element will apply in the absence of a specified fault element. The Code establishes four default fault elements: intention, knowledge, recklessness and negligence. The Code provides that for conduct, the default fault element is intention. For circumstance or result, the default fault element is recklessness.

The Industry, Science and Resources Legislation (Application of Criminal Code) Bill 2001 makes amendments to the *Atomic Energy Act 1953*, *Bounty and Capitalisation Grants (Textile Yarns) Act 1981*, *Bounty (Bed Sheeting) Act 1977*, *Bounty (Books) Act 1986*, *Bounty (Citric Acid) Act 1991*, *Bounty (Computers) Act 1984*, *Bounty (Fuel Ethanol) Act 1994*, *Bounty (Machine Tools and Robots) Act 1985*, *Bounty (Photographic Film) Act 1989*, *Bounty (Printed Fabrics) Act 1981*, *Bounty (Ships) Act 1989*, *Designs Act 1906*, *Liquefied Petroleum Gas (Grants) Act 1980*, *Liquid Fuel Emergency Act 1984*, *Management and Investment Companies Act 1983*, *National Measurement Act 1960*, *Offshore Minerals Act 1994*, *Patents Act 1990*, *Petroleum Excise (Prices) Act 1987*, *Petroleum Retail Marketing Sites Act 1980*, *Petroleum*

(Submerged Lands) Act 1967, Petroleum (Timor Gap Zone of Cooperation) Act 1990, Pooled Development Funds Act 1992, Scout Association Act 1924, Trade Marks Act 1995 and the Tradex Scheme Act 1999.

Amendments arise from:

- specifying that an offence is one of strict liability (with an express statement on the face of the offence that is an offence of strict liability, referring to section 6.1 of the *Criminal Code*);
- restructuring offence provisions which include an inappropriate fault element for conduct;
- restructuring offence provisions which include an inappropriate fault element for circumstance;
- restructuring offence provisions where part of the conduct element of the offence includes breach of a condition;
- restructuring offence provisions to proscribe the actions of a person whose conduct causes damage, injury, destruction or obliteration of prescribed property;
- restructuring criminal offence provisions containing a defence, by putting the defence provisions in separate subsections, in order to avoid a defence being mistakenly interpreted to be part of the elements of the offence;
- specifying whether a defence places a legal or evidential burden on a defendant;
- restructuring an offence to resolve an internal conflict between the offence and the complicity provision of the *Criminal Code*;
- restructuring ancillary offence provisions so as to apply the relevant ancillary provisions of the *Criminal Code*;
- extension of meaning of ‘engaging in conduct’ to include omissions;
- restructuring offence provisions so as not to require knowledge of law;
- specifying in provisions which establish criminal responsibility for corporations whether or not Part 2.5 of the *Criminal Code* (dealing with corporate criminal responsibility) is applicable.

The approach in this Bill is to make the minimal amendments necessary to enable offences to operate in the same way after the *Criminal Code* comes into effect as they operate before the *Criminal Code* applies.

FINANCIAL IMPACT STATEMENT

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

NOTES ON CLAUSES

Clause 1: Short title

1. This clause provides the short title by which the Act may be cited.

Clause 2: Commencement

2. Clause 2 provides that this Act will commence on the day after the day on which it receives the Royal Assent.

Clause 3: Schedule(s)

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

Clause 4: Application of amendments

4. Subclause 4(1) provides that, subject to subclause 4(2), each amendment made by this Act only applies to acts or omissions after commencement of the amendment. Subclause 4(2) provides that if an act or omission is alleged to have taken place between two dates, one before and one after commencement of a particular amendment, the amendment does not apply to the alleged act or omission.

Schedule 1 - Amendment of Acts

Atomic Energy Act 1953

Item 1 - At the end of Part 1

5. This item inserts a new section 34A into the *Atomic Energy Act 1953* to provide that Chapter 2 of the Criminal Code applies to all offences created by that Act. The item also inserts a note after the section drawing attention to the provisions of Chapter 2 of the Criminal Code relating to general principles of criminal responsibility.

Item 2 - At the end of subsection 36(1)

6. This item provides the penalty for offences under subsection 36(1). The amendment is consequent upon the repeal of subsection 36(1A): see item 3.

Item 3 - Subsection 36(1A)

7. This item repeals the existing subsection 36(1A) of the *Atomic Energy Act 1953*. Subsection 36(1A) unnecessarily separates the requirement established in subsection 36(1) from the offence of failing to comply with that requirement. The penalty applicable to a contravention of the requirement in subsection 36(1) is added after that subsection: see item 2.

8. This item also effectively removes the defence of reasonable excuse from the offence in subsection 36(1). The defence is recreated in a new subsection 36(3) (see item 4). The rationale for this amendment is to prevent future interpretation that the reasonable excuse element is an element of the offence, which would have to be disproved in the negative by the prosecution, and puts it beyond doubt that it is a defence to the offence.

Item 4 - At the end of section 36

9. This item creates new subsections 36(3) and 36(4). Subsection 36(3) recreates the defence of reasonable excuse in relation to the offence in subsection 36(1): see item 3.
10. The note to this subsection provides that the defendant bears an evidential burden in relation to the matters in subsection 36(3). It also draws attention to the provisions of subsection 13.3(3) of the *Criminal Code*.
11. New subsection 36(4) specifies that an offence against subsection 36(1) is an offence of strict liability. This reflects the present requirements of the former section 36(1A). A note on strict liability is included and refers to the provisions of section 6.1 of the *Criminal Code*.
12. Strict liability is defined in section 6.1 of the *Criminal Code* and provides that where an offence is intended to be one of strict liability, then it should be identified as such in the statute. Where strict liability applies to an element of an offence or the complete offence, there is a defence of mistake of fact under section 9.2 of the *Criminal Code*. Section 9.2 provides that the person is not criminally responsible for an offence of this nature if at or before the time of the conduct the person considered whether or not a relevant fact existed and is under a mistaken but reasonable belief about that fact and, had that fact existed, the conduct would not constitute an offence. This would cover the situation where the defendant made a mistake about some matter of fact. If there is a mistake of fact, the evidential burden of proof is on the defence. It means that the defendant has to adduce or point to the evidence that suggests a reasonable possibility that the matter exists or does not exist. If the defendant is able to do this, the prosecution is required to prove beyond the reasonable doubt that there was no such mistake.

Item 5 - Subsection 37(2)

13. This item repeals the existing subsection 37(2) of the *Atomic Energy Act 1953* and substitutes new subsections 37(2) to 37(6).
14. The offence provision has been restructured to separate out the fault liability (“refuse to comply”) and the strict liability (“fail to comply”) offences. The reconstruction also separates the defence of reasonable excuse from the offences and recreates it as a stand-alone defence to both offences.
15. The new subsection 37(2) recreates the “refuse to comply” offence from existing subsection 37(2). It provides that a person must not refuse to comply with a notice served on the person under subsection 37(1). The existing penalties are prescribed for a natural person and a body corporate.
16. The new subsection 37(3) maintains a defence of "reasonable excuse" which was provided for under the old subsection 37(2). It has been separately recreated in a new subsection in

order to avoid the defence being mistakenly interpreted to be part of the elements of the offence in the new subsection 37(2). The note to this subsection provides that the defendant bears an evidential burden in relation to the matters in subsection 37(3). It also draws attention to the provisions of subsection 13.3(3) of the Criminal Code.

17. The new subsection 37(4) recreates the “fail to comply” offence from existing subsection 37(2). It provides that a person must not fail to comply with a notice served on the person under subsection 37(1). The existing penalties are prescribed for a natural person and a body corporate.
18. The new subsection 37(5) maintains a defence of "reasonable excuse" which was provided for under the old subsection 37(2). It has been separately recreated in a new subsection in order to avoid the defence being mistakenly interpreted to be part of the elements of the offence in the new subsection 37(4). The note to this subsection provides that the defendant bears an evidential burden in relation to the matters in subsection 36(5). It also draws attention to the provisions of subsection 13.3(3) of the Criminal Code.
19. This item inserts new subsection 37(6) which applies strict liability to the offence recreated in subsection 37(4) of the Act. Subsection 37(4) provides that a person must not fail to comply with a notice served on the person under subsection (1). The fine is \$2,000 for a natural person or \$10,000 for a body corporate. This is an administrative obligation with a low penalty and is therefore the type of offence where strict liability is applied under the existing law.
20. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision. An explanation of “strict liability” appears at paragraph 12 above.

Item 6 - Subsection 41D(1)

21. This item omits the term "shall not refuse or fail" from the existing subsection 41D(1) and substitutes the term "must not refuse". Subsection 41D(1) currently provides that a person who refuses to comply with a condition or restriction under Part III of the *Atomic Energy Act 1953* is guilty of an offence. The amendment of this offence provision has been done so as to separate out the fault liability and the strict liability offences. The new subsection 41D(1A) mentioned below recreates the strict liability offence currently contained in subsection 41D(1).
22. This item also replaces the heading to Section 41D with the new heading “**Offences relating to breach of condition etc.**”

Item 7 - After subsection 41D(2)

23. This item repeals the existing subsection 41D(2) of the *Atomic Energy Act 1953* and substitutes new subsections 41D(2) and 41D(3) into section 41D of the *Atomic Energy Act 1953*.
24. New subsection 41D(2) provides that a person, required to comply with a condition or restriction, subject to which an authority has been conferred on the person under Part III of the *Atomic Energy Act 1953*, is guilty of an offence if he or she fails to comply with the requirement. The penalty mirrors the penalty prescribed in subsection 41D(1) and recreates the existing penalties for a natural person and a body corporate. The new subsection 41D(2) further specifies that for the purposes of this subsection it does not

matter whether the authority was conferred before or after the commencement of section 41D.

25. New subsection 41D(3) applies strict liability to the offence in subsections 41D(1A), which carries a penalty of \$2,000 for a natural person or \$10,000 for a body corporate. The offence created by subsection 41D(2) is an administrative obligation with a low penalty and is therefore the type of offence where strict liability is applied under the existing law.
26. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision. An explanation of “strict liability” appears at paragraph 12 above.

Item 8 - After section 41D

27. This item inserts a new subsection 41E containing subsections 41E(1) and (2), which were embodied in the former 41D(2): see item 7.
28. New subsection 41E(1) recreates the two offences in existing subsection 41D(2), namely that a person is guilty of an offence if he or she enters, or is on land, of which another person is in possession under Part III of the *Atomic Energy Act 1953*. The subsection also provides the same penalty for this offence as was prescribed under subsection 41D(2). New subsection 41E(2) recreates the defences from existing 41D(2) to an offence under that subsection. The reconstruction made by items 7 and 8 is made in order to avoid the defences being mistakenly interpreted to be part of the elements of the offence under subsection 41E(1). The note to this subsection provides that the defendant bears an evidential burden in relation to the matters in subsection 41E(2). It also draws attention to the provisions of subsection 13.3(3) of the *Criminal Code*.

Bounty and Capitalisation Grants (Textile Yarns) Act 1981

Item 9 - At the end of Part 1

29. This item adds a new section 3B into the *Bounty and Capitalisation Grants (Textile Yarns) Act 1981* which provides that Chapter 2 of the *Criminal Code* applies to all offences created by the *Bounty and Capitalisation Grants (Textile Yarns) Act 1981*.
30. It also inserts a note that says Chapter 2 of the *Criminal Code* sets out general principles of criminal responsibility.

Item 10 - Subsection 10B(1)

31. This item proposes that the words “becomes aware” be omitted from subsection 10B(1) (which contains the physical element of “becomes aware”) and be substituted with “subsequently knows”. As “becomes aware” is a circumstance, it attracts the default fault element of recklessness. The proposed amendment changes the default element of recklessness to a fault element of knowledge. This means that knowledge will apply to the circumstance of “becoming aware”.

Item 11 - Subsection 18(1)

32. In order to avoid the defence of "without reasonable excuse" being mistakenly interpreted to be part of the elements of the offence under subsection 18(1) the words "without reasonable excuse" are being omitted from subsection 18(1). A new subsection 18(2) has been inserted (see Item 12) to provide for a defence of "reasonable excuse".

Item 12 -After subsection 18(1)

33. A new subsection 18(2) has been inserted to provide for a defence of "reasonable excuse". The note to this subsection provides that the defendant bears an evidential burden in relation to the matters in subsection 18(2). It also draws attention to the provisions of subsection 13.3(3) of the *Criminal Code*.

Bounty (Bed Sheeting) Act 1977**Item 13 - After section 4A**

34. This item inserts a new Section 4B into the *Bounty (Bed Sheeting) Act 1977* which provides that Chapter 2 of the Criminal Code applies to all offences created by the *Bounty (Bed Sheeting) Act 1977*.
35. It also inserts a note that says Chapter 2 of the Criminal Code sets out general principles of criminal responsibility.

Item 14 - Subsection 10C(1)

36. This item proposes that the words "becomes aware" be omitted from subsection 10C(1) (which contains the physical element of "becomes aware") and be substituted with "subsequently knows". As "becomes aware" is a circumstance, it attracts the default fault element of recklessness. The proposed amendment changes the default element of recklessness to a fault element of knowledge. This means that knowledge will apply to the circumstance of "becoming aware".

Item 15 - Subsection 18(1)

37. In order to avoid the defence of "without reasonable excuse" being mistakenly interpreted to be part of the elements of the offence under subsection 18(1) the words "without reasonable excuse" are being omitted from subsection 18(1). A new subsection 18(2) has been inserted (see Item 16) to provide for a defence of "reasonable excuse".

Item 16 - After subsection 18(1)

38. A new subsection 18(2) has been inserted to provide for a defence of "reasonable excuse". The note to this subsection provides that the defendant bears an evidential burden in relation to the matters in subsection 18(2). It also draws attention to the provisions of subsection 13.3(3) of the *Criminal Code*.

Bounty (Books) Act 1986

Item 17 - At the end of Part 1

39. This item adds a new Section 9A into the *Bounty (Books) Act 1986* which provides that Chapter 2 of the Criminal Code applies to all offences created by the *Bounty (Books) Act 1986*.
40. It also inserts a note that says Chapter 2 of the Criminal Code sets out general principles of criminal responsibility.

Item 18 - Subsection 16(1)

41. This item proposes that the words "becomes aware" be omitted from subsection 16(1) (which contains the physical element of "becomes aware") and be substituted with "subsequently knows". As "becomes aware" is a circumstance, it attracts the default fault element of recklessness. The proposed amendment changes the default element of recklessness to a fault element of knowledge. This means that knowledge will apply to the circumstance of "becoming aware".

Item 19 - Subsection 27(1)

42. In order to avoid the defence of "without reasonable excuse" being mistakenly interpreted to be part of the elements of the offence under subsection 27(1) the words "without reasonable excuse" are being omitted from subsection 27(1). A new subsection 27(2) has been inserted (see Item 20) to provide for a defence of "reasonable excuse".

Item 20 - After subsection 27(1)

43. A new subsection 27(2) has been inserted to provide for a defence of "reasonable excuse". The note to this subsection provides that the defendant bears an evidential burden in relation to the matters in subsection 27(2). It also draws attention to the provisions of subsection 13.3(3) of the *Criminal Code*.

Bounty (Citric Acid) Act 1991

Item 21 - At the end of Part 1

44. This item adds a new Section 5A into the *Bounty (Citric Acid) Act 1991* which provides that Chapter 2 of the Criminal Code applies to all offences created by the *Bounty (Citric Acid) Act 1991*.
45. It also inserts a note that says Chapter 2 of the Criminal Code sets out general principles of criminal responsibility.

Item 22 - Subsection 12(1)

46. This item proposes that the words "becomes aware" be omitted from subsection 12(1) (which contains the physical element of "becomes aware") and be substituted with

"subsequently knows". As "becomes aware" is a circumstance, it attracts the default fault element of recklessness. The proposed amendment changes the default element of recklessness to a fault element of knowledge. This means that knowledge will apply to the circumstance of "becoming aware".

Item 23 - Subsection 23(1)

47. In order to avoid the defence of "without reasonable excuse" being mistakenly interpreted to be part of the elements of the offence under subsection 23(1) the words "without reasonable excuse" are being omitted from subsection 23(1). A new subsection 23(2) has been inserted (see Item 24) to provide for a defence of "reasonable excuse".

Item 24 - After subsection 23(1)

48. A new subsection 23(2) has been inserted to provide for a defence of "reasonable excuse". The note to this subsection provides that the defendant bears an evidential burden in relation to the matters in subsection 23(2). It also draws attention to the provisions of subsection 13.3(3) of the *Criminal Code*.

Bounty (Computers) Act 1984

Item 25 - At the end of Part 1

49. This item adds a new Section 8A into the *Bounty (Computers) Act 1984* which provides that Chapter 2 of the Criminal Code applies to all offences created by the *Bounty (Computers) Act 1984*.
50. It also inserts a note that says Chapter 2 of the Criminal Code sets out general principles of criminal responsibility.

Item 26 - Subsection 15(1)

51. This item proposes that the words "becomes aware" be omitted from subsection 15(1) (which contains the physical element of "becomes aware") and be substituted with "subsequently knows". As "becomes aware" is a circumstance, it attracts the default fault element of recklessness. The proposed amendment changes the default element of recklessness to a fault element of knowledge. This means that knowledge will apply to the circumstance of "becoming aware".

Item 27 - Subsection 27(1)

52. In order to avoid the defence of "without reasonable excuse" being mistakenly interpreted to be part of the elements of the offence under subsection 27(1) the words "without reasonable excuse" are being omitted from subsection 27(1). A new subsection 27(2) has been inserted (see Item 28) to provide for a defence of "reasonable excuse".

Item 28 - After subsection 27(1)

53. A new subsection 27(2) has been inserted to provide for a defence of "reasonable excuse". The note to this subsection provides that the defendant bears an evidential burden in

relation to the matters in subsection 27(2). It also draws attention to the provisions of subsection 13.3(3) of the *Criminal Code*.

Bounty (Fuel Ethanol) Act 1994

Item 29 - At the end of Part 1

54. This item inserts proposed section 9A which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility.
55. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

Item 30 - Subsection 30(1)

56. Subsection 30(1) provides that section 30 applies to a person who made a claim for payment of bounty and becomes aware that the claim was, because of an inadvertent error, for an amount more than \$200 greater than the person's entitlement. Subsection 30(2) provides that the person must, within 21 days after discovering the excess, acknowledge the excess in the prescribed way. Following application of the *Criminal Code* a circumstance such as 'becoming aware' will attract the default fault element of recklessness, whereas the fault element of knowledge would appear to reflect the legislative intent at the time the provision was enacted. This item therefore proposes the replacement of the words "becomes aware" with "subsequently knows". It is considered that subsection 30(1) will continue to operate in the same manner as at present following this amendment.

Item 31 – Subsection 55(1)

57. This item proposes the repeal and substitution of subsection 55(1) and in order to achieve several amendments. First, subsection 55(1) provides that a person must not, without reasonable excuse, refuse or fail to attend before an authorised officer or take an oath or make an affirmation or answer a question or produce an account or other document, when required under the Act. The penalty for this offence is imprisonment for 6 months. Proposed subsections (1) and (3A) are used, respectively, to separate the offences of 'fail' (which does not imply a fault element) and 'refuse' (which implies a fault element). Proposed subsection (2) applies strict liability to the 'fail' offence in subsection (1). The application of strict liability to this offence preserves the existing situation, namely that the offence is already one of strict liability. The offence concerns a statutory obligation which could be difficult to establish if the prosecution was required to prove intention with respect to the failure to comply with the required actions. This is the type of statutory obligation which is usually interpreted to mean that the legislature intended that strict liability should apply. Another factor in determining whether strict liability applies is the penalty, which in this case is low. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision. An explanation of "strict liability" appears at paragraph 12 above.
58. Second, the phrase "without reasonable excuse" has not been retained in proposed subsections (1) and (3A) but has been recreated in separate subsections (3) and (3B), in relation to the offences proposed in subsections (1) and (3A), respectively. The rationale for these amendments is to prevent future interpretation that the reasonable excuse element

of these provisions is an element of the offences, which would have to be disproved in the negative by the prosecution. The proposed amendments will put it beyond doubt that a reasonable excuse is a defence to the offences. This item also adds the standard note after each of proposed subsections (3) and (3B) concerning the imposition of an evidential burden on a defendant by subsection 13.3(3) of the *Criminal Code* if a defendant relies on the reasonable excuse defence established, respectively, by subsection (3) or (3B).

Bounty (Machine Tools and Robots) Act 1985

Item 32 - At the end of Part 1

59. This item adds a new Section 15A into *the Bounty (Machine Tools and Robots) Act 1985* which provides that Chapter 2 of the Criminal Code applies to all offences created by the *Bounty (Machine Tools and Robots) Act 1985*.
60. It also inserts a note that says Chapter 2 of the Criminal Code sets out general principles of criminal responsibility.

Item 33 - Subsection 23(1)

61. This item proposes that the words "becomes aware" be omitted from subsection 23(1) (which contains the physical element of "becomes aware") and be substituted with "subsequently knows". As "becomes aware" is a circumstance, it attracts the default fault element of recklessness. The proposed amendment changes the default element of recklessness to a fault element of knowledge. This means that knowledge will apply to the circumstance of "becoming aware".

Item 34 - Subsection 24(7)

62. This item proposes the repeal of subsection 24(7) of *the Bounty (Machine Tools and Robots) Act 1985*. Subsection 24(7) contains an offence relating to providing information that is, to the knowledge of the producer, false or misleading in a material particular.
63. The fault elements of this offence are very similar to the general offence provision of providing false or misleading information covered by Section 137.1 of the *Criminal Code* which provides adequate coverage for these offences. Therefore it is being proposed that subsection 24(7) of *the Bounty (Machine Tools and Robots) Act 1985* be repealed.

Item 35 - Subsection 35(1)

64. In order to avoid the defence of "without reasonable excuse" being mistakenly interpreted to be part of the elements of the offence under subsection 35(1) the words "without reasonable excuse" are being omitted from subsection 35(1). A new subsection 35(2) has been inserted (see below) to provide for a defence of "reasonable excuse".

Item 36 - After subsection 35(1)

65. A new subsection 35(2) has been inserted to provide for a defence of "reasonable excuse". The note to this subsection provides that the defendant bears an evidential burden in relation to the matters in subsection 35(2). It also draws attention to the provisions of subsection 13.3(3) of the *Criminal Code*.

Bounty (Photographic Film) Act 1989

Item 37 - At the end of Part 1

66. This item adds a new Section 6A into the *Bounty (Photographic Film) Act 1989* which provides that Chapter 2 of the Criminal Code applies to all offences created by the *Bounty (Photographic Film) Act 1989*.
67. It also inserts a note that says Chapter 2 of the Criminal Code sets out general principles of criminal responsibility.

Item 38 - Subsection 13(1)

68. This item proposes that the words "becomes aware" be omitted from subsection 13(1) (which contain the physical element of "becomes aware") and be substituted with "subsequently knows". As "becomes aware" is a circumstance, it attracts the default fault element of recklessness. The proposed amendment changes the default element of recklessness to a fault element of knowledge. This means that knowledge will apply to the circumstance of "becoming aware".

Item 39 - Subsection 24(1)

69. In order to avoid the defence of "without reasonable excuse" being mistakenly interpreted to be part of the elements of the offence under subsection 24(1) the words "without reasonable excuse" are being omitted from subsection 24(1). A new subsection 24(2) has been inserted (see Item 40) to provide for a defence of "reasonable excuse".

Item 40 - After subsection 24(1)

70. A new subsection 24(2) has been inserted to provide for a defence of "reasonable excuse". The note to this subsection provides that the defendant bears an evidential burden in relation to the matters in subsection 24(2). It also draws attention to the provisions of subsection 13.3(3) of the *Criminal Code*.

Bounty (Printed Fabrics) Act 1981

Item 41 - After section 4

71. This item adds a new Section 4A into the *Bounty (Printed Fabrics) Act 1981* which provides that Chapter 2 of the Criminal Code applies to all offences created by the *Bounty (Printed Fabrics) Act 1981*.
72. It also inserts a note that says Chapter 2 of the Criminal Code sets out general principles of criminal responsibility.

Item 42 - Subsection 10B(1)

73. This item proposes that the words "becomes aware" be omitted from subsection 10B(1) (which contains the physical element of "becomes aware") and be substituted with "subsequently knows". As "becomes aware" is a circumstance, it attracts the default fault

element of recklessness. The proposed amendment changes the default element of recklessness to a fault element of knowledge. This means that knowledge will apply to the circumstance of “becoming aware”.

Item 43 - Subsection 18(1)

74. In order to avoid the defence of "without reasonable excuse" being mistakenly interpreted to be part of the elements of the offence under subsection 18(1) the words “without reasonable excuse” are being omitted from subsection 18(1). A new subsection 18(1A) has been inserted (see Item 44) to provide for a defence of “reasonable excuse”.

Item 44 - After subsection 18(1)

75. A new subsection 18(1A) has been inserted to provide for a defence of “reasonable excuse”. The note to this subsection provides that the defendant bears an evidential burden in relation to the matters in subsection 18(1A). It also draws attention to the provisions of subsection 13.3(3) of the *Criminal Code*.

Item 45 - Subsection 18(2)

76. This item proposes a change to the subclause from 'knowingly obtain or attempt to obtain' to 'obtain'. Section 11.1 of the *Criminal Code* creates a general offence of attempt, which will apply to all Commonwealth laws from 15 December 2001. This means that it is no longer necessary to include the words “or attempt to obtain” in subsection 18(2).

Item 46 - Subsection 18(3)

77. This item proposes omitting 'or attempt to obtain' from subclause 18(3) of the *Bounty (Printed Fabrics) Act 1981*. Section 11.1 of the *Criminal Code* creates a general offence of attempt, which will apply to all Commonwealth laws from 15 December 2001. This means that it is no longer necessary to include the words “or attempt to obtain” in subsection 18(3).

Bounty (Ships) Act 1989

Item 47 - At the end of Part 1

78. This item adds a new Section 7A into the *Bounty (Ships) Act 1989* which provides that Chapter 2 of the Criminal Code applies to all offences created by the *Bounty (Ships) Act 1989*.
79. It also inserts a note that says Chapter 2 of the Criminal Code sets out general principles of criminal responsibility.

Item 48 - Subsection 14(1)

80. This item proposes that the words "becomes aware" be omitted from subsection 14(1) (which contains the physical element of “becomes aware”) and be substituted with "subsequently knows". As “becomes aware” is a circumstance, it attracts the default fault element of recklessness. The proposed amendment changes the default element of recklessness to a fault element of knowledge. This means that knowledge will apply to the circumstance of “becoming aware”.

Item 49 - Subsection 25(1)

81. The offence provision has been restructured to separate out the fault liability and the strict liability offences. The reconstruction also provides for the defence of "reasonable excuse" to be separately available for the fault liability and for the strict liable offences.
82. The provision omits the words "shall not, without reasonable excuse, refuse or fail" and substitutes the words "must not refuse". The words "without reasonable excuse" are being deleted to avoid mistakenly interpreting these words to be part of the elements of the offence. A new subsection 25(2) and subsection 25(4) have been inserted (see Item 50) to provide for a defence of "reasonable excuse".
83. The amended subsection 25(1) provides that a person must not refuse to comply with the conduct specified in paragraphs 25(1)(a), (b), or (c). As the amended provision does not specify a fault element for this offence, section 5.6 of the *Criminal Code* will impose a default fault element.
84. The new subsection 25(3) (see Item 50) provides for the situation where there is a failure to comply with the conduct elements as set out in the new subsection 25(3).

Item 50 - After subsection 25(1)

85. A new subsection 25(2) has been inserted to provide for a defence of "reasonable excuse" in respect to an offence under subsection 25(1). The note to this subsection provides that the defendant bears an evidential burden in relation to the matters in subsection 25(2). It also draws attention to the provisions of subsection 13.3(3) of the *Criminal Code*.
86. The new subsection 25(3) maintains the "fails" element of the original subsection 25(1). It also refers to the same conduct as does section 25(1). It also applies the same penalty as subsection 25(1).
87. A new subsection 25(4) has been inserted to provide for a defence of "reasonable excuse" in respect to an offence under subsection 25(3). The note to this subsection provides that the defendant bears an evidential burden in relation to the matters in subsection 25(4). It also draws attention to the provisions of subsection 13.3(3) of the *Criminal Code*.
88. A new subsection 25(5) specifies that an offence against subsection 25(5) is an offence of strict liability. This reflects the present requirements of the former section 25(1). A note on strict liability is included and refers to the provisions of section 6.1 of the *Criminal Code*. An explanation of "strict liability" appears at paragraph 12 above.

Designs Act 1906**Item 51 - At the end of Part 1**

89. This item amends Part 1 of the *Designs Act 1906* by inserting a new provision to apply Chapter 2 of the *Criminal Code* to offences in that Act. Chapter 2 establishes the codified general principles of criminal responsibility. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

Item 52 - Section 36

90. This item amends section 36 of the *Designs Act 1906* to delete the word 'wilfully', so that the appropriate default fault element or elements in section 5.6 of the *Criminal Code* will apply to the offences of making false entries in the Register of Designs; or making, producing or tendering in evidence any writing falsely purporting to be a copy of an entry in the Register of Designs. The *Criminal Code* default fault element that will apply in place of "wilfully", namely intention, is the *Criminal Code*'s equivalent fault element to the non-*Criminal Code* fault element of "wilfully".

Item 53 - Subsection 42B(1)

91. Items 53, 54 and 55 amend section 42B of the *Designs Act 1906* to set out the defence of lawful excuse in a new subsection. This preserves the defence, currently set out in subsections 42B(1) and (2), but is intended to avoid that defence being mistakenly interpreted to be part of the elements of the offence to be proved by the prosecution. Item 53 removes the words "shall not, without lawful excuse, and" from subsection 42B (1) and replaces them with the words "must not, ". Item 54 below makes the same amendment to subsection 42B (2). Item 55 below will set out the defence of lawful excuse to apply to offences under both of those subsections. Subsection 42B(1) currently makes it an offence for witnesses summoned by the Registrar of Designs to fail to comply with the summons, without lawful excuse.

Item 54 - Subsection 42B(2)

92. As indicated above in respect of item 53, this item amends subsection 42B(2) by removing the words "shall not, without lawful excuse, and" from that subsection and replacing them with the words "must not, ". Subsection 42B(2) currently makes it an offence for a person required by the Registrar to produce a document or article to fail to produce it, without lawful excuse.

Item 55 - At the end of section 42B

93. As indicated above in respect of item 53, this item sets out the defence of lawful excuse applying to offences in subsections 42B(1) and (2) in a separate new subsection 42B(3). The note to the new subsection states that the defendant bears an evidential burden in relation to the defence, as set out in subsection 13.3(3) of the *Criminal Code*. This means that if the defendant wishes to raise the defence of lawful excuse, the defendant need only adduce or point to evidence that suggests a reasonable possibility that the defence exists — see subsection 13.3 (6) of the *Criminal Code*.

Item 56 - Section 42C

94. In the same manner as items 53-55 above, items 56 and 57 amend section 42C of the *Designs Act 1906* to set out the defence of lawful excuse in a new subsection. Item 56 removes the words "shall not, without lawful excuse," from section 42C and replaces them with the words "must not". Item 57 below will set out the defence of lawful excuse in the same manner as item 55 above. Section 42C makes it an offence for a person appearing before the Commissioner to refuse, without lawful excuse: to be sworn or make an affirmation; to produce documents or articles that a person is lawfully required to produce; or to answer questions that the person is lawfully required to answer.

Item 57 - At the end of section 42C

95. As indicated above in respect of item 56, this item sets out the defence of lawful excuse to an offence under section 42C in a separate new subsection 42C(2), and includes a note to the new subsection stating that the defendant bears an evidential burden in relation to the defence.

Item 58 - Subsection 45(1)

96. This item amends subsection 45(1) of the *Designs Act 1906* by deleting the fault element of “knowingly”. Subsection 45(1) currently applies the fault element of knowledge (“knowingly”) in relation to the physical elements of conduct, namely falsely representing that any design applied to any article sold by him is registered. Following application of the *Criminal Code*, the fault element of knowledge will be restricted to physical elements of circumstance or result, and intention will be the sole *Criminal Code* fault element that can be applied to a physical element of conduct: see sections 5.2 and 5.3 of the *Criminal Code*. Applying “knowingly” to a physical element of conduct in the pre-*Criminal Code* environment is equivalent to applying the *Criminal Code* fault element of intention. Accordingly this item proposes the deletion of “knowingly” in subsection 45(1), and the appropriate and equivalent *Criminal Code* default fault element, namely intention, will apply by operation of section 5.6 of the *Criminal Code*.

Item 59 - Subsections 45A(1) and (2)

97. This item repeals subsections 45A(1) and (2) of the *Designs Act 1906*. Along with item 61 below, it amends section 45A of the *Designs Act 1906* to repeal the provisions in that section providing for the vicarious liability of a body corporate for offences against the Act committed by a director, servant or agent of the body corporate. The vicarious liability of a body corporate will, instead, be determined under the provisions of Part 2.5 of the *Criminal Code*. The remaining provisions in section 45A will continue to provide for the vicarious liability of a person other than a body corporate (i.e. a natural person) for offences against the Act committed by a servant or agent of the person. To indicate to the reader that the expression 'servant' encompasses all employees (and not merely personal servants) the section is given the new heading: 'Conduct of employees and agents of natural persons'.

Item 60 - Subsection 45A(6)

98. This item amends subsection 45A(6) of the *Designs Act 1906* to remove a reference to subsection (1), consequentially on the repeal of subsection 45A(1) by item 59 above.

Item 61 - Subsection 45A(7)

99. This item repeals subsection 45(7). Along with item 59 above, it amends section 45A of the *Designs Act 1906* to repeal the provisions in that section providing for the vicarious liability of a body corporate for offences against the Act committed by a director, servant or agent of the body corporate.

Item 62 - Subsection 45A(9)

100. This item amends subsection 45A(9) of the *Designs Act 1906* consequentially on the repeal of sections 7 and 7A, and subsection 86(1) of the *Crimes Act 1914* — which deal with the ancillary offences of attempt, incitement and conspiracy — and their replacement by

sections 11.1, 11.4, and 11.5 of the *Criminal Code* — which deal with the same ancillary offences.

Item 63 - At the end of section 45A

101. This item adds a note to the end of the amended section 45A (see item 59 above) directing the reader to Part 2.5 of the *Criminal Code* for provisions relating to the vicarious liability of a body corporate.

Liquefied Petroleum Gas (Grants) Act 1980

Item 64 - After section 3B

102. This item inserts proposed section 3C which applies Chapter 2 (except Part 2.5) of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility. There is an exception in relation to Part 2.5 of the *Criminal Code* which concerns corporate criminal responsibility. The Act already has separate provisions in relation to corporate criminal responsibility in relation to offences under that Act (subsections 7A(19), (20) and (20A)). Part 2.5 of the *Criminal Code* contains general principles of corporate criminal responsibility which when it was introduced in 1995 was in appropriate cases recognised as requiring supplementation with specific provisions. This Bill reflects the status quo in relation to special provisions concerning corporate criminal responsibility. Therefore it has been decided to take the approach of retaining existing special provisions in relation to corporate criminal responsibility by excluding operation of Part 2.5.
103. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

Item 65 - Subsection 7A(12)

104. This item proposes two amendments to subsection 7A(12). First, subsection 7A(12) applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct, namely a corporation’s obtaining the benefit of a payment or payments under a scheme or schemes to which it is not entitled. Following application of the *Criminal Code*, the fault element of knowledge will be restricted to physical elements of circumstance or result, and intention will be the sole *Criminal Code* fault element that can be applied to a physical element of conduct: see sections 5.2 and 5.3 of the *Criminal Code*. Accordingly, this item proposes the removal of “knowingly” in subsection 7A(12). With the removal of “knowingly” the fault element of “intention” will become the default fault element to be proven by the prosecution. It is considered that subsection 7A(12) will continue to operate in the same manner as at present following this amendment.
105. Second, this item proposes to amend subsection 7A(12) by removing the reference to attempting to commit the primary offence in paragraph 7A(12) of obtaining a benefit to which there is no entitlement. Reliance will instead be placed upon the relevant general ancillary provision in the *Criminal Code*, namely section 11.1 (attempt). This ancillary provision is present in Chapter 2 of the *Criminal Code*, which is being applied to this Act by item 64 of this Schedule and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

Liquid Fuel Emergency Act 1984

Item 66 - Subsection 3(1) (definition of relevant provision of this Act)

106. This item removes the reference to “section 28” in the definition of a “relevant provision of this Act” consequent upon the proposed repeal of section 28 (see item 64 of this Schedule).

Item 67 - At the end of Part 1

107. This item inserts proposed section 11A which applies Chapter 2 (except Part 2.5) of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility. There is an exception in relation to Part 2.5 of the *Criminal Code* which concerns corporate criminal responsibility. The Act already has separate provisions in relation to corporate criminal responsibility in relation to offences under that Act (section 40). Part 2.5 of the *Criminal Code* contains general principles of corporate criminal responsibility which when it was introduced in 1995 was in appropriate cases recognised as requiring supplementation with specific provisions. This Bill reflects the status quo in relation to special provisions concerning corporate criminal responsibility. Therefore it has been decided to take the approach of retaining existing special provisions in relation to corporate criminal responsibility by excluding operation of Part 2.5.
108. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

Item 68 – Subsections 14(5)

109. Subsection 14(5) applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct, namely maintaining or making available information in relation to liquid fuels that is false or misleading. Following application of the *Criminal Code*, the fault element of knowledge will be restricted to physical elements of circumstance or result, and intention will be the sole *Criminal Code* fault element that can be applied to a physical element of conduct: see sections 5.2 and 5.3 of the *Criminal Code*. Accordingly this item proposes the deletion of “knowingly maintain or make available statistical information that” in subsection 14(5) and its replacement with the phrase “maintain or make available statistical information knowing that it”. With this change, “knowingly” has been replaced with the equivalent *Code* fault of “intention” in relation to the physical element of conduct of maintaining or making information available and the fault element of “knowledge” has been preserved in relation to the physical element of circumstance that the information maintained or made available is false or misleading in a material particular.
110. It is considered that subsection 14(5) will continue to operate in the same manner as at present following this amendment.

Item 69 – Section 28

111. This item proposes the repeal of section 28 to remove references to: attempting to contravene a relevant provision of the Act; aiding, abetting, counselling or procuring a person to contravene such a provision; inducing a person to contravene such a provision; being knowingly concerned in such a contravention; or conspiring with others to contravene such a provision. These matters are ancillary to the primary offence of

contravening a relevant provision of the Act. Reliance will instead be placed upon the relevant general ancillary provision in the *Criminal Code*, namely sections 11.1 (attempt), 11.2 (aiding, abetting, counselling or procuring the commission of a primary offence), 11.4 (incitement) and 11.5 (conspiracy). These ancillary provisions are present in Chapter 2 of the *Criminal Code*, which is being applied to this Act by item 67 of this schedule and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

Item 70 – After subsection 29(5)

112. This item inserts proposed subsection 29(5A) which applies strict liability to the offence contained in subsection 29(5) of the Act. The offence concerns the return of an identity card by a person authorised to exercise powers under the Act in the event that the person ceases to be an authorised person for the purposes of the Act. The maximum penalty for this offence is \$100. The application of strict liability to this offence preserves the existing situation, namely that the offence is already one of strict liability. The offence concerns an administrative obligation which could be difficult to establish if the prosecution was required to prove intention with respect to the failure to return the card. This is the type of obligation which is usually interpreted to mean that the legislature intended that strict liability should apply. Another factor in determining whether strict liability applies is the penalty, which in this case is very low.
113. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision. An explanation of “strict liability” appears at paragraph 12 above.

Item 71 – Subsection 30(2)

114. This item proposes several amendments to subsection 30(2), which are achieved by the repeal and substitution of new subsections 30(2), (2A) and (2B). First, subsection 30(2) provides that a person shall not refuse or fail to comply with a notice under section 30, concerning the furnishing of information or documents, to the extent that the person is capable of complying with it. The penalty for this offence is \$1,000. Proposed paragraphs 30(2)(a) and (b) are used, respectively, to separate the offences of 'refuse' (which implies a fault element) and 'fail' (which does not imply a fault element). Proposed subsection 30(2B) applies strict liability to the 'fail' offence. The application of strict liability to this offence preserves the existing situation, namely that the offence is already one of strict liability. The offence concerns a statutory obligation which could be difficult to establish if the prosecution was required to prove intention with respect to the failure to furnish information or documents. This is the type of statutory obligation which is usually interpreted to mean that the legislature intended that strict liability should apply. Another factor in determining whether strict liability applies is the penalty, which in this case is low. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision. An explanation of “strict liability” appears at paragraph 12 above.
115. Second, the phrase "to the extent that the person is capable of complying with it" has not been retained in proposed subsection 30(2) but has been recreated by subsection 30(2A) which proposes that subsection (2) does not apply to the extent that the person is not capable of complying with the notice. The rationale for this amendment is to prevent future interpretation that the capacity to comply element of this provision is an element of

the offence, which would have to be disproved in the negative by the prosecution. The proposed amendment will put it beyond doubt that, to the extent that a person is incapable of complying with a notice, this is a defence to the offence. This item also adds the standard note after proposed subsection 30(2A) concerning the imposition of an evidential burden on a defendant by subsection 13.3(3) of the *Criminal Code* if a defendant relies on the incapacity to comply defence established by subsection 30(2A).

Item 72 – Subsection 30(3)

116. Subsection 30(3) applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct namely, in purported compliance with a notice under section 30, furnishing information that is false or misleading in a material particular. Following application of the *Criminal Code*, the fault element of knowledge will be restricted to physical elements of circumstance or result, and intention will be the sole *Criminal Code* fault element that can be applied to a physical element of conduct: see sections 5.2 and 5.3 of the *Criminal Code*. Accordingly this item proposes the deletion of “knowingly furnish information that” in subsection 30(3) and its replacement with the phrase “furnish information knowing that it”. With this change, “knowingly” has been replaced with the equivalent *Code* fault of “intention” in relation to the physical element of conduct of furnishing information and the fault element of “knowledge” has been preserved in relation to the physical element of circumstance that the information furnished is false or misleading in a material particular.
117. It is considered that subsection 30(3) will continue to operate in the same manner as at present following this amendment.

Item 73 – Subsection 34(3)

118. Consequent upon the proposed repeal of section 28 (see item 69 of this Schedule) this item amends subsection 34(3), the net effect of which is to update references to ancillary conduct by reference to the *Criminal Code*. The substituted provision refers to Part 2.4 of the *Criminal Code*, which governs ancillary offence provisions.

Management and Investment Companies Act 1983

Item 74 – at the end of Part 1

119. This item inserts proposed section 4A which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

National Measurement Act 1960

Item 75 – at the end of Part 1

120. This item inserts proposed section 6A which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

Item 76 –Section 18J

121. This item proposes the repeal of section 18J, which applies Chapter 2 of the *Criminal Code* only to Part VA of the *National Measurement Act 1960*. It is consequential to the proposed amendment made by item 75.

Offshore Minerals Act 1994**Item 77 - Section 11(1)**

122. Subsection 11(1) currently applies the fault elements of intention and recklessness (identified as "intentionally or recklessly") to the physical element of conduct in relation to offence provisions in subsections 364(3), 372(1), 385(1)(2) and 423(1) of the Act.
123. Following application of the Criminal Code, the fault element of recklessness will be restricted to physical elements of circumstance or result, and intention will be the sole Criminal Code fault element that can be applied to a physical element of conduct: see sections 5.2 and 5.3 of the Criminal Code. Accordingly this item proposes the deletion of recklessness from this provision, as its present form would not operate in the same manner following application of the Criminal Code. However the Criminal Code's default fault provision (section 5.6) will preserve the operation of the fault element of recklessness by applying it to all physical elements of circumstance in relation to subsections 364(3), 372(1), 385(1)(2) and 423(1) of the Act. Similarly, the fault element of intention will still continue to apply to the physical element of conduct by virtue of section 5.6.
124. It is considered that subsection 11(1) will continue to operate in the same manner as at present following this amendment.

Item 78 - After section 11

125. This item adds a new section 11A which applies Chapter 2 of the Criminal Code to all offences against the *Offshore Minerals Act 1994*. Chapter 2 establishes the codified general principles of criminal responsibility.
126. A standard note concerning Chapter 2 of the Criminal Code setting out the general principles of criminal responsibility is also added after this provision to clarify that this particular Chapter of the Code applies.

Item 79 - Section 44(b)

127. Section 44 deals with persons who unnecessarily interfere with other activities in a licence area or special purpose consent granted under the Act. Paragraph 44(b) currently applies the fault elements of intention and recklessness (identified as "intentionally or recklessly") to the physical element of conduct in relation to section 44 of the Act.
128. Following application of the Criminal Code, the fault element of recklessness will be restricted to physical elements of circumstance or result, and intention will be the sole Criminal Code fault element that can be applied to a physical element of conduct: see sections 5.2 and 5.3 of the Criminal Code. Accordingly this item proposes the deletion of recklessness from this provision, as its present form would not operate in the same manner following application of the Criminal Code. However the Criminal Code's default fault provision (section 5.6) will preserve the operation of the fault element of recklessness by

applying it to all physical elements of circumstance in relation to sections 44 of the Act. Similarly, the fault element of intention will still continue to apply to the physical element of conduct by virtue of section 5.6 of the *Criminal Code*. Section 44 will continue to operate in the same manner as at present following this amendment.

Item 80 - Subsection 364(3)

129. This subsection empowers the Designated Authority (the relevant State/Territory Minister) to request the production of documents in respect to an application for a transfer in a licence. This item proposes to repeal subsection 364(3) and place the defence of reasonable excuse into a new subsection 364(4). The rationale for this amendment is to prevent future interpretation that the "reasonable excuse" element of this provision may be interpreted as an element of the offence, which would have to be disproved in the negative by the prosecution. The new subsection 364(4) puts it beyond doubt that "reasonable excuse" is a defence to the offence.
130. A standard note advising that a defendant bears an evidential burden in relation to the defence of "reasonable excuse" has been added following subsection 364(4) to assist the reader.

**Item 81 - Subsection 372(1);and
Item 82 - After subsection 372(1)**

131. Subsection 372(1) requires a person to comply with a request under section 367, 368, 370, or 371. Item 310 proposes to repeal the words "without reasonable excuse" from subsection 371(1) and place the defence of reasonable excuse into a new subsection 372(1A). The rationale for this amendment is to prevent future interpretation that the "reasonable excuse" element of this provision may be interpreted as an element of the offence, which would have to be disproved in the negative by the prosecution.
132. Item 315 inserts a new subsection 372(1A), which puts it beyond doubt that "reasonable excuse" is a defence to the offence under subsection 372(1). A standard note advising that a defendant bears an evidential burden in relation to the defence of "reasonable excuse" has been added to following subsection 364 (4) to assist the reader.

Item 83 - At the end of subsection 404(4)

133. A standard note has been added that clarifies the present situation in respect of the burden of proof in respect a defence under subsection 404(4). It advises that a defendant bears a legal burden as is the case at present in relation to a matter in subsection 404(4).

Item 84 - Subsection 404(5)

134. This item effectively amends subsection 404(5) by deleting references to the ancillary offence elements of aiding, abetting, counselling or procuring the primary offence in subsection 404(3). These ancillary offences are being replaced by the equivalent ancillary offences contained in section 11.2 of the *Criminal Code*, which will apply to this Act, by operation of this Bill.
135. The substituted subsection 404(5) maintains the existing legal burden on the defendant if he or she raises the defence as is the case at present. The defence is reworded in language that is compliant with the *Criminal Code's* principles of construction.

136. This change is consistent with the minimalist approach to the harmonisation of existing offences with the Criminal Code because it does not require any revisiting of the original policy.

Item 85 - Section 423

137. Section 423 places an obligation on an inspector to return their identity card to the Designated Authority as soon as possible after the termination of their appointment to ensure the integrity of the identity card system is maintained.
138. This item proposes to insert the defence of reasonable excuse into a new subsection (2). The rationale for this amendment is that the provision, as it currently stands, could be interpreted so that the "reasonable excuse" element of this provision could be considered as an element of the offence. The prosecution, would have to prove that there was no "reasonable excuse" in order to successfully prove that the offence was committed. The proposed amendment puts it beyond doubt that it is a defence to the offence.
139. A standard note advising that a defendant bears an evidentiary burden in relation to the matter has been added to clarify the nature of the burden where a defendant relies on the reasonable excuse defence, established by the proposed subsection 423(2).

Patents Act 1990

Item 86 - At the end of Chapter 1

140. This item amends Chapter 1 of the *Patents Act 1990* by inserting a new provision to apply Chapter 2 of the *Criminal Code* to offences in that Act. Chapter 2 establishes the codified general principles of criminal responsibility. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

Item 87 - Section 179

141. Items 87 and 88 amend section 179 of the *Patents Act 1990* to set out the defence of lawful excuse in a new subsection. This preserves the defence, currently set out in section 179, but avoids that defence being mistakenly interpreted to be part of the elements of the offence to be proved by the prosecution. Item 87 removes the words "without lawful excuse" from section 179. Item 88 below will set out the defence of lawful excuse. Section 179 currently makes it an offence for witnesses summoned by the Commissioner of Patents (the Commissioner) to fail to comply with the summons, without lawful excuse.

Item 88 - At the end of section 179

142. As indicated above in respect of item 87, this item sets out the defence of lawful excuse in a separate new subsection 179(2). The note to the new subsection states that the defendant bears an evidential burden in relation to the defence, as set out in subsection 13.3(3) of the *Criminal Code*. This means that if the defendant wishes to raise the defence of lawful excuse, the defendant need only adduce or point to evidence that suggests a reasonable possibility that the defence exists — see subsection 13.3 (6) of the *Criminal Code*.

Item 89 - Section 180

143. In the same manner as items 87 and 88 above, items 89 and 90 amend section 180 of the *Patents Act 1990* to set out the defence of lawful excuse, currently in that section, in a new subsection. Item 89 removes the words "without lawful excuse" from section 180. Item 90 below will set out the defence of lawful excuse. Section 180 makes it an offence for a person appearing before the Commissioner to refuse, without lawful excuse, to be sworn or make an affirmation; or to refuse, without lawful excuse, to answer questions that the person is lawfully required to answer.

Item 90 At the end of section 180

144. As indicated above in respect of item 89, this item sets out the defence of lawful excuse in a separate new subsection 180(2), and includes a note to the new subsection stating that the defendant bears an evidential burden in relation to the defence.

Item 91 - Section 181

145. In the same manner as items 87 and 88 above, items 91 and 92 amend section 181 of the *Patents Act 1990* to set out the defence of lawful excuse, currently in that section, in a new subsection. Item 91 removes the words "without lawful excuse" from section 180. Item 92 below will set out the defence of lawful excuse. Section 181 makes it an offence for a person required by the Commissioner to produce a document or article to fail to produce it, without lawful excuse.

Item 92 - At the end of section 181

146. As indicated above in respect of item 91, this item sets out the defence of lawful excuse in a separate new subsection 181(2), and includes a note to the new subsection stating that the defendant bears an evidential burden in relation to the defence.

Item 93 - Section 191

147. Section 191 of the *Patents Act 1990* currently applies the fault elements of knowledge and recklessness ("knowingly or recklessly") in relation to the physical elements of conduct, namely the physical elements described in paragraphs (a), (b) or (c) — making a false entry in the Register of Patents; causing a false entry to be made in the Register; or tendering in evidence a document that falsely purports to be a copy of, or extract from, an entry in the Register. Following application of the *Criminal Code*, the fault elements of knowledge and recklessness will be restricted to physical elements of circumstance or result, and intention will be the sole *Criminal Code* fault element that can be applied to a physical element of conduct: see sections 5.2 and 5.3 of the *Criminal Code*. Accordingly this item proposes the deletion of "knowingly or recklessly" in section 191 and the appropriate default fault element, namely intention, will apply by operation of *Criminal Code* section 5.6. The fault element of intention is the direct *Criminal Code* equivalent of "knowingly" where the latter has been applied to physical elements of conduct, and the fault element of recklessness will apply by default to each physical element of circumstance or result in section 191.

Item 94 Subsections 225(1) and (2)

148. This item repeals subsections 225(1) and (2) of the *Patents Act 1990*. Along with item 97 below it amends section 225 of the *Patents Act 1990* to remove the provisions in that section providing for the vicarious liability of a company for offences against the Act committed by a director, servant or agent of the company. The vicarious liability of a company will, instead, be determined under the provisions of Part 2.5 of the *Criminal Code*. The remaining provisions in section 225 will continue to provide for the vicarious liability of a person other than a company (i.e. a natural person) for offences against the Act committed by a servant or agent of the person. To indicate to the reader that the expression 'servant' encompasses all employees (and not merely personal servants) the section is given the new heading: 'Conduct of employees and agents of natural persons'.

Item 95 Subsection 225(5)

149. This item amends subsection 225(5) of the *Patents Act 1990* consequentially on the repeal of sections 5, 7 and 7A, and subsection 86(1) of the *Crimes Act 1914* — which deal with the ancillary offences of aiding, abetting, attempt, incitement and conspiracy — and their replacement by sections 11.1, 11.2, 11.4, and 11.5 of the *Criminal Code* — which deal with the same ancillary offences.

Item 96 Subsection 225(7)

150. This item amends subsection 225(7) of the *Patents Act 1990* to remove a reference to subsection (1), consequentially on the repeal of subsection 225(1) by item 94 above.

Item 97 Subsection 225(8)

151. This item repeals subsection 225(8) of the *Patents Act 1990* — see item 94 above.

Item 98 At the end of section 225

152. This item adds a note to the end of the amended section 225 (see item 94 above) directing the reader to Part 2.5 of the *Criminal Code* for provisions relating to the vicarious liability of a body corporate (i.e. a company).

Petroleum Excise (Prices) Act 1987**Item 99 - At the end of Part 1**

153. This item inserts proposed section 4A which applies Chapter 2 (except Part 2.5) of the *Criminal Code* to the Act. Chapter 2 establishes the codified general principles of criminal responsibility. There is an exception in relation to Part 2.5 of the *Criminal Code* which concerns corporate criminal responsibility. The Act already has a separate provision in relation to corporate criminal responsibility in relation to offences under that Act (section 11). Part 2.5 of the *Criminal Code* contains general principles of corporate criminal responsibility which when it was introduced in 1995 was in appropriate cases recognised as requiring supplementation with specific provisions. This Bill reflects the status quo in relation to special provisions concerning corporate criminal responsibility. Therefore it has been decided to take the approach of retaining the existing special provisions in relation to corporate criminal responsibility by excluding the operation of Part 2.5.

154. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

Item 100 – At the end of section 10

155. This item inserts proposed subsection 10(8) which applies strict liability to the offence in subsection 10(7) of the Act. Subsection 10(7) provides that a person shall not fail to comply with a requirement made of the person under section 10. Section 10 provides that a person may be required, by notice in writing, to furnish the Minister or an authorised person with required information, to attend before the Minister or authorised person to then and there answer questions, to produce to the Minister or authorised person any documents in the custody or under the control of the person, and to give an oath or affirmation that the information or answers that the person will give will be true. In the case of a natural person the offence carries a fine of \$1,000 or imprisonment for 6 months, or both. In the case of a body corporate the offence carries a fine of \$5,000. The application of strict liability to this offence preserves the existing situation, namely that the offence is already one of strict liability. The offence concerns statutory obligations which could be difficult to establish if the prosecution was required to prove intention with respect to the failure to meet requirements to provide information or evidence. This is the type of obligation which is usually interpreted to mean that the legislature intended that strict liability should apply. Another factor in determining whether strict liability applies is the penalty, which in this case is low.
156. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision. An explanation of “strict liability” appears at paragraph 12 above.

Petroleum Retail Marketing Sites Act 1980

Item 101 – After section 8

157. This item inserts proposed section 9 which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility.
158. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

Item 102 – Subsection 14(2)

159. This item proposes to remove the defence of reasonable excuse from subsection 14(2). The defence is recreated in a new subsection 14(2A) (see item 103 of this Schedule). The rationale for this amendment is to prevent future interpretation that the reasonable excuse element of this provision is an element of the offence, which would have to be disproved in the negative by the prosecution. The proposed amendment will put it beyond doubt that a reasonable excuse is a defence to the offence.

Item 103 – After subsection 14(2)

160. This item proposes the insertion of two new subsections. First, consequent upon item 102 of this Schedule, this item inserts proposed subsection 14(2A) which recreates the defence of reasonable excuse in relation to an offence against subsection 14(2). This item also adds the standard note after proposed subsection 14(2A) concerning the imposition of an

evidential burden on a defendant by subsection 13.3(3) of the *Criminal Code* if a defendant relies on the reasonable excuse defence established by subsection 14(2A).

161. Second, this item inserts proposed subsection 14(2B) which applies strict liability to the offence contained in subsection 14(2). The application of strict liability to this offence preserves the existing situation, namely that the offence is already one of strict liability. Subsection 14(2) provides that a person must not fail to comply with a requirement under section 14. The person can claim a defence if he or she has a reasonable excuse. The offence carries a penalty of a fine not exceeding \$1,000. Section 14 gives an authorized officer the power to require a person to produce books in the custody or under the control of a person that may be relevant to retail sales of motor fuel and, if the books are not produced, may require the person to state, to best knowledge and belief, where the books may be found and to identify the person who last had custody of the books and where that person may be found. This is a statutory obligation which could be difficult to establish if the prosecution was required to prove intention with respect to the failure to assist the inspector. This is the type of obligation which is usually interpreted to mean that the legislature intended that strict liability should apply. Another factor in determining whether strict liability applies is the penalty, which in this case is low. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision. An explanation of “strict liability” appears at paragraph 12 above.

Petroleum (Submerged Lands) Act 1967

Item 104 - At the end of Part 1

162. This item inserts proposed subsections 8AB(1) and (2). First, subsection 8AB(1) applies Chapter 2 of the *Criminal Code* to the Act, subject to subsection 8AB(2). Chapter 2 establishes the codified general principles of criminal responsibility. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.
163. Second, subsection 8AB(2) provides an exception in relation to Part 2.5 of the *Criminal Code*, which concerns corporate criminal responsibility. The Act already has a separate provision in relation to corporate criminal responsibility in relation to an offence under Schedule 7 of that Act (Clause 50). Part 2.5 of the *Criminal Code* contains general principles of corporate criminal responsibility which when it was introduced in 1995 was in appropriate cases recognised as requiring supplementation with specific provisions. This Bill reflects the status quo in relation to special provisions concerning corporate criminal responsibility. Therefore it has been decided to take the approach of retaining the existing special provisions in relation to corporate criminal responsibility by excluding the operation of Part 2.5.

Item 105 - Subsection 82(1)

164. This item proposes to insert subsection 82(1A) which provides that strict liability is applied to the physical element of the offence in subsection 82(1) that the instrument is an instrument of the kind referred to in paragraph 81(4)(b). Subsection 82(1) prohibits a person from lodging with the Designated Authority an instrument in relation to a transfer or dealing that contains a statement that, to the knowledge of the person, is false or misleading in a material particular in relation to the consideration paid or in relation to any other fact or circumstance affecting the amount of fee payable.

165. This physical element is an appropriate candidate for the application of strict liability because in most applicable instances the person concerned will not possess any fault element concerning this physical element, and accordingly the offence would become almost unenforceable if the prosecution were obliged to demonstrate fault. Further, the person's degree of culpability under this offence is not materially affected by absence of the subject fault. However the defence of mistake of fact should be available to the defendant, as this provision should not operate so as to criminalise the conduct of persons who made a reasonable mistake of fact in relation to the identity of the affected person. Accordingly strict liability, and not absolute liability, is the appropriate application.
166. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision. An explanation of "strict liability" appears at paragraph 12 above.

Item 106 - Subsection 84(2)

167. Subsection 84(2) applies the fault element of knowledge (or "knowingly") in relation to the proscribed physical element of conduct, namely furnishing information to the Designated Authority that is false or misleading. Following application of the *Criminal Code*, the fault element of knowledge will be restricted to physical elements of circumstance or result, and intention will be the sole *Criminal Code* fault element that can be applied to a physical element of conduct: see sections 5.2 and 5.3 of the *Criminal Code*. Accordingly this item proposes the deletion of the phrase "shall not knowingly furnish information that" in subsection 84(2) and its replacement with the phrase "must not furnish information knowing that it". With this change, "knowingly" has been replaced with the equivalent *Code* fault of "intention" in relation to the physical element of conduct of furnishing information and the fault element of "knowledge" has been preserved in relation to the physical element of circumstance that the information furnished is false or misleading in a material particular.
168. It is considered that subsection 84(2) will continue to operate in the same manner as at present following this amendment.

Item 107 - Subsection 85(2)

169. This item proposes several amendments to subsection 85(2), which are achieved by the repeal and substitution of subsection 85(2) and adding new subsections 85(3) and (4). Subsection 85(2) provides that a person shall not fail or refuse to comply with a requirement given under subsection (1) or (1A). These subsections provide that the Designated Authority may require a person to produce documents concerning a change in title due to devolution; a change in a company name; or a change of a titleholder's interests or rights in a title. The maximum penalty for this offence is 50 penalty units. Proposed subsections 85(2) and (4) are used, respectively, to separate the offences of 'fail' (which does not imply a fault element) and 'refuse' (which implies a fault element). Proposed subsection 85(3) applies strict liability to the 'fail' offence. The application of strict liability to this offence preserves the existing situation, namely that the offence is already one of strict liability. The offence concerns a statutory obligation which could be difficult to establish if the prosecution was required to prove intention with respect to the failure to produce documents, or make them available for inspection. This is the type of statutory obligation which is usually interpreted to mean that the legislature intended that strict liability should apply. Another factor in determining whether strict liability applies is the penalty, which in this case is low.

170. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision. An explanation of “strict liability” appears at paragraph 12 above.

Item 108 - Section 90

171. Section 90 uses the non-*Criminal Code* fault element “wilfully” in relation to the physical element of conduct, namely making, causing to be made, or concurring in making, a false entry in a Register or producing or tendering in evidence a document falsely purporting to be a copy or extract from an instrument or from an entry in a Register. This is akin to applying the fault element of intention, which is the equivalent used in the *Criminal Code*. This item proposes the deletion of the word “wilfully” in section 90. The default fault element of intention will then apply (see section 5.6 of the *Criminal Code*). It is considered that section 90 will continue to operate in the same manner as at present following this amendment.

Item 109 – At the end of subsection 97(6) (before the penalty)

172. Section 97 provides that a permittee, lessee, licensee or holder of a special prospecting authority shall carry out activities in a proper and workmanlike manner and in keeping with good oil-field practice. Subsection 97(6) provides that it is a defence if a person charged with failing to comply with a provision of this section (or a defendant in an action arising out of failure to comply) can prove that he took all reasonable steps to comply with the provision. This provision imposes a legal burden on the person or defendant (section 13.4 of the *Code* refers). This means that the defendant must prove the existence of the matter. The note to the subsection provides, as is the case, that the defendant bears a legal burden in relation to the matters in subsection (6).

Item 110 – After subsection 98(3)

173. This item inserts proposed subsection 98(3A) which applies strict liability to the offences contained in subsections 98(2) and (3) of the Act. The offences concern failure to maintain or remove prescribed property. The maximum penalty for these offences is 100 penalty units. The application of strict liability to these offences preserves the existing situation, namely that the offences are already ones of strict liability. The offences concern statutory obligations which could be difficult to establish if the prosecution was required to prove intention with respect to the failure to maintain or remove the property. This is the type of obligation which is usually interpreted to mean that the legislature intended that strict liability should apply. Another factor in determining whether strict liability applies is the penalty, which in this case is low.
174. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision. An explanation of “strict liability” appears at paragraph 12 above.

Item 111 - After subsection 101(7)

175. This item inserts proposed subsection 101(7A) which applies strict liability to the offence contained in subsection 101(7) of the Act. Subsection 101(7) provides that a person who fails to comply with a direction in force under subsection 101(1) is guilty of an offence punishable, upon conviction, by a fine not exceeding \$10,000. Subsection 101(1) gives the Designated Authority the power to give a titleholder a direction as to any matter with respect to which regulations may be made. The application of strict liability to the offence

proscribed by subsection 101(7) preserves the existing situation, namely that the offence is already one of strict liability. The offence concerns a statutory obligation which could be difficult to establish if the prosecution was required to prove intention with respect to the failure to comply with a direction. This is the type of obligation which is usually interpreted to mean that the legislature intended that strict liability should apply.

176. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision. An explanation of “strict liability” appears at paragraph 12 above.

Item 112 - After subsection 101(8)

177. This item inserts the standard note after subsection (8) concerning the imposition of an evidential burden on a defendant if a defendant relies on the defence established by paragraph 101(8)(b).

Item 113 - Section 117

178. This item proposes the repeal and substitution of section 117 in order to achieve several amendments. First, subsection 117(a) makes it an offence to refuse or fail to comply with an instrument under section 115 to the extent the person is capable of complying with it. Section 115 gives the Designated Authority or an inspector the power to require a person to furnish information in writing or to attend to answer questions on matters relating to petroleum exploration, recovery and ancillary operations. The maximum penalty for this offence is a fine of 100 penalty units. Proposed paragraphs 117(1)(a) and (b) are used, respectively, to separate the offences of 'refuse' (which implies a fault element) and 'fail' (which does not imply a fault element). Proposed subsection 117(3) applies strict liability to the 'fail' offence. The application of strict liability to this offence preserves the existing situation, namely that the offence is already one of strict liability. The offence concerns a statutory obligation which could be difficult to establish if the prosecution was required to prove intention with respect to the failure to comply with an instrument. This is the type of statutory obligation which is usually interpreted to mean that the legislature intended that strict liability should apply. Another factor in determining whether strict liability applies is the penalty, which in this case is low. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision. An explanation of “strict liability” appears at paragraph 12 above.
179. Second, subsections 117(b) and (c) apply the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct, namely furnishing information that is false or misleading, or making a statement or producing a document that is false or misleading in a material particular. Following application of the *Criminal Code*, the fault element of knowledge will be restricted to physical elements of circumstance or result, and intention will be the sole *Criminal Code* fault element that can be applied to a physical element of conduct: see sections 5.2 and 5.3 of the *Criminal Code*. Accordingly the repeal of this section has the effect of deleting the phrase “knowingly furnish information that is false and misleading” in subsection 117(b) and the phrase “knowingly make a statement or produce a document that is false or misleading” in subsection 117(c) and substituting the phrase “furnish information knowing that it is false or misleading” in proposed paragraph 117(1)(c) and the phrase “make a statement or produce a document knowing that it is false or misleading” in proposed paragraph 117(1)(d). With this change, “knowingly” has been replaced with the equivalent *Code* fault of “intention” in relation to the physical element of conduct of furnishing information or making a statement and the fault element of “knowledge” has been preserved in relation to the physical element of circumstance that

the information furnished or statement made is false or misleading in a material particular. It is considered that proposed paragraphs 117(1)(c) and (d) will operate in the same manner as subsections 117(b) and (c), respectively, operate at present following this amendment.

180. Third, the phrase "to the extent to which he is capable of complying with it" has not been retained in proposed paragraphs 117(1)(a) and (b) but has been recreated by subsection 117(2) which proposes that paragraph (1)(a) or (b) does not apply to the extent to which the person is not capable of complying with the requirement. The rationale for this amendment is to prevent future interpretation that the capacity to comply element of this provision is an element of the offence, which would have to be disproved in the negative by the prosecution. The proposed amendment will put it beyond doubt that, to the extent that a person is incapable of complying with a notice, this is a defence to the offence. This item also adds the standard note after proposed subsection 117(2) concerning the imposition of an evidential burden on a defendant by subsection 13.3(3) of the Criminal Code if a defendant relies on the incapacity to comply defence established by subsection 117(2).

Item 114 - At the end of section 119

181. This item inserts proposed subsection 119(4) which applies strict liability to the offence in subsection 119(3) of the Act. Subsection 119(3) provides that where a vessel enters or remains in a prohibited safety zone (that has been gazetted for the purpose of protecting a well, structure or any equipment) the owner and the person in command or in charge of the vessel are each guilty of an offence against section 119 and are punishable, upon conviction, by imprisonment for not more than 10 years. This subsection imposes vicarious liability on both the owner and person in command of a vessel and, as any defendant would not have the relevant fault, this is an offence of strict liability. The application of strict liability to this offence preserves the existing situation, namely that the offence is already one of strict liability. The penalty for the offence is high (up to 10 years). The penalty is in keeping with the potential for extensive injury/loss of human life and the potential catastrophic damage to the environment should an unauthorised vessel in a safety zone collide with a well, structure or any equipment associated with petroleum exploration, development or ancillary activities.
182. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision. An explanation of "strict liability" appears at paragraph 12 above.

Item 115 – Subsection 124A(1)

183. This item proposes to repeal and replace subsection 124A(1) in order to achieve two amendments. First, paragraphs 124(a) and (b) make it an offence to "damage" or "interfere" with a structure or vessel or activities on a structure or vessel. These provisions are being amended to remove the words "damage" and "interfere" as the active verbs and rephrased to proscribe the actions of a person whose conduct, by performance of an act, causes damage to, or interference with, the prescribed property. The rationale for these amendments is that a person does not damage or interfere something, rather the damage is the result of the person's action and is not in itself a physical element of conduct. It follows that retaining "damage" or "interfere" as the active verbs in a criminal offence may lead to real difficulties in interpreting the offence following application of the *Criminal Code*. Constructing the offence in the amended form will better identify the physical elements of conduct and result, and the fault elements that attach to these physical elements. The fault element of intention will still apply to the physical element of conduct

by virtue of the *Criminal Code*'s default fault provision (section 5.6). Similarly, the fault element of recklessness will attach to the result of the person's conduct, namely the resultant interference or damage, and it will be necessary for the prosecution to demonstrate that the person was reckless as to whether his or her conduct would cause the resultant lack of maintenance or removal. Second, given the reliance on the default fault elements, the words "intentionally or recklessly" are deleted.

Item 116 - At the end of subsection 126(2)

184. This item inserts a penalty of 50 penalty units at the end of subsection 126(2) to clarify that the penalty at the end of section 126 applies equally to subsection 126(2). This puts it beyond doubt that subsection 2 creates a criminal offence.

Item 117 – Subsection 126(3)

185. This item proposes to remove the defence of reasonable excuse from subsection 126(3). The defence is recreated in a new subsection 126(4) (see item 118 of this Schedule). The rationale for this amendment is to prevent future interpretation that the reasonable excuse element of this provision is an element of the offence, which would have to be disproved in the negative by the prosecution. The proposed amendment will put it beyond doubt that a reasonable excuse is a defence to the offence.

Item 118 - At the end of section 126

186. Consequent to item 117 of this Schedule, this item inserts proposed subsection 126(4) which recreates the defence of reasonable excuse in relation to an offence against subsection 126(3). This item also adds the standard note after proposed subsection 126(4) concerning the imposition of an evidential burden on a defendant by subsection 13.3(3) of the *Criminal Code* if a defendant relies on the reasonable excuse defence established by subsection 126(4).

Item 119 - Paragraph 133(1)(b)

187. This item repeals paragraph 133(1)(b) of the *Petroleum (Submerged Lands) Act* and inserts new paragraphs 133(1)(b) and (ba). Proposed paragraph (1)(b) retains the existing reference to section 6 of the *Crimes Act 1914* but paragraph (1)(ba) substitutes references to section 11.1, 11.4 or 11.5 of the *Criminal Code* for the existing references to sections 7 or 7A or subsection 86(1) of the *Crimes Act 1914*.
188. Sections 7, 7A and 86(1) of the *Crimes Act 1914* are concerned with the offences of attempt, inciting or urging and conspiracy. These sections of the *Crimes Act 1914* are repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2000*. These offences are replaced by equivalent provisions of the *Criminal Code* in the new paragraph 133(1)(ba).

Item 120 - After subsection 140D(1)

189. This item inserts proposed subsection 140D(1A) which applies strict liability to the offence in subsection 140D(1) of the Act. Subsection 140D(1) provides that where a vessel (not being an exempt vessel) enters or remains without authorisation in a gazetted area to be avoided, the owner and master of the vessel are each guilty of an offence punishable, on conviction, by a fine not exceeding \$50,000 or imprisonment for a period not exceeding 5

years, or both. This subsection imposes vicarious liability on both the owner and master of a vessel and, as any defendant would not have the relevant fault, this is an offence of strict liability. The application of strict liability to this offence preserves the existing situation, namely that the offence is already one of strict liability. The penalty for the offence is high (up to 5 years imprisonment or a fine, or both). The penalty is in keeping with the potential for extensive injury/loss of human life and the potential catastrophic damage to the environment should an unauthorised vessel in an area to be avoided collide with a well, pipeline, structure or any equipment associated with petroleum exploration, development or ancillary activities.

190. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision. An explanation of “strict liability” appears at paragraph 12 above.

Item 121 - After subsection 140D(2)

191. Subsection 140D(2) provides that it is a defence to a prosecution for an offence against subsection (1) in relation to a vessel, without authorisation, entering, or remaining in, the area to be avoided if the person charged satisfies the court that an unforeseen emergency rendered it necessary for the vessel to enter or remain in the area for specified safety purposes or the vessel entered or remained in the area in circumstances not under the control of the person who was in charge of the navigational watch of the vessel. This provision imposes a legal burden on the person or defendant (section 13.4 of the *Code* refers). This means that the defendant must prove the existence of the matter. The note to the subsection provides, as is the case, that the defendant bears a legal burden in relation to the matters in subsection (2).

Item 122 - After subsection 140E(2)

192. This item inserts proposed subsection 140E(2A) which applies strict liability to the offence contained in paragraph 140E(2)(a) of the Act. The offence concerns the failure of a person to facilitate by all reasonable means the boarding of a vessel by an authorised person pursuant to subsection (1). The maximum penalty for this offence is a fine not exceeding 50 penalty units. The application of strict liability to this offence preserves the existing situation, namely that the offence is already one of strict liability. The offence concerns a statutory obligation which could be difficult to establish if the prosecution was required to prove intention with respect to the failure to facilitate boarding of the vessel. This is the type of obligation which is usually interpreted to mean that the legislature intended that strict liability should apply. Another factor in determining whether strict liability applies is the penalty, which in this case is low.
193. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision. An explanation of “strict liability” appears at paragraph 12 above.

Item 123 - Clause 2 of Schedule 7 (definition of contravention)

194. This item repeals the definition of 'contravention' in clause 2 of Schedule 7 of the *Petroleum (Submerged Lands) Act 1967* and inserts a new definition. The new definition retains the existing reference to section 6 of the *Crimes Act 1914* but substitutes references to section 11.1, 11.4 or 11.5 of the *Criminal Code* for the existing references to sections 7 or 7A or subsection 86(1) of the *Crimes Act 1914*.

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

Item 124 - Subclause 32(2) of Schedule 7

196. This item proposes to remove the defence of reasonable excuse from subclause 32(2). The defence is recreated in a new subclause 32(2A) (see item 125 of this Schedule). The rationale for this amendment is to prevent future interpretation that the reasonable excuse element of this provision is an element of the offence, which would have to be disproved in the negative by the prosecution. The proposed amendment will put it beyond doubt that a reasonable excuse is a defence to the offence.

Item 125 - After subclause 32(2) of Schedule 7

197. This item proposes two further amendments to clause 32. First, consequent upon item 124 of this Schedule, this item inserts proposed subclause 32(2A) which recreates the defence of reasonable excuse in relation to an offence against subclause 32(2). This item also adds the standard note after proposed subclause 32(2A) concerning the imposition of an evidential burden on a defendant by subclause 13.3(3) of the *Criminal Code* if a defendant relies on the reasonable excuse defence established by subclause 32(2A).
198. Second, this item inserts proposed subclause 32(2B) which applies strict liability to the offence contained in subclause 32(2). Subclause 32(2) provides that a person must not fail to comply with a requirement under clause 32. The person can claim a defence if he or she has a reasonable excuse. The application of strict liability to this offence preserves the existing situation, namely that the offence is already one of strict liability. The offence carries a penalty of imprisonment for 6 months. Clause 32 gives an inspector, to the extent that it is reasonably necessary to do so in connection with an investigation, the power to require a prescribed person to give to the investigator reasonable assistance, answers to questions and documents requested. This is a statutory obligation which could be difficult to establish if the prosecution was required to prove intention with respect to the failure to assist the inspector. This is the type of obligation which is usually interpreted to mean that the legislature intended that strict liability should apply. Another factor in determining whether strict liability applies is the penalty, which in this case is low. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision. An explanation of “strict liability” appears at paragraph 12 above.

Item 126 - Subclause 32(3) of Schedule 7

199. Subclause 32(3) applies the fault element of knowledge (“knowingly”) and recklessness (“recklessly”) in relation to the proscribed physical element of conduct, namely, furnishing information to an inspector, in connection with the conduct of an investigation, that is false or misleading in a material particular. The use of ‘knowingly’ is akin to applying the fault element of intention, which is the equivalent used in the *Criminal Code*. Following application of the *Criminal Code*, the fault elements of knowledge and recklessness will be restricted to physical elements of circumstance or result, and intention will be the sole *Criminal Code* fault element that can be applied to a physical element of conduct: see sections 5.2 and 5.3 of the *Criminal Code*. Accordingly this item proposes the deletion of “knowingly or recklessly” in subclause 32(3). Upon application of the *Criminal Code*, its default fault provision (section 5.6) will apply the fault element of intention to each

physical element of conduct and the fault element of recklessness to each physical element of circumstance or result in subclause 32(3). It is considered that subclause 32(3) will continue to operate in the same manner as at present following this amendment.

Item 127 - Clause 39 of Schedule 7

200. This item proposes to remove the defence of reasonable excuse from clause 39 of Schedule 7. The defence is recreated in a new subclause 39(2), see item 128 of this Schedule. The rationale for this amendment is to prevent future interpretation that the reasonable excuse element of this provision is an element of the offence, which would have to be disproved in the negative by the prosecution. The proposed amendment will put it beyond doubt that a reasonable excuse is a defence to the offence.

Item 128 - At the end of clause 39 of Schedule 7

201. This item inserts two new subclauses. First, consequent upon item 127 of this Schedule, this item inserts proposed subclause 39(2) which recreates the defence of reasonable excuse in relation to an offence against subclause 39(1). This item also adds the standard note after proposed subclause 39(2) concerning the imposition of an evidential burden on a defendant by subsection 13.3(3) of the *Criminal Code* if a defendant relies on the reasonable excuse defence established by subclause 39(2).
202. Second, this item inserts proposed subclause 39(3) which applies strict liability to the offence contained in subclause 39(1) of the Act. The offence concerns tampering with a written notice issued by an inspector in conducting an investigation while that notice is displayed, or removing a notice before prescribed actions have been completed, or before the notice has ceased to have effect. The penalty for this offence is imprisonment for 6 months. The application of strict liability to this offence preserves the existing situation, namely that the offence is already one of strict liability. The offence concerns a statutory obligation which could be difficult to establish if the prosecution was required to prove intention with respect to tampering with or removing the notice. This is the type of obligation which is usually interpreted to mean that the legislature intended that strict liability should apply. Another factor in determining whether strict liability applies is the penalty, which in this case is low.
203. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision. An explanation of "strict liability" appears at paragraph 12 above.

Item 129 - Clause 45 of Schedule 7

204. This item proposes several amendments to subclause 45 of Schedule 7 which are achieved by the repeal of clause 45 and its substitution with proposed subclauses 45(1) and (2). Clause 45 provides that a person must not, without reasonable excuse, wilfully or recklessly, interfere with or render ineffective, or require or cause another person to interfere with or render ineffective, prescribed protective equipment or safety devices. First, this clause applies the fault element of recklessness and the non-*Criminal Code* element of wilfully in relation to the physical element of conduct, namely interfering with, or rendering ineffective, prescribed protective equipment or safety devices. The use of 'wilfully' is akin to applying the fault element of intention, which is the equivalent used in the *Criminal Code*. Following application of the *Criminal Code*, intention will be the sole *Criminal Code* fault element that can be applied to a physical element of conduct (see sections 5.2 and 5.5 of the *Criminal Code*.) This item therefore omits the words "wilfully

or recklessly" from proposed subclause 45(1), which proposes that a person must not perform an act that results in the interference with or the rendering ineffective of, prescribed equipment or devices. With this amendment the fault element of intention will apply by default to each physical element of conduct and the fault element of recklessness will apply by default to each physical element of circumstance or result in clause 45.

205. Second, clause 45 is being amended to remove the phrase "interfere with or render ineffective" as the active verbs and rephrased to provide that a person must not "perform an act that results in the interference with, or rendering ineffective of, any protective equipment or safety device". The rationale for this amendment is that a person does not interfere with or render ineffective prescribed equipment and devices, rather the interference or rendering ineffective is the result of the person's conduct, by performance of an act, and is not in itself a physical element of conduct. It follows that retaining "interfere" or "render" as the active verbs in a criminal offence may lead to real difficulties in interpreting the offence following application of the *Criminal Code*. Constructing the offence in the amended form will better identify the physical elements of conduct and result, and the fault elements that attach to these physical elements. As stated in the first paragraph of the Note for this item, the fault element of intention will still apply to the physical element of conduct by virtue of the *Criminal Code*'s default fault provision (section 5.6). Similarly, the fault element of recklessness will attach to the result of the person's conduct, namely the resultant interference or rendering ineffective and it will be necessary for the prosecution to demonstrate that the person was reckless as to whether his or her conduct would cause the resultant interference or rendering ineffective of the prescribed equipment or devices.
206. Third, this item moves the defence of reasonable excuse from clause 45 to proposed subclause 45(2). The rationale for this amendment is to prevent future interpretation that the reasonable excuse element of this provision is an element of the offence, which would have to be disproved in the negative by the prosecution. The proposed amendment will put it beyond that a reasonable excuse is a defence to the offence. This item also adds the standard note after proposed subclause 45(2) concerning the imposition of an evidential burden on a defendant by subsection 13.3(3) of the *Criminal Code* if a defendant relies on the reasonable excuse defence established by subclause 45(2).
207. Fourth, this item proposes to amend subclause 45 by not retaining the reference to requiring or otherwise causing another person to interfere with or render ineffective prescribed protective equipment or safety devices. Reliance will instead be placed upon the relevant general ancillary provision in the *Criminal Code*, namely section 11.2 (aiding, abetting, counselling or procuring the commission of a primary offence) and 11.4 (incitement). These ancillary provisions are present in Chapter 2 of the *Criminal Code*, which is being applied to this Act by item 104 of this schedule and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

Item 130 - Paragraphs 48(1)(b) and (c) of Schedule 7

208. This item proposes to repeal and replace paragraphs 48(1)(b) and (c) of Schedule 7 in order to achieve two amendments. First, paragraph 48(1)(b) is being amended to remove the word "injure" as the active verb and rephrased to provide that an employer must not "perform an act that results in injury to an employee in his or her employment". Second, paragraph 48(1)(c) is being amended to remove the word "[prejudicially] alter" as the active verb and rephrased to provide that an employer must not "perform an act that prejudicially alters the employee's position...". The rationale for these two amendments is that an employer does not injure an employee or prejudicially alter the employee's position,

rather the injury or alteration is the result of the employer's conduct, by performance of an act, and is not in itself a physical element of conduct. It follows that retaining "injure" or "alter" as the active verb in a criminal offence may lead to real difficulties in interpreting the offence following application of the *Criminal Code*. Constructing the offence in the amended form will better identify the physical elements of conduct and result, and the fault elements that attach to these physical elements. The fault element of intention will still apply to the physical element of conduct by virtue of the *Criminal Code*'s default fault provision (section 5.6). Similarly, the fault element of recklessness will attach to the result of the person's conduct, namely the resultant injury or prejudicial alteration of position, and it will be necessary for the prosecution to demonstrate that the person was reckless as to whether his or her conduct would cause the resultant injury or prejudicial alteration of position.

Item 131 - At the end of subclause 48(2) of Schedule 7

209. Subclause 48(1) of Schedule 7 provides that an employee must not dismiss an employee or act in certain prescribed ways detrimental to the employee because the employee has complained, or proposes to complain, about a matter concerning the health, safety or welfare of employees at work or because the employee has assisted, or proposes to assist, in the conduct of an investigation or because the employee has ceased, or proposes to cease, to perform work in accordance with a (valid and current) direction by a health and safety representative. Subclause 48(2) provides that in proceedings for an offence against subclause (1), if all the relevant facts and circumstances, other than the reason for an action alleged in the charge, are proved, it lies upon the defendant to establish that the action was not taken for that reason.
210. This provision imposes a legal burden on the person or defendant (section 13.4 of the *Code* refers). This means that the defendant must prove the existence of the matter. The note to the subclause provides, as is the case, that the defendant bears a legal burden in relation to the matters in subclause (2).

Item 132 - At the end of clause 52 of Schedule 7

211. Clause 52 provides that it is a defence to a prosecution for refusing or failing to do anything required by the Act or the regulations (insofar as Schedule 7 is applicable pursuant to subsection 140H(2) of the Act) if the defendant proves that it was not practicable to do it because of an emergency prevailing at the relevant time.
212. This provision imposes a legal burden on the person or defendant (section 13.4 of the *Code* refers). This means that the defendant must prove the existence of the matter. The note to the clause provides, as is the case, that the defendant bears a legal burden in relation to the matters in clause 52.

Petroleum (Timor Gap Zone of Cooperation) Act 1990

Item 133 – At the end of Part 1

213. This item inserts proposed section 5A which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility.

214. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

Item 134 - At the end of subsection 9(2)

215. This item inserts a penalty of \$5,000 at the end of subsection 9(2) to clarify that the penalty at the end of section 9 applies equally to subsection 9(2). This puts it beyond doubt that subsection 2 creates a criminal offence.

Item 135 – Subsection 9(3)

216. This item proposes the removal of the defence of reasonable excuse from subsection 9(3). The defence is recreated in a new subsection 9(4), see item 136 of this Schedule. The rationale for this amendment is to prevent future interpretation that the reasonable excuse element of this provision is an element of the offence, which would have to be disproved in the negative by the prosecution. The proposed amendment will put it beyond doubt that a reasonable excuse is a defence to the offence.

Item 136 - At the end of section 9

217. Consequent upon item 135, this item inserts proposed subsection 9(4) which recreates the defence of reasonable excuse in relation to an offence against subsection 9(3). This item also adds the standard note after subsection 9(4) concerning the imposition of an evidential burden on a defendant by subsection 13.3(3) of the *Code* if a defendant relies on the reasonable excuse defence established by subsection 9(4).

Pooled Development Funds Act 1993

Item 137 – At the end of Part 1

218. This item inserts proposed section 4B which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

Item 138 – Subsection 28(2B)

219. This item reconstructs subsection 28(2B), which is effected by repealing and replacing the subsection. The reconstruction is made to clarify the offence's physical elements, which are described in paragraphs (a) to (d), and to ensure that the correct default fault element of intention or recklessness applies to each physical element as appropriate.

Item 139 – Subsection 28(3)

220. This item inserts a new subsection 28(3) which creates a definition of “engage in conduct” for the purposes of section 28. The definition provides that “engage in conduct” means to do an act or omit to perform an act. The definition, which is drawn from the *Criminal Code*, is utilised in the offence in reconstructed subsection 28(2B) (see item 138) where it is intended that the offence shall capture the conduct of a defendant who contravenes subsection 28(2B) through active conduct or through omission to comply.

Item 140 – Subsection 42(1)

221. This item amends subsection 42(1) by replacing “becoming aware” with “the PDF knows”. This amendment is necessary because, if left unamended, then following application of the *Criminal Code* the phrase “becoming aware” would constitute a physical element of circumstance, to which the default fault element of recklessness would attach. The effect would be that the prosecution would be required to prove that the defendant was reckless as to becoming aware of the relevant event – in other words reckless as to knowing the relevant fact – which would be an unworkable proposition. The amendment ensures that this element of the offence remains a simple fault element of knowing the relevant fact.

Item 141 – Section 49

222. This item amends section 49 by replacing “becomes aware” with “knows”. This amendment is necessary because, if left unamended, then following application of the *Criminal Code* the phrase “becomes aware” would constitute a physical element of circumstance, to which the default fault element of recklessness would attach. The effect would be that the prosecution would be required to prove that the defendant was reckless as to becoming aware of the relevant event – in other words reckless as to knowing the relevant fact – which would be an unworkable proposition. The amendment ensures that this element of the offence remains a simple fault element of knowing the relevant fact.

Item 142 – Paragraphs 50(3)(a), (b) and (d)

223. Paragraphs 50(3)(a), (b) and (d) apply the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical elements of conduct in these paragraphs. Following application of the *Criminal Code*, the fault elements of knowledge and recklessness will be restricted to physical elements of circumstance or result, and intention will be the sole *Criminal Code* fault element that can be applied to a physical element of conduct: see sections 5.2 and 5.3 of the *Criminal Code*. Accordingly this item proposes the deletion of “knowingly or recklessly” in paragraphs 50(3)(a), (b) and (d) and the appropriate fault element, namely intention, will apply by operation of the *Criminal Code*’s default fault provision (section 5.6). The fault element of intention is the direct *Criminal Code* equivalent of pre-*Criminal Code* “knowingly” where the latter has been applied to physical elements of conduct, and the fault element of recklessness will apply by default to each physical element of circumstance or result in paragraphs 50(3)(a), (b) and (d): see *Criminal Code* section 5.6. It is considered that paragraphs 50(3)(a), (b) and (d) will continue to operate in the same manner as at present following this amendment.

Item 143 – Subsections 51(1) and (2), and**Item 144 – At the end of sections 51.**

224. These items propose to remove the defences of reasonable excuse from subsections 51(1) and (2) and recreate them in a new subsection 51(3). The rationale for this amendment is to prevent future interpretation that the reasonable excuse element of this provision is an element of the offence, which would have to be disproved in the negative by the prosecution, and puts it beyond doubt that it is a defence to the offence.

225. The standard note is added after proposed subsection 51(3) concerning the imposition of an evidential burden on a defendant by subsection 13.3(3) of the *Criminal Code* if a defendant relies on the reasonable excuse defence established by subsection 51(3).

Scout Association Act 1924

Item 145 - After section 1

226. This item amends the *Scout Association Act 1924* by inserting a new provision to apply Chapter 2 of the *Criminal Code* to offences in that Act. Chapter 2 establishes the codified general principles of criminal responsibility. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

Item 146 - At the end of section 4 (after the penalty)

227. This item adds a note to section 4 of the *Scout Association Act 1924*, stating that the defendant bears a legal burden, and directing the reader to section 13.4 of the *Criminal Code* — which sets out the circumstances in which a law may impose such a burden.

228. Section 4 of the *Scout Association Act 1924* currently imposes on a defendant the legal burden of proving that the defendant was authorised by the Scout Association, or the Local Branch (e.g. the Scout Association of Australia), to use any uniform, emblem, badge etc. registered in the Register of Designs.

Trade Marks Act 1995

Item 147 - Reader's Guide (last paragraph under the heading "*Crimes Act 1914*")

229. This item repeals that paragraph from the Reader's Guide to the *Trade Marks Act 1995*, consequentially on the application of the *Criminal Code* to Commonwealth legislation.

Item 148 - Reader's Guide (before the heading "*Trade Marks Act 1955*")

230. This item inserts new text into the Reader's Guide to the *Trade Marks Act 1995*, consequentially on the application of the *Criminal Code* to Commonwealth legislation.

Item 149 - After section 4

231. This item amends Part 1 of the *Trade Marks Act 1995* by inserting a new provision to apply Chapter 2 of the *Criminal Code* to offences in the Act. Chapter 2 establishes the codified general principles of criminal responsibility. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

Item 150 - Subsection 143(2)

232. This item amends subsection 143(2) of the *Trade Marks Act 1995* by deleting “intentionally or recklessly”. Subsection 143(2) currently applies the fault elements of intention and recklessness (“intentionally or recklessly”) to the physical element of conduct — namely, the importer or their agent failing to comply with the Customs CEO’s request for information or documents. Following application of the *Criminal Code*, the fault element of recklessness will be restricted to physical elements of circumstance or result, and intention will be the sole *Criminal Code* fault element that can be applied to a physical element of conduct: see sections 5.2 and 5.3 of the *Criminal Code*. Accordingly this item proposes the deletion of the fault elements from subsection 143(2), as its present

form would not operate in the same manner following application of the *Criminal Code*. However the *Criminal Code*'s default fault provision (section 5.6) will preserve the operation of the fault elements of intention and recklessness by applying them respectively to the physical elements of conduct and circumstance in subsection 143(2).

Item 151 - Subsection 145(1)

233. In the same manner as item 150 above, this item amends subsection 145(1) by deleting “intentionally or recklessly”. Subsection 145(1) currently applies the fault elements of intention and recklessness (“intentionally or recklessly”) to the physical element of conduct — namely falsifying or unlawfully removing a registered trade mark, knowing that, or reckless of whether or not, the trade mark is registered.

Item 152 - Subsection 146(1)

234. In the same manner as item 150 above, this item amends subsection 146(1) by deleting “intentionally or recklessly”. Subsection 146(1) currently applies the fault elements of intention and recklessness (“intentionally or recklessly”) to the physical element of conduct — namely, falsely applying a registered trade mark to goods, or in relation to goods or services, knowing that, or reckless of whether or not, the trade mark is registered.

Item 153 - At the end of section 147

235. This item proposes to insert new subsection 147(4) which provides that strict liability is applied to the physical element of the offences in subsection 147(1), (2) and (3) - that the offence referred to in paragraph (1)(a), (1)(b), (2)(a), (2)(b) or subsection (3) is an offence against section 145 or 146. The offences set out in sections 145, 146 and 147 relate to the counterfeiting and forgery of trade marks, serving to protect the commercial activities of the registered owner of a trade mark and preventing deception of consumers.

236. This physical element is an appropriate candidate for the application of strict liability because in most applicable instances the person concerned will not possess any fault element concerning this physical element, and accordingly the offence would become almost unenforceable if the prosecution were obliged to demonstrate fault. Further, the person’s degree of culpability under this offence is not materially affected by absence of the subject fault.

237. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Item 154 - Subsection 150(2)

238. This item amends subsection 150(2) of the *Trade Marks Act 1995* consequentially on the repeal of section 5 of the *Crimes Act 1914* — which deals with the ancillary offence of aiding, abetting, counselling or procuring an offence— and its replacement by section 11.2 of the *Criminal Code* — which deals with same ancillary offence, now called complicity and common purpose.

Item 155 - Subsections 151(1), (2), (3) and (4)

239. In the same manner as item 150 above, this item amends subsections 151(1), (2), (3) and (4) by deleting “intentionally or recklessly”. Those subsections apply the fault elements of intention and recklessness (“intentionally or recklessly”) to the physical elements of

conduct in those subsections — making certain representations regarding trade marks (including whether a trade mark is registered in Australia), unless the person has knowledge, or has reasonable grounds for their belief.

Item 156 - Subsections 153(1) and (2)

240. Items 156 and 157 amend section 153 of the *Trade Marks Act 1995* to set out the defence of reasonable excuse in a new subsection. This preserves the defence, currently set out in subsections 153(1) and (2), but is intended to avoid that defence being mistakenly interpreted to be part of the elements of the offence to be proved by the prosecution. Item 156 removes the words "without reasonable excuse" from subsections 153(1) and (2). Item 157 below will set out the defence of reasonable excuse to apply to offences under both of those subsections. Section 153 provides that it is an offence for a person to disobey a summons to appear as a witness before the Registrar, or to fail to produce a document or thing when required to do so by the Registrar of Trade Marks (the Registrar).

Item 157 - After subsection 153(2)

241. As indicated above in respect of item 156, this item sets out the defence of reasonable excuse applying to offences in subsections 153(1) and (2) in a separate new subsection 153(2A). The note to the new subsection states that the defendant bears an evidential burden in relation to the defence, as set out in subsection 13.3(3) of the *Criminal Code*. This means that if the defendant wishes to raise the defence of lawful excuse, the defendant need only adduce or point to evidence that suggests a reasonable possibility that the defence exists — see subsection 13.3 (6) of the *Criminal Code*.

Item 158 - Subsection 153(3) (note 2)

242. This item repeals note 2 to subsection 153(3), which defines an offence of strict liability, and replaces it with a note referring to section 6.1 of the *Criminal Code* — which sets out the consequences of an offence being of strict liability. Subsection 153(3) currently provides that an offence under section 153 is an offence of strict liability. An explanation of "strict liability" appears at paragraph 12 above.

Item 159 - Subsection 154(1)

243. In the same manner as items 156 and 157 above, items 159 and 160 amend section 154 of the *Trade Marks Act 1995* to set out the defence of reasonable excuse in a new subsection. Item 159 removes the words "without reasonable excuse" from subsection 154(1). Item 160 below will set out the defence of reasonable excuse to apply to an offence under that subsection. Section 154 provides that it is an offence for a person appearing before the Registrar as a witness: to refuse to be sworn or to make an affirmation; to refuse to answer questions that the person is lawfully required to answer; or to fail to produce a document or thing that the person is lawfully required to produce.

Item 160 - After subsection 154(1)

244. As indicated above in respect of item 159, this item sets out the defence of reasonable excuse to an offence under subsection 154(1) of the *Trade Marks Act 1995* in a separate new subsection 154(1A), and includes a note to the new subsection stating that the defendant bears an evidential burden in relation to the defence.

Item 161 - Subsection 154(2) (note 2)

245. In the same manner as item 158, this item repeals note 2 to subsection 154(2) and replaces it with a note referring to section 6.1 of the *Criminal Code*. Subsection 154(2) currently provides that an offence under section 154 is an offence of strict liability. An explanation of “strict liability” appears at paragraph 12 above.

Item 162 - Paragraph 156(3)(b)

246. This item amends paragraph 156(3)(b) of the *Trade Marks Act 1995* by deleting the fault element of “knowingly”. Paragraph 156(3)(b) applies the fault element of knowledge (“knowingly”) in relation to the physical elements of conduct, namely being a party to a body corporate's offence against section 156. Following application of the *Criminal Code*, the fault element of knowledge will be restricted to physical elements of circumstance or result, and intention will be the sole *Criminal Code* fault element that can be applied to a physical element of conduct: see sections 5.2 and 5.3 of the *Criminal Code*. Applying “knowingly” to a physical element of conduct in the pre-*Criminal Code* environment is equivalent to applying the *Criminal Code* fault element of intention. Accordingly this item proposes the deletion of “knowingly” in paragraph 156(3)(b), and the appropriate and equivalent *Criminal Code* default fault element, namely intention, will apply by operation of section 5.6 of the *Criminal Code*.

Item 163 - Subsection 156(6) (note)

247. In the same manner as item 158, this item repeals the note to subsection 156(6) of the *Trade Marks Act 1995* and replaces it with a note referring to section 6.1 of the *Criminal Code*. Subsection 156(6) currently provides that an offence under section 156 is an offence of strict liability. An explanation of “strict liability” appears at paragraph 12 above.

Item 164 - Subsection 157(2) (note 2)

248. In the same manner as item 158, this item repeals note 2 to subsection 157(2) of the *Trade Marks Act 1995* and replaces it with a note referring to section 6.1 of the *Criminal Code*. Subsection 157(2) currently provides that an offence under section 157 is an offence of strict liability.

Item 165 - Paragraph 160(1)(b)

249. This item amends subsection 160(1) of the *Trade Marks Act 1995* consequentially on the repeal of sections 7 and 7A, and subsection 86(1) of the *Crimes Act 1914* — which deal with the ancillary offences of attempt, incitement and conspiracy — and their replacement by sections 11.1, 11.4, and 11.5 of the *Criminal Code* — which deal with the same ancillary offences.

250. The note to this item gives section 166 below the new heading: 'Conduct of employees and agents of natural persons' — see item 167 below.

Item 166 - At the end of subsection 160(1)

251. This item adds a note at the end of subsection 160(1) of the *Trade Marks Act 1995*. Items 167 and 168 below amend section 160 of the *Trade Marks Act 1995* to remove the provisions currently in that section providing for the vicarious liability of a body corporate

for offences against the *Trade Marks Act 1995* committed by a director, servant or agent of the body corporate. The vicarious liability of a body corporate will, instead, be determined under the provisions of Part 2.5 of the *Criminal Code* — as indicated by the note. The remaining provisions in section 160 will continue to provide for the vicarious liability of a person other than a body corporate (i.e. a natural person) for offences against the Act committed by a servant or agent of the person. The heading to section 160 is amended by the note to item 165 — to indicate to the reader that the expression 'servant' encompasses all employees (and not merely personal servants).

Item 167 - Subsections 160(2) and (3)

252. This item repeals subsections 160(2) and (3) of the *Trade Marks Act 1995* — see item 166 above.

Item 168 - Subsection 160(7) (definition of *director*)

253. This item repeals the definition of *director* in subsection 160(7) of the *Trade Marks Act 1995* — see item 166 above.

Tradex Scheme Act 1999

Item 169 - At the end of section 26

254. This item proposes to insert subsection 26(2) which provides that strict liability will apply to the physical element of the offence in paragraph 26(1)(b) that the requirement is a requirement made by subsection 9(6). The offence in section 26(1) provides that a holder of a tradex order who is required to notify the Secretary of the details of a change in any of the particulars entered in the Register in respect of the order must comply with that requirement. The offence carries a fine of 30 penalty units. Following application of the Criminal Code, the prosecution will still be required to demonstrate that the defendant possessed the relevant fault, namely recklessness, that he or she was required to notify the Secretary of the details described in paragraph 26(1)(b).

255. This physical element is an appropriate candidate for the application of strict liability because in most applicable instances the person concerned will not possess any fault element concerning this physical element, and accordingly the offence would become almost unenforceable if the prosecution were obliged to demonstrate fault. Further, the person's degree of culpability under this offence is not materially affected by the absence of the subject fault. However the defence of mistake of fact should be available to the defendant, as this provision should not operate so as to criminalise the conduct of persons who made a reasonable mistake of fact in relation to the identified physical element of circumstance. Accordingly strict liability, and not absolute liability, is the appropriate action.

256. The standard note referring to section 6.1 of the Criminal Code, which governs strict liability, is also added after this provision. An explanation of "strict liability" appears at paragraph 12 above.

Item 170 - At the end of section 27

257. This item proposes to insert subsection 27(2) into the Tradex Scheme Act which provides that strict liability will apply to the physical element of the offence in paragraph 27(1)(b)

that the requirement is a requirement made by section 15. The offence in section 27(1) provides that a holder of a tradex order who is required to give a notice to the Secretary if they become ineligible to hold the order must comply with that requirement. The offence carries a fine of 30 penalty units. Following application of the Criminal Code, the prosecution will still be required to demonstrate that the defendant possessed the relevant fault, namely recklessness, that he or she was required to notify the Secretary of the details described in paragraph 27(1)(b).

258. This physical element is an appropriate candidate for the application of strict liability because in most applicable instances the person concerned will not possess any fault element concerning this physical element, and accordingly the offence would become almost unenforceable if the prosecution were obliged to demonstrate fault. Further, the person's degree of culpability under this offence is not materially affected by the absence of the subject fault. However the defence of mistake of fact should be available to the defendant, as this provision should not operate so as to criminalise the conduct of persons who made a reasonable mistake of fact in relation to the identified physical element of circumstance. Accordingly strict liability, and not absolute liability, is the appropriate action.
259. The standard note referring to section 6.1 of the Criminal Code, which governs strict liability, is also added after this provision. An explanation of "strict liability" appears at paragraph 12 above.

Item 171 - At the end of section 29

260. This item proposes to insert subsection 29(2) into the Tradex Scheme Act which provides that strict liability will apply to the physical element of the offence in paragraph 29(1)(a) that the requirement is a requirement made by section 22. The offence in section 29(1) provides that a holder of a tradex order who is required to keep records in relation to nominated goods must comply with that requirement. The offence carries a fine of 30 penalty units. Following application of the Criminal Code, the prosecution will still be required to demonstrate that the defendant possessed the relevant fault, namely recklessness, that he or she was required to keep records as described in paragraph 29(1)(a).
261. This physical element is an appropriate candidate for the application of strict liability because in most applicable instances the person concerned will not possess any fault element concerning this physical element, and accordingly the offence would become almost unenforceable if the prosecution were obliged to demonstrate fault. Further, the person's degree of culpability under this offence is not materially affected by the absence of the subject fault. However the defence of mistake of fact should be available to the defendant, as this provision should not operate so as to criminalise the conduct of persons who made a reasonable mistake of fact in relation to the identified physical element of circumstance. Accordingly strict liability, and not absolute liability, is the appropriate action.
262. The standard note referring to section 6.1 of the Criminal Code, which governs strict liability, is also added after this provision. An explanation of "strict liability" appears at paragraph 12 above.