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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**LAW AND JUSTICE LEGISLATION AMENDMENT
(APPLICATION OF CRIMINAL CODE)
BILL 2000**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Justice and Customs,
Senator The Honourable Amanda Vanstone)

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LAW AND JUSTICE LEGISLATION AMENDMENT
(APPLICATION OF CRIMINAL CODE) BILL 2000

GENERAL OUTLINE

The Bill amends 50 Attorney-General's portfolio statutes by harmonising various offences and related provisions with Chapter 2 of the *Criminal Code Act 1995*. The amendments are to ensure that the relevant offences continue to have much the same meaning and to operate in the same manner as they do at present. The *Criminal Code* contains a standard approach to the formulation of criminal offences. Offences developed over many years as part of the Commonwealth statute book are by no means standard and it is therefore necessary to make adjustment for when the *Criminal Code* applies to all Commonwealth offences on 15 December 2001 (as provided for in *Criminal Code Amendment (Application) Act 2000*). The Bill is one of a number being prepared for offences administered by other Ministers (for example: *Treasury Legislation Amendment (Application of Criminal Code) Bill 2000* which was introduced in the House of Representatives on 29 June 2000).

The application of the *Criminal Code* to all offences will improve Commonwealth criminal law by clarifying important element of offences, in particular, the fault elements. At present many hours of practitioners and court time are wasted in litigation about the meaning of particular fault elements or the extent to which the prosecution should have the burden of proving those fault elements. The proposed amendments have been kept to a minimum because to completely harmonise all offences in every aspect of the policy of the *Criminal Code* would be such an enormous task that it would take considerably more time to complete. The aim of the Bill is to simply ensure that existing offences operate in much the same way as they do now. However, there will be occasions where the operation of existing offences will be uncertain. The amendments will therefore sometimes involve judgment about the

likely effect of existing offences. Where this occurs it will provide much needed clarification of the meaning of the relevant provisions.

The effect of the Bill is to harmonise all offences-creating and related provisions within the Attorney-General's portfolio with the general principles of criminal responsibility as codified in Chapter 2 of the *Criminal Code*. The major forms of amendment effected by this Bill are:

- applying the *Criminal Code* to all offence-creating and related provisions in the Attorney-General's portfolio;
- removing the defences of lawful excuse and lawful authority specific to individual provisions and instead placing reliance on the *Criminal Code*'s general defence of lawful authority and lawful excuse (section 10.5);
- disapplying some *Crimes Act 1914* general offence provisions (sections 4, 5, 7, 7A, 14, 15D and 86) which duplicate provisions of the *Criminal Code* in relation to provisions to which the *Criminal Code* has been applied, and later repealing these *Crimes Act* sections;
- consequentially deleting references in Attorney-General's portfolio legislation to sections 4, 5, 7, 7A, 14, 15D and 86 of the *Crimes Act* and replacing these with references to equivalent *Criminal Code* provisions where appropriate;
- amending the *Criminal Code* to enable it to be applied to regulations;
- repealing or amending provisions to remove ancillary offences, with reliance instead being placed upon the ancillary offence provisions of the *Criminal Code* (sections 11.1, 11.2, 11.4 and 11.5);
- applying strict liability or absolute liability to individual offences or specified physical elements of offences where appropriate;
- reconstructing provisions in order to clarify physical elements of conduct, circumstance and result;
- removing or replacing inappropriate fault elements; and
- repealing offence-creating provisions which duplicate any of the general offence provisions in the *Criminal Code*.

FINANCIAL IMPACT STATEMENT

It is not possible to assess what impact the Bill will have on Commonwealth expenditure or revenue except that it should be positive. This is because the Bill will contribute to a clarification of the law and therefore less lengthy court proceedings.

NOTES ON CLAUSES

Clause 1: Short Title

1. Clause 1 of the Bill deals with the short title.

Clause 2: Commencement

2. Clause 2 of the Bill deals with the commencement. It effectively provides that subject to subclauses 2(2), (3) and (4), the Act commences on the later of the 28th day after the day on which this Act receives Royal Assent and the day on which the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (“Theft Fraud Act”) generally commences.

3. Aspects of the Bill will need to commence 28 days after the proposed amendment receives the Royal Assent. This will include the provisions which will assist with the harmonisation of all offences with the *Criminal Code*. For example, early commencement of item 3 of Schedule 1 which proposes that the Code should be able to be applied regulations will facilitate progress with the harmonisation of offences in regulations with Chapter 2 of the *Criminal Code*. However, in many cases, the amendment will not commence until 15 December 2001. This is the date when the Chapter 2 of the *Criminal Code* will apply to all Commonwealth offences. Generally, the commencement in relation to those offences needs to be delayed because they are linked to other legislation or regulations which have not yet been amended.

4. The linkage to the commencement of the Theft Fraud Act is necessary because a number of the amendments proposed by this Bill are tied to, and reliant upon, amendments made by the Theft Fraud Act. For example, the Theft Fraud Act inserts section 10.5 into the *Criminal Code*. Section 10.5 creates general defences of lawful authority and lawful excuse. This Bill proposes that a number of provisions be amended to remove specific defences of lawful authority and lawful excuse, with a

defendant then being able to rely upon the equivalent defences in section 10.5. It follows that this Bill must commence simultaneously with the Theft Fraud Act.

5. Subclauses 2(2), (3) and (4) provide for different commencement for a number of items in this Bill. Subclause 2(2) provides for the earlier commencement of the following items in Schedule 1 on the 28th day after the day on which this Bill receives Royal Assent:

(a) item 1, which disapplies certain sections of the *Crimes Act 1914* in relation to offences to which the *Criminal Code* has been applied. The early commencement of this provision is necessary because there is a significant number of offence-creating provisions throughout Commonwealth Acts to which the *Criminal Code* has already been applied. The effect of item 61A is to prevent there being two sets of lawful authority / excuse defence provisions and two sets of ancillary offence provisions applying to such offence-creating provisions;

(b) item 2, which amends s4D of the *Crimes Act 1914*; and

(c) item 3, which permits the application of the *Criminal Code* to regulations. As stated below, there is some doubt whether section 2.2 of the *Criminal Code* presently permits the application of Chapter 2 of the *Criminal Code* to regulations prior to the general date of application of Chapter 2 to all offences against Commonwealth law, which is stated by subsection 2.2(2) to be 15 December 2001. The amendment proposed by item 3 is designed to remove any doubt in this regard and make it clear that if the Governor-General has power under any Act to make regulations then that power includes the power to apply the *Criminal Code* to those regulations. It is clearly desirable that this provision commence as soon as possible.

6. Subclause 2(3) effectively defers the commencement of the items in Schedule 51 by providing for commencement on the date specified in subsection 2.2(2) of the *Criminal Code*, which is 15 December 2001. These items are:

(a) items 1, 2 and 3, which consequentially amend the *Commonwealth Places (Application of Laws) Act 1970* (“*Commonwealth Places Act*”) in view of the impending application of the *Criminal Code*. The *Commonwealth Places Act* does not create any offences of its own and the deferred commencement of this provision is desirable because the ancillary provisions of the *Crimes Act* must remain applicable to the *Commonwealth Places Act* until the repeal of those ancillary provisions on 15 December 2001 (see item 4 of Schedule 51);

(b) item 4, which provides for the repeal of sections 4, 5, 7, 7A, 14, 15D and 86 of the *Crimes Act 1914* and the provision which disapplies these sections in relation to an offence to which the *Criminal Code* has been applied (section 3BB: see item 1 of Schedule 1). The deferred repeal of sections 4, 5, 7, 7A, 14, 15D and 86 is necessary because they will be required to continue in operation until 15 December 2001 in relation to provisions to which the *Criminal Code* has not yet been applied; and

(c) item 5, which repeals paragraph 27(b) of the *Transfer of Prisoners Act 1983*. It is necessary to defer commencement of this provision because the *Criminal Code* will not apply to this Act until 15 December 2001 and the *Crimes Act* provisions specified in paragraph 27(b) will be required to continue operating in that capacity until then.

7. Subclauses 2(4), 2(5), 2(6), 2(7) and 2(8) provide for the non-commencement or amended operation of the specified items where other legislation that amends the relevant provisions in the principal Acts has or has not previously commenced as the case may be.

Clause 3: Schedule of amendments

8. Clause 3 of the Bill provides that each Act that is specified in a Schedule to the Bill shall be amended or repealed as provided in the Schedule, subject to the commencement provision as described in clause 2.

Clause 4: Transitional provision

9. Clause 4 of the Bill provides for transitional arrangements.

Schedule 1 – Amendments commencing on the 28th day after Royal Assent

Crimes Act 1914

Item 1 - Disapplication of certain Crimes Act provisions

10. The item inserts proposed section 3BB which provides for the progressive disapplication of sections 4, 5, 7, 7A, 14, 15D and 86 of the *Crimes Act 1914* in relation to an offence against a provision of the *Crimes Act 1914* or an offence against any other law of the Commonwealth if Chapter 2 of the *Criminal Code* has been applied to that offence. Sections 5, 7, 7A, 14, 15D and 86 are being replaced in effect by sections 10.5, 11.1, 11.2, 11.4, 11.5, 13.3, 13.4 and 13.5 of the *Criminal Code*. Section 4, which applies the common law in relation to the principles of criminal responsibility, will no longer be required as the *Criminal Code* establishes codified principles concerning criminal responsibility. *Criminal Code* section 10.5 is being inserted into the *Criminal Code* by virtue of Item 7, Schedule 1 of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*, which is scheduled to commence in tandem with this Bill.

11. This item is scheduled for early commencement because of the need to begin its operation in relation to offences to which the *Criminal Code* has already been applied: see clause 2(2) for more details.

Item 2 – section 4D

12. This item amends section 4D of the *Crimes Act 1914*. The existing section 4D creates two presumptions:

- (i) that a prohibition coupled with a penalty is an offence; and

(ii) that a penalty is a maximum penalty only.

13. However, the existing provision fails to clearly lay down the second presumption where an offence is drafted under the '*Criminal Code*' style. Before the enactment of the *Criminal Code*, offences were generally drafted according to one of two formulae.

Formula 1:

“A person must not do X

Penalty: Y penalty units”

When this formula was employed, section 4D operated to create an offence of contravening the prohibition against doing “X” and provided that the penalty at the foot of the provision is the maximum penalty that may be imposed for that offence

Formula 2:

“A person who does X is guilty of an offence punishable, on conviction, by a fine of not more than Y penalty units”

14. Where this formula was employed it was not necessary to rely on section 4D as the provision was explicitly stated to be an offence and the penalty was explicitly stated to be a maximum only.

15. Under the *Criminal Code*, a third formula has been adopted.

Formula 3:

“A person is guilty of an offence if the person does X

Penalty: Y penalty units”

16. Where this formula is employed, section 4D arguably does not operate to create the presumption that the penalty is a maximum only, because a person who commits the offence does not *contravene* any prohibition. This problem has generally been avoided by using the phrase “Maximum Penalty” rather than “Penalty”. However, the

proposed amendment overcomes any doubt by making it clear that a penalty for an offence is to be presumed to be a maximum only, regardless of whether the provision can be 'contravened'.

17. In practice, the existing ambiguity did not create a problem. It was always implicit in the provision governing sentencing for Commonwealth offences (*Crimes Act*, section 16A) that courts had a discretion in imposing sentence, unless expressly overridden. This is also consistent with the position at common law, so a court would tend to read any ambiguity in favour of the retention of a sentencing discretion. Nonetheless, the amendment will it clear to readers of the *Crimes Act* that there is a presumption that Commonwealth criminal penalties are maximums only.

Criminal Code Act 1995

Item 3 - Application of the Criminal Code to regulations

18. This item proposes to insert section 3AA concerning the application of the *Criminal Code* to regulations. There is some doubt whether section 2.2 of the *Criminal Code* presently permits the application of Chapter 2 of the *Criminal Code* to regulations prior to the general date of application of Chapter 2 to all offences against Commonwealth law, which is stated by subsection 2.2(2) to be 15 December 2001. Proposed section 3AA is designed to remove any doubt in this regard and make it clear that if the Governor-General has power under any Act to make regulations then that power includes the power to apply the *Criminal Code* to those regulations.

19. Subsection 3AA(1) will permit the application of Chapter 2 to any offences contained in regulations prior to 15 December 2001. Subsection 3AA(2) effectively provides that such application may occur at any time from the day on which regulations are made up to 14 December 2001, after which time section 3AA will be subsumed in effect by subsection 2.2(2). Subsection 3AA(3) makes provision for this outcome by providing that section 3AA ceases to have effect, and is taken to have been repealed, on 15 December 2001.

Schedule 2 - Australian Federal Police Act 1979

Item 1 - Application of Criminal Code

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

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

Item 2 - Amendment of inappropriate fault element

22. Subsection 49M(1) applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct, namely contravening a restraining order. 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 replacement of “knowingly” in subsection 49M(1) by the appropriate and equivalent fault element, namely intention. It is considered that subsection 49M(1) will continue to operate in the same manner as at present following this amendment.

Item 3 - Lawful excuse defence

23. This item proposes to remove the specific defence of lawful excuse from paragraph 63(b). Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item.

24. The general defences of lawful excuse and lawful authority are being inserted into Chapter 2 of the *Criminal Code* as section 10.5 by virtue of clause 7 of the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000. Section 10.5 will be progressively made applicable to all offences under Commonwealth law. The specific lawful excuse defence in paragraph 63(b) will duplicate section 10.5 and will correspondingly be unnecessary.

25. Section 10.5 will differ from the present general lawful excuse and lawful authority defence provision (section 15D of the *Crimes Act 1914*) in one important respect, namely the degree of burden placed upon an accused person who intends to raise the defence. Section 15D requires the defendant to prove the lawful excuse or lawful authority, thus imposing a legal burden of proof upon the accused person which he or she must discharge on the balance of probabilities. By contrast, following application of the *Criminal Code* the accused will incur an evidential burden in establishing the defence under section 10.5, namely the burden of adducing evidence that suggests a reasonable possibility that the defence exists (subsections 13.3(3) and 13.3(6) of the *Criminal Code*). Section 15D will become unnecessary upon the general application of Chapter 2 of the *Criminal Code* on 15 December 2001 (section 2.2 of the *Criminal Code*) and will be repealed on that date by virtue of item 4 of Schedule 51 of this Bill.

26. The general commencement provision to this Bill (clause 2) provides that most of this Bill, including this item, will commence simultaneously with the commencement of the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000. It follows that the deletion of the specific lawful excuse provision from paragraph 63(b) will occur simultaneously with the entry into force of section 10.5 of the *Criminal Code*. The operation of paragraph 63(b) will therefore be unaffected by the amendment proposed by this item.

Item 4 – Lawful excuse defence

27. This item proposes to remove the specific defence of lawful excuse from paragraphs 63(c) and (d). Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful excuse defence see the explanation at item 3 of this Schedule.

Item 5 – Reasonable excuse defence

28. This item proposes to insert subsection 63(2) which provides a defence of reasonable excuse in relation to an offence against paragraphs 63(b), (c) and (d). This will replace the present defence of lawful excuse, which is being deleted by items 3 and 4 of this Schedule.

29. The offences in paragraphs 63(b), (c) and (d) prohibit people who are not AFP members wearing or possessing AFP uniform, insignia, weapons, documentation and other items without a lawful excuse. Under proposed section 10.5, which is being inserted into the *Criminal Code* by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*, there is to be a defence which provides a person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by a law. The proposed defence will cover the situation where a person is for some reason authorised by law to wear or possess AFP clothing or equipment, but it does not cover the situation where someone might have some other reasonable excuse for possessing that clothing or equipment. For example, a member of the public might find an AFP weapon that has been lost. It would be undesirable in those circumstances for the person not to be exempted from the offence if the person merely picked up the weapon with the intention of returning it to the AFP so that it could be put in safe keeping. It is therefore appropriate to replace lawful excuse with a reasonable excuse exception. It is likely that those who originally drafted the offence expected it to apply to those circumstances.

30. This item also adds the standard note after proposed subsection 63(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 subsection 63(2).

Item 6 - Strict liability applied

31. This item proposes to insert subsection 64(1A) which provides that the offence contained in subsection 64(1) is an offence of strict liability. The offence provides that an AFP member must, at all times when he or she is wearing his or her police uniform, wear his or her identification number on, or attached to, the front of his or her uniform. The maximum penalty for this offence is 5 penalty units. The application of strict liability to this offence reflects the most likely way in which the current offence would be interpreted. The offence concerns an obligation which could be difficult to establish if the prosecution was required to prove intention with respect to the failure to wear the identification number. 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. In addition, a member would be able to rely on appropriate defences in subsection (2) if his or her conduct was the result of an act done by another person without the consent of the member, or resulted from an unintentional omission on the member's part.

32. 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 the status of

the identification number, for example where he or she mistakenly wore an old identification badge rather than the current one. 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 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.

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

Schedule 3 - Australian Protective Service Act 1987

Item 1 - Application of Criminal Code

34. 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.

35. of criminal responsibility is also added after this provision.

Item 2 - Replacing references to certain Crimes Act 1914 provisions

36. Certain *Crimes Act 1914* provisions, including sections 7 and 7A, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001: see items 1 of Schedule 1 and 4 of Schedule 51. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the references in paragraph 13(2)(b) to sections 7 and 7A of the *Crimes Act 1914*, which concern attempt and incitement to commit primary offences, be replaced by references to the *Criminal Code* provisions which deal with attempt and incitement (sections 11.1 and 11.4). These *Criminal Code* provisions will apply to this Act by virtue of this Bill: see item 1 of this Schedule.

Item 3 - Strict liability applied

37. This item inserts proposed subsection 19(3A) which applies strict liability to the offence in subsection 19(3) of the Act. Subsection 19(3) provides that protective service officer shall, at all times when in uniform, wear his or her identification number on, or attached to, the front of the uniform. The offence carries a fine of \$500. This is an obligation with a low penalty and is therefore the type of offence where strict liability is applied under the existing law. In addition, a member would be able to rely on appropriate defences in subsection (4) if his or her conduct was the result of an act done by another person without the consent of the officer, or resulted from an unintentional omission on the officer's part. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

Item 4 - Strict liability applied

39. This item proposes to insert subsection 19(7) which provides that the offence contained in subsection 19(6) is an offence of strict liability. The offence concerns the return of a uniform by an APS member to the Director of the Australian Protective Service in the event that the person ceases to be a protective service officer. The maximum penalty for this offence is \$100. The application of strict liability to this offence reflects the most likely way in which the current offence would be interpreted. 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

Item 5 - Strict liability applied

41. This item inserts subsection 20(4A) which proposes that the offence contained in subsection 20(4) should be an offence of strict liability. The offence concerns the return of an identity card by an APS member to the Director of the Australian Protective Service in the event that the person ceases to be a protective service officer. The maximum penalty for this offence is \$100. The application of strict liability to this offence reflects the most likely way in which the current offence would be interpreted. 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

Schedule 4 - Australian Security Intelligence Organisation Act 1979

Item 1 - Application of all Criminal Code principles except corporate criminal responsibility

43. This item inserts proposed section 4A which applies Chapter 2 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 separate provisions in relation to corporate criminal responsibility in relation to offences under that Act (subsections 93(5), (6) and (7)). 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, and those similar to it, 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.

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

Item 2 – Deleting reasonable excuse defence

45. This item proposes to remove the defence of reasonable excuse from subsection 92M(1). The defence is recreated in a new subsection 92M(3A) (see item 5 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, and puts it beyond doubt that it is a defence to the offence.

Item 3 – Deleting reasonable excuse defence

46. This item proposes to remove the defence of reasonable excuse from paragraph 92M(2)(b). The defence is recreated in a new subsection 92M(3A) (see item 5 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, and puts it beyond doubt that it is a defence to the offence.

Item 4 – Deleting reasonable excuse defence

47. This item proposes to remove the defence of reasonable excuse from subsection 92M(3). The defence is recreated in a new subsection 92M(3A) (see item 5 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, and puts it beyond doubt that it is a defence to the offence.

Item 5 – Recreating reasonable excuse defence

48. This item is consequent upon items 2, 3 and 4 of this Schedule. It inserts proposed subsection 92M(3A) which recreates the defence of reasonable excuse in relation to an offence against subsections 92M(1), (2) and (3).

49. This item also adds the standard note after proposed subsection 92M(3A) 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 92M(3A).

Item 6

50. The amendment effected by this item is consequential upon the amendments made by items 2, 3, 4 and 5 of this Schedule.

Schedule 5 - Bankruptcy Act 1966***Item 1 - Application of Criminal Code***

51. This item inserts proposed section 7A which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility.

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

Item 2 - Strict liability applied

53. This item inserts proposed subsection 54(3) which applies strict liability to the offences in subsections 54(1) and (2) of the Act. Subsection 54(1) provides that where a sequestration order is made, the person against whose estate it is made is required, within 14 days, to state his or her bankruptcy and to furnish a copy of the statement to the trustee. The fine is 5 penalty units (\$550). Subsection (2) provides for a similar notification requirement in relation to debtors and also involves a penalty of \$550.

These are administrative obligations with a low penalty and are therefore the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

Item 3 – Deleting reasonable excuse defence

55. This item proposes to remove the defence of reasonable excuse from subsection 56F(1). The defence is recreated in a new subsection 56F(1B) (see item 4 below). 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.

Item 4 - Strict liability applied: recreating reasonable excuse defence

56. This item proposes two amendments to section 56F. First, it inserts proposed subsection 56F(1A) which applies strict liability to the offence in subsection 56F(1) of the Act. Subsection 56F(1) provides that a member of a partnership who did not join in presenting a debtor's petition against the partnership but who became a bankrupt as a result of the acceptance of the petition must, within 14 days after being notified of the bankruptcy, provide a statement of his or her affairs and of the partnership to the trustee. The person can claim a defence if he or she has a reasonable excuse, and the offence carries a fine of 5 penalty units (\$550). 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

58. Second, consequent to item 3 (above) this item inserts proposed subsection 56F(1B) which recreates the defence of reasonable excuse in relation to an offence against subsection 56F(1).

59. This item also adds the standard note after proposed subsection 56F(1B) 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 56F(1B).

Item 5 - Strict liability applied

60. This item inserts proposed subsection 80(1A) which applies strict liability to the offence in subsection 80(1) of the Act. Subsection 80(1) provides that if during a bankruptcy a change occurs in the bankrupt's name, or in any other particulars that the bankrupt was required to set out in the bankrupt's statement of affairs under subparagraph 6A(2)(b)(i), the bankrupt must immediately tell the trustee in writing of the change. The penalty is 6 months imprisonment. This is an administrative obligation and is therefore the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

Item 6 – Deleting reasonable excuse defence

62. This item proposes to remove the defence of reasonable excuse from subsection 155J(1). The defence is recreated in a new subsection 155J(1B) (see item 7 below). 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.

Item 7 - Strict liability applied: recreating reasonable excuse defence

63. This item proposes two amendments to section 155J. First, it inserts proposed subsection 155J(1A) which applies strict liability to the offence in subsection 155J(1) of the Act. Subsection 155J(1) provides that a person who ceases to be registered as a trustee must give his or her certificate of registration to the Inspector-General. The person can claim a defence if he or she has a reasonable excuse, and the offence carries a fine of 1 penalty unit (\$110). 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

65. Second, consequent to item 6 (above) this item inserts proposed subsection 155J(1B) which recreates the defence of reasonable excuse in relation to an offence against subsection 155J(1).

66. This item also adds the standard note after proposed subsection 155J(1B) 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 155J(1B).

Item 8 - Strict liability applied

67. This item inserts proposed subsection 168(2) which applies strict liability to the offence in subsection 168(1) of the Act. Subsection 168(1) provides that a trustee of the estate of a bankrupt shall not pay into a private banking account any moneys received by him or her as a trustee. The offence carries a fine of \$500. 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

Item 9 - Strict liability applied

69. This item inserts proposed subsection 173(2) which applies strict liability to the offence in subsection 173(1) of the Act. Subsection 173(1) provides that a trustee of the estate of a bankrupt shall keep such accounts and records as are required by subsection 173(1) and shall permit a creditor of the bankrupt or agent to inspect the accounts and records as required by subsection 173(1). The offence carries a fine of 5 penalty units (\$550). 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

Item 10 - Strict liability applied

71. This item inserts proposed subsection 175(5A) which applies strict liability to the offence in subsection 175(5) of the Act. Subsection 175(5) provides that for the purposes of an audit under section 175, a trustee shall produce to an auditor such books and information as the auditor requires. The offence carries a fine of 5 penalty units (\$550). 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

Item 11 - Strict liability applied

73. This item inserts proposed subsection 182(5) which applies strict liability to the offence in subsection 182(4) of the Act. Subsection 182(4) provides that where a person registered as a trustee dies, the person administering the estate of the deceased person shall forthwith notify the Official Receiver. The offence carries a fine of \$100. 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

Item 12 - Strict liability applied

75. This item inserts proposed subsection 246(1A) which applies strict liability to the offence in subsection 246(1) of the Act. Subsection 246(1) provides that where an order is made under section 244 or 245 for the administration of the estate of a deceased person, and there is a legal representative of the deceased person, the legal representative shall make a statement of the deceased person's affairs and of his or her administration of the estate, and give a copy of the statement to the Official Receiver within 28 days of being notified of the making of the order. The offence carries a fine of 5 penalty units (\$550). 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

Item 13 - Amendment of inappropriate fault element

77. Section 263A uses the non-*Criminal Code* fault element "wilfully" in relation to the physical element of conduct, namely making a false statement in an affidavit to be used for the purposes of the Act. This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes the replacement of "wilfully" in section 263A by the appropriate and equivalent *Criminal Code* fault element, namely intention. It is considered that section 263A will continue to operate in the same manner as at present following this amendment.

Item 14 – Deleting reasonable excuse defence

78. This item proposes to remove the defence of reasonable excuse from subsection 264A(1A). The defence is recreated in a new subsection 264A(1B) (see item 15 below). 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.

Item 15 – Recreating reasonable excuse defence

79. This item is consequent upon item 14 (above). It inserts proposed subsection 264A(1B) which recreates the defence of reasonable excuse in relation to an offence against subsection 264A(1A).

80. This item also adds the standard note after proposed subsection 264A(1B) 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 264A(1B).

Item 16 – Deleting reasonable excuse defence

81. This item proposes to remove the defence of reasonable excuse from subsection 264C(1). The defence is recreated in a new subsection 264C(1A) (see item 17 below). 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.

Item 17 – Recreating reasonable excuse defence

82. This item is consequent upon item 16 (above). It inserts proposed subsection 264C(1A) which recreates the defence of reasonable excuse in relation to an offence against subsection 264C(1).

83. This item also adds the standard note after proposed subsection 264C(1A) 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 264C(1A).

Item 18 - Strict liability applied

84. This item proposes to insert subsection 264E(2) which provides that strict liability is applied to the physical elements of circumstance described in proposed subsection 264E(2) and which comprise elements of the offence in subsection 264E(1). Subsection 264E(1) proscribes various forms of conduct in relation to Registrars or magistrates who are performing an examination under this Act, namely insulting, disturbing, interrupting, using insulting or threatening language, or using words calculated to improperly influence or bring into disrepute such persons.

85. These physical elements are appropriate candidates for the application of strict liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

Item 19 - Identification of defence

87. This item proposes to remove the defence of “to the best of his or her knowledge and belief” from paragraphs 265(1)(a), (b) and (ca) and remove it to a separate subsection (see item 20 below). This defence is of a particular character which makes this amendment desirable, namely it is peculiarly within the knowledge of the defendant whether he or she has complied with the requirements of paragraphs 265(1)(a), (b) or (ca) to the best of his or her knowledge and belief. Because of the nature of this defence, and particularly in the circumstance of the application of the *Criminal Code* which sets a goal of enhancing clarity concerning the principles of criminal responsibility, it is desirable to clearly identify this provision as a defence to which an evidential burden is imposed on the defendant by the *Criminal Code* (subsection 13.3(3)). This is best effected by removing the defence to a separate subsection and adding the standard note which provides that subsection 13.3(3) of the *Criminal Code* imposes an evidential burden on the defendant. An evidential burden is defined by subsection 13.3(6) as one in which the defendant is required to adduce or point to evidence that suggests a reasonable possibility that the matter exists or does not exist (as the case may be).

Item 20 – Recreation of defence

88. This item is consequent upon item 19 above. It proposes to create a new subsection 265(1A) which provides that a bankrupt is taken to have complied with paragraphs 265(1)(a), (b) or (ca) if he or she has complied with that paragraph to the best of his or her knowledge and belief. The standard note concerning the imposition of an evidential burden on the defendant by subsection 13.3(3) of the *Criminal Code* is also added.

Item 21 - Clarifying a fault element

89. This item proposes that the phrase “for the purpose of” in subsection 265(3) be replaced by the phrase “with the intention of”. The phrase “for the purpose of” should no longer be used in offence-creating provisions because of the potential confusion which could arise as to the applicable fault element. This confusion could arise

because most offences do not specify the fault element and because the phrase “for the purpose of” could be interpreted to refer to an additional fault element of intention attaching to the physical element of conduct or denote a physical element of result which would thereby attract the default fault element of recklessness.

90. There are two possible interpretations in relation to the phrase “for the purpose of” in subsection 265(3). First, the phrase could denote a physical element of result, namely that the defendant obtained the consent of his or her creditors, or any of them, to any matter relating to any of the bankrupt’s examinable affairs as a result of making a false representation or committing any fraud. On this interpretation the fault element of recklessness would attach to this physical element of result by virtue of the *Criminal Code*’s default fault provision (section 5.6), and the prosecution would merely have to prove that the defendant made a false representation or committed fraud being reckless as to whether a creditor’s consent was obtained as a result of his or her actions.

91. In the alternative the phrase would be interpreted to identify an additional fault element of intention attaching to the physical element of conduct. Under this second interpretation the prosecution would be required to prove a higher degree of culpability, namely that the defendant made the false representation or committed fraud with intention of obtaining a creditor’s consent.

92. It follows that the phrase “for the purposes of” has the potential to create significant confusion in interpreting offence-creating provisions to which the *Criminal Code* has been applied. If a physical element of result is intended to be part of the offence, then that should be described clearly: for example, the words “to achieve the result of” could be used in place of “for the purposes of”. Conversely, if the phrase “for the purposes of” are meant to denote an additional fault element of intention attaching to the physical element of conduct then the phrase “with the intention of” would be better used in its stead.

93. In the instance of subsection 265(3) the correct interpretation is that the defendant makes the false representation or commits fraud with the intention of obtaining a creditor's consent, and this item proposes the appropriate amendment accordingly.

Item 22 – Deleting reasonable excuse defence

94. This item proposes to remove the defence of reasonable excuse from subsection 265A(1). The defence is recreated in a new subsection 265A(1A) (see item 23 below). 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.

Item 23 – Recreating reasonable excuse defence

95. This item is consequent upon item 22 above. It inserts proposed subsection 265A(1A) which recreates the defence of reasonable excuse in relation to an offence against subsection 265A(1).

96. This item also adds the standard note after proposed subsection 265A(1A) 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 265A(1A).

Item 24 – Deleting reasonable excuse defence

97. This item proposes to remove the defence of reasonable excuse from subsection 265A(3). The defence is recreated in a new subsection 265A(3A) (see item 25 below). 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.

Item 25 – Recreating reasonable excuse defence

98. This item is consequent upon item 24 above. It inserts proposed subsection 265A(3A) which recreates the defence of reasonable excuse in relation to an offence against subsection 265A(3).

99. This item also adds the standard note after proposed subsection 265A(3A) 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 265A(3A).

Item 26 – Deleting reasonable excuse defence

100. This item proposes to remove the defence of reasonable excuse from section 267B. The defence is recreated in a new subsection 267B(2) (see item 27 below). 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.

Item 27 – Recreating reasonable excuse defence

101. This item is consequent upon item 26 above. It inserts proposed subsection 267B(2) which recreates the defence of reasonable excuse in relation to an offence against section 267B.

102. This item also adds the standard note after proposed subsection 267B(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 subsection 267B(2).

Item 28 – Deleting reasonable excuse defence

103. This item proposes to remove the defence of reasonable excuse from section 267D. The defence is recreated in a new subsection 267D(2) (see item 29 below).

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.

Item 29 – Recreating reasonable excuse defence

104. This item is consequent upon item 28 above. It inserts proposed subsection 267D(2) which recreates the defence of reasonable excuse in relation to an offence against section 267D.

105. This item also adds the standard note after proposed subsection 267D(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 subsection 267D(2).

Item 30 – Deleting reasonable excuse defence

106. This item proposes to remove the defence of reasonable excuse from section 267F. The defence is recreated in a new subsection 267F(2) (see item 31 below). 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.

Item 31 – Recreating reasonable excuse defence

107. This item is consequent upon item 30 above. It inserts proposed subsection 267F(2) which recreates the defence of reasonable excuse in relation to an offence against section 267F.

108. This item also adds the standard note after proposed subsection 267F(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 subsection 267F(2).

Item 32 - Identification of defence

109. This item proposes to remove the defence of “to the best of his or her knowledge and belief” from paragraphs 268(2)(a) and (ba) and remove it to a separate subsection (see item 33 below below). This defence is of a particular character which makes this amendment desirable, namely it is peculiarly within the knowledge of the defendant whether he or she has complied with the requirements of paragraphs 268(2)(a) or (ba) to the best of his or her knowledge and belief. Because of the nature of this defence, and particularly in the circumstance of the application of the *Criminal Code* which sets a goal of enhancing clarity concerning the principles of criminal responsibility, it is desirable to clearly identify this provision as a defence to which an evidential burden is imposed on the defendant by the *Criminal Code* (subsection 13.3(3)). This is best effected by removing the defence to a separate subsection and adding the standard note which provides that subsection 13.3(3) of the *Criminal Code* imposes an evidential burden on the defendant. An evidential burden is defined by subsection 13.3(6) as one in which the defendant is required to adduce or point to evidence that suggests a reasonable possibility that the matter exists or does not exist (as the case may be).

Item 33 – Recreation of defence

110. This item is consequent upon item 32 above above. It proposes to create a new subsection 268(2A) which provides that a bankrupt is taken to have complied with paragraphs 268(2)(a) or (ba) if he or she has complied with that paragraph to the best of his or her knowledge and belief. The standard note concerning the imposition of an evidential burden on the defendant by subsection 13.3(3) of the *Criminal Code* is also added.

Item 34 - Clarifying a fault element

111. This item proposes that the phrase “for the purpose of” in subsection 268(3) be replaced by the phrase “with the intention of”. For details on the reasons for replacing the phrase “for the purpose of” see the explanation at item 21 of this Schedule. In the case of subsection 268(3) the correct interpretation is that the defendant makes the false representation or commits fraud with the intention of obtaining a creditor’s consent, and this item proposes the appropriate amendment accordingly.

Item 35 - Evidential burden note

112. The offences in sections 268(2) and (3) provide that a debtor who has executed a deed of assignment or arrangement shall make all the disclosures prescribed by subsection 268(2) and shall not make a false representation or commit any fraud for the purpose of obtaining the consent of any of his or her creditors to any matter relating to a debtor's examinable affairs, except as permitted by subsection 268(4). Subsection 268(4) permits a defence to a contravention of subsection 268(2) and (3) where, the final dividend has been paid under the deed or after the deed has been declared to be void (in the case of a deed of assignment) or after the terms of the deed have been carried out or after the deed has been declared to be void or has been terminated (in the case of a deed of arrangement). This item proposes the insertion of a note after subsection 268(4) which makes it clear that the defendant bears an evidential burden in relation to a defence raised under subsection 268(4). Subsection 13.3(6) of the *Criminal Code* provides that an evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matters exists or does not exist (as the case may be).

Item 36 - Identification of defence

113. This item proposes to remove the defence of "to the best of his or her knowledge and belief" from subsection 268(5) and remove it to a separate subsection (see item 37 below). This defence is of a particular character which makes this amendment desirable, namely it is peculiarly within the knowledge of the defendant whether he or she has complied with the requirements of subsection 268(5) to the best of his or her knowledge and belief. Because of the nature of this defence, and particularly in the circumstance of the application of the *Criminal Code* which sets a goal of enhancing clarity concerning the principles of criminal responsibility, it is desirable to clearly identify this provision as a defence to which an evidential burden is imposed on the defendant by the *Criminal Code* (subsection 13.3(3)). This is best effected by removing the defence to a separate subsection and adding the standard note which provides that subsection 13.3(3) of the *Criminal Code* imposes an evidential burden on

the defendant. An evidential burden is defined by subsection 13.3(6) as one in which the defendant is required to adduce or point to evidence that suggests a reasonable possibility that the matter exists or does not exist (as the case may be).

Item 37 – Recreation of defence

114. This item is consequent upon item 36 above. It proposes to create a new subsection 268(5A) which provides that a bankrupt is taken to have complied with subsection 268(5) if he or she has complied with that subsection to the best of his or her knowledge and belief. The standard note concerning the imposition of an evidential burden on the defendant by subsection 13.3(3) of the *Criminal Code* is also added.

**Schedule 6 - Classification (Publications, Films and Computer Games)
Act 1995**

Item 1 - Application of Criminal Code

115. 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.

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

Item 2 - Insertion of notes related to strict liability

117. This item inserts a note after subsection 23(4), which provides that an offence against subsection 23(3) is a strict liability offence. The note refers to the *Criminal Code* provision governing the principles concerning strict liability (section 6.1).

Item 3 - Insertion of notes related to strict liability

118. This item inserts a note after subsection 24(4), which provides that an offence against subsection 24(3) is a strict liability offence. The note refers to the *Criminal Code* provision governing the principles concerning strict liability (section 6.1).

Item 4 - Insertion of notes related to strict liability

119. This item inserts a note after subsection 23(4), which provides that an offence against subsection 23(3) is a strict liability offence. The note refers to the *Criminal Code* provision governing the principles concerning strict liability (section 6.1).

Item 5 – Deleting reasonable excuse defence

120. This item proposes to remove the defence of reasonable excuse from subsection 70(4). The defence is recreated in a new subsection 70(6) (see item 6 below). 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.

Item 6 - Strict liability applied: recreating reasonable excuse defence

121. This item proposes two amendments to section 56F. First, it inserts proposed subsection 70(5) which applies strict liability to the offence in subsection 70(4) of the Act. Subsection 70(4) provides that a person who, without reasonable excuse, contravenes subsection 70(3) is guilty of an offence. Subsection 70(3) empowers the Auditor-General to require any person to give to him or her information in the person's possession or to which the person has access, and provides that the person must comply with such a requirement. The offence carries a fine of 10 penalty units. 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

123. Second, consequent to item 5 above, this item inserts proposed subsection 70(6) which recreates the defence of reasonable excuse in relation to an offence against subsection 70(4).

124. This item also adds the standard note after proposed subsection 70(6) 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 70(6).

Schedule 7 - Commerce (Trade Descriptions) Act 1905

Item 1 - Application of Criminal Code

125. This item inserts a note referring to the application of Chapter 2 of the *Criminal Code* to this Act via application to the *Customs Act 1901*. The *Criminal Code* is applied to this Act in this manner because of section 2, which provides that this Act shall be incorporated and read as one with the *Customs Act*. Accordingly the application of the specified components of the *Criminal Code* to the *Customs Act's* criminal offences and offences dealt with by way of a Customs prosecution (see item 2 of Schedule 21) will also apply those components to each such offence in this Act on the same basis.

Item 2 - Strict liability applied

126. This item proposes to insert subsection 6(2) which provides that strict liability is applied to the physical element of circumstance in the offence in subsection 6(1) that the notice to be given is notice in accordance with the regulations. Subsection 6(1) imposes an obligation upon a person who intends to export goods to give notice to Customs in accordance with the regulations.

127. 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

Item 3 - Amendment of inappropriate fault element

129. Subsection 9(2) applies the fault element of knowledge (or "knowingly") in relation to the proscribed physical element of conduct, namely importing goods. 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 replacement of "knowingly" in subsection 9(2) by the appropriate and equivalent fault element, namely intention. It is considered that subsection 9(2) will continue to operate in the same manner as at present following this amendment.

Item 4 - Amendment of inappropriate fault element

130. Paragraphs 12(1)(a) and (b) apply the fault element of knowledge (or "knowingly") in relation to the proscribed physical element of conduct, namely

applying any false trade description to any goods, or export or enter for export or put on any ship or boat for export any goods. 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 replacement of “knowingly” in paragraphs 12(1)(a) and (b) by the appropriate and equivalent fault element, namely intention. It is considered that paragraphs 12(1)(a) and (b) will continue to operate in the same manner as at present following this amendment.

Schedule 8 - Complaints (Australian Federal Police) Act 1981

Item 1 - Application of Criminal Code

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

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

Item 2 – Deleting reasonable excuse defence

133. This item proposes to remove the defence of reasonable excuse from paragraph 7(8)(a). The defence is recreated in a new subsection 7(8A) (see item 3 below). 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.

Item 3 – Recreating reasonable excuse defence

134. This item is consequent upon item 2 above. It inserts proposed subsection 7(8A) which recreates the defence of reasonable excuse in relation to an offence against paragraph 7(8)(a).

135. This item also adds the standard note after proposed subsection 7(8A) 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 7(8A).

Item 4 – Deleting reasonable excuse defence

136. This item proposes to remove the defence of reasonable excuse from subsection 44(1). The defence is recreated in a new subsection 44(1B) (see item 5 below). 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.

Item 5 - Recreating reasonable excuse defence

137. This item is consequent upon item 4 above. It inserts proposed subsection 44(1A) which recreates the defence of reasonable excuse in relation to an offence against subsection 44(1).

138. This item also adds the standard note after proposed subsection 44(1B) 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 44(1B).

Item 6 - Deleting reasonable excuse defence

139. This item proposes the repeal and substitution of paragraph 50(8)(a), the net effect of which is to remove the defence of reasonable excuse from paragraph

50(8)(a). The defence is recreated in a new subsection 50(8A) (see item 8 below). 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.

Item 7 - Amendment of inappropriate fault element: deleting reasonable excuse defence

140. This item proposes two amendments to paragraph 50(8)(b). First, paragraph 50(8)(b) uses the non-*Criminal Code* fault element “wilfully” in relation to the physical element of conduct, namely obstructing, hindering or resisting a person, or any of the persons, holding an inquiry under subsection (1). This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes the replacement of “wilfully” in paragraph 50(8)(b) by the appropriate and equivalent *Criminal Code* fault element, namely intention. It is considered that paragraph 50(8)(b) will continue to operate in the same manner as at present following this amendment.

141. Second, this item proposes to remove the defence of reasonable excuse from paragraph 50(8)(b). The defence is recreated in a new subsection 50(8A) (see item 8 below). 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.

Item 8– Recreating reasonable excuse defence

142. This item is consequent upon items 6 and 7 above. It inserts proposed subsection 50(8A) which recreates the defence of reasonable excuse in relation to an offence against existing paragraphs 50(8)(a) or (b). Paragraph 8(a) has been reconstructed as paragraphs 8(a), (aa) and (ab): see item 6.

143. This item also adds the standard note after proposed subsection 50(8A) 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 50(8A).

Item 9 – Deleting reasonable excuse defence

144. This item proposes to remove the defence of reasonable excuse from section 82. The defence is recreated in a new subsection 82(2) (see item 10 below). 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.

Item 10 – Recreating reasonable excuse defence

145. This item is consequent upon item 9 above. It inserts proposed subsection 82(2) which recreates the defence of reasonable excuse in relation to an offence against subsection 82(1).

146. This item also adds the standard note after proposed subsection 82(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 subsection 82(2).

Item 11 – Deleting reasonable excuse defence

147. This item proposes to remove the defence of reasonable excuse from subsection 83(1). The defence is recreated in a new subsection 83(1A) (see item 12 below). 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.

Item 12 – Recreating reasonable excuse defence

148. This item is consequent upon item 11 above. It inserts proposed subsection 83(1A) which recreates the defence of reasonable excuse in relation to an offence against subsection 83(1).

149. This item also adds the standard note after proposed subsection 83(1A) 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 83(1A).

Schedule 9 - Copyright Act 1968***Item 1 - Application of Criminal Code***

150. 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.

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

Item 2 – Strict liability applied

152. This item inserts proposed subsection 47A(3A) which applies strict liability to the offence in subsection 47A(3) of the Act. Subsection 47A(3) provides that a person

is guilty of an offence where, at any time before the expiration of the prescribed retention period after the making by a person of a sound broadcast of a literary or dramatic work in reliance on subsection (1), a record made for the purposes of paragraph (1)(b) in relation to the making of the sound broadcast is not retained by the person. The offence carries a penalty of \$500. This is a regulatory obligation with a low penalty and is therefore the type of offence where strict liability is applied under the existing law. Further, a defendant can rely on the “due diligence” defence in subsection 47A(4). For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

Item 3 – Deleting reasonable excuse defence

154. This item proposes to remove the defence of reasonable excuse from subsection 47A(7). The defence is recreated in a new subsection 47A(7A) (see item 4 below). 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.

Item 4 - Strict liability applied: recreating reasonable excuse defence

155. This item proposes two amendments to section 47A. First, it inserts proposed subsection 47A(7A) which applies strict liability to the offence in subsection 47A(7) of the Act. Subsection 47A(7) provides that a person who receives a notice of intended inspection under subsection (6) shall allow the owner or agent to inspect the records to which the notice relates during business hours on the day specified in the notice. The offence carries a fine of \$500. The person can claim a defence if he or she has a reasonable excuse. This is an obligation provision of the type where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

157. Second, consequent to item 3 above this item inserts proposed subsection 47A(7B) which recreates the defence of reasonable excuse in relation to an offence against subsection 47A(7).

158. This item also adds the standard note after proposed subsection 47A(7B) 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 47A(7B).

Item 5 - Lawful excuse defence

159. This item proposes to remove the specific defence of lawful excuse from subsection 172(1). Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful excuse defence see the explanation at item 3 of Schedule 2.

Item 6 – Penalty

160. This item is consequent upon the amendment being effected by item 5 above and proposes to insert the penalty presently applicable to an offence against subsection 172(1), namely \$10 penalty units or 3 months imprisonment, after subsection 172(1). This is intended to assist the correct interpretation that subsection 172(1) creates a criminal offence and that the penalty applicable to an offence against this subsection is the penalty described.

Item 7 - Lawful excuse defence

161. This item proposes to remove the specific defence of lawful excuse from subsection 172(2). Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this

Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful excuse defence see the explanation at item 3 of Schedule 2.

Item 8 – Penalty

162. This item is consequent upon the amendment being effected by item 7 above and proposes to insert and update the penalty applicable to an offence against subsection 172(2), namely \$10 penalty units or 3 months imprisonment, after subsection 172(2). This is intended to assist the correct interpretation that subsection 172(2) creates a criminal offence and that the penalty applicable to an offence against this subsection is the penalty described.

Item 9 - Lawful excuse defence

163. This item proposes to remove the specific defence of lawful excuse from subsection 172(3). Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful excuse defence see the explanation at item 3 of Schedule 2.

Item 10 – Penalty

164. This item is consequent upon the amendment being effected by item 9 above and proposes to update the penalty presently applicable to an offence against subsection 172(3), namely a fine of \$1000, in the nearest equivalent penalty units.

Item 11 – Reasonable excuse defence

165. This item proposes to insert subsection 172(4) which provides a defence of reasonable excuse in relation to an offence against subsections 172(1), (2) and (3). This will replace the present defence of lawful excuse, which is being deleted by items 5, 7 and 9 of this Schedule.

166. The offences in subsection 172(1), (2) and (3) concern the failure to perform as required of a person who has been duly summonsed to appear before the Tribunal as a

witness, to produce a specified document or article, to be sworn or make an affirmation, or to answer questions as the case may be. Under proposed section 10.5, which is being inserted into the *Criminal Code* by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*, there is to be a defence which provides a person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by a law. The proposed defence will cover the situation where a person is for some reason authorised by law to wear or possess AFP clothing or equipment, but it does not cover the situation where someone might have some other reasonable excuse for not performing as required. For example, it would be undesirable for the person not to be exempted from the offence if the person was prevented from compliance by factors beyond his or her control, such as suffering sudden illness. It is therefore appropriate to replace lawful excuse with a reasonable excuse exception. It is likely that those who originally drafted the offence expected it to apply to those circumstances.

167. This item also adds the standard note after proposed subsection 172(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 172(4).

Item 12 - Strict liability applied

168. This item inserts proposed subsection 203E(6A) which applies strict liability to the offence in subsection 203E(6) of the Act. Subsection 203E(6) provides that where a person who attends at the premises of a library or archives for the purpose of exercising the powers conferred on him or her by subsection (4) is not provided with all reasonable facilities and assistance for the effective exercise of those powers, the body administering the library or archives, as the case may be, and the officer in charge of the library or archives, as the case may be, are guilty of an offence. The offence carries a fine of \$500, and the defendant can rely upon the broad defences in subsection 203E(8) and (9) as well as the general defence of mistake of fact. This is an obligation with a low penalty and is therefore the type of offence where strict

liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

Item 13 - Clarifying a fault element

169. This item proposes that the phrase “for the purpose of” in subsection 203E(10) be replaced by the phrase “with the intention of”. For details on the reasons for replacing the phrase “for the purpose of” see the explanation at item 21 of Schedule 5. In the case of subsection 203E(10) the correct interpretation is that the defendant makes a record of, or divulges or communicates to a person, the prescribed information with the intention of effecting an outcome other than those described in paragraphs 203E(10(a)-(c), and this item proposes the appropriate amendment accordingly.

Item 14 - Strict liability applied

170. This item inserts proposed subsection 203E(10A) which applies strict liability to the offence in subsection 203E(10) of the Act. Subsection 203E(10) provides that a person who makes a record of, or divulges or communicates to a person, information in relation to which subsection 203E(11) applies is guilty of an offence. The offence carries a fine of \$500. 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

Item 15 - Amendment of inappropriate fault element

172. Subsection 203F(2) uses the fault element “wilfully” in relation to the physical element of conduct, namely destroying or damaging or causing the disposal or destruction of any relevant declaration to which this subsection applies. This is akin to applying the fault element of intention, which is the equivalent used in the *Criminal Code*. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes that “wilfully” be deleted from subsection 203F(2) and replaced with “intentionally”. It is considered that subsection 203F(2) will continue to operate in the same manner as at present following this amendment.

Schedule 10 - Crimes Act 1914

Item 1 - Replacing references to certain Crimes Act 1914 provisions

173. Certain *Crimes Act 1914* provisions, including sections 7A and 86, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001: see items 1 of Schedule 1 and 4 of Schedule 51. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the references in paragraph 3(1)(a) of the definition of “associated offence” to sections 7A and 86 of the *Crimes Act 1914*, which concern incitement to commit primary offences and conspiring to commit primary offences, be replaced by reference to the *Criminal Code* ancillary provisions. These *Criminal Code* provisions will apply to this Act by virtue of this Bill: see item 4 of this Schedule.

Item 2 - Replacing references to certain Crimes Act 1914 provisions

174. Certain *Crimes Act 1914* provisions, including sections 5, 7, 7A and 86, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001: see items 1 of

Schedule 1 and 4 of Schedule 51. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the references in paragraph 3(1)(b) of the definition of “associated offence” to sections 5, 7, 7A and 86 of the *Crimes Act 1914*, which concern aiding or abetting the commission of primary offences, attempting to commit primary offences, incitement to commit primary offences, and conspiring to commit primary offences, be replaced by reference to the *Criminal Code* ancillary provisions. These *Criminal Code* provisions will apply to this Act by virtue of this Bill: see item 4 below.

Item 3 - Replacing references to certain Crimes Act 1914 provisions

175. Certain *Crimes Act 1914* provisions, including sections 5, 7, 7A and 86, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001: see items 1 of Schedule 1 and 4 of Schedule 51. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the references in subparagraph 3(1)(c)(i) of the definition of “associated offence” to sections 5, 7, 7A and 86 of the *Crimes Act 1914*, which concern aiding or abetting the commission of primary offences, attempting to commit primary offences, incitement to commit primary offences, and conspiring to commit primary offences, be replaced by reference to the *Criminal Code* ancillary provisions. These *Criminal Code* provisions will apply to this Act by virtue of this Bill: see item 4 below.

Item 4- Application of Criminal Code

176. This item inserts proposed section 3BA which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility.

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

Item 5 – Deleting reasonable excuse defence

178. This item proposes to remove the defence of reasonable excuse from subsection 3V(2). The defence is recreated in a new subsection 3V(2A) (see item 6 below). 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.

Item 6 – Recreating reasonable excuse defence

179. This item is consequent upon item 5 above. It inserts proposed subsection 3V(2A) which recreates the defence of reasonable excuse in relation to an offence against subsection 3V(2).

180. This item also adds the standard note after proposed subsection 3V(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 3V(2A).

Item 7– Clarifying reasonable excuse defence

181. This item proposes to repeal and substitute subsection 3ZL(2), the effect of which is to remove the defence of reasonable excuse from subsection 3ZL(2) and recreate it in a new subsection 3ZL(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.

182. The standard note is added after proposed subsection 3ZL(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 3ZL(3).

Item 8 – Definition

183. This item inserts into subsection 15V(2) a definition of “engage in conduct”, which is defined to comprise doing an act and omitting to perform an act. The definition mirrors the same definition in the *Criminal Code*. The phrase “engage in conduct” is utilised in a number of provisions in this Act.

Item 9 – Amending references to ancillary conduct

184. This item repeals and substitutes subparagraph 15W(1)(b)(ii), 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.

Item 10 – Amending references to ancillary conduct

185. This item amends section 15X, 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.

Item 11 – Deleting reasonable excuse defence

186. This item proposes to remove the defence of reasonable excuse from subsection 19AZA(1). The defence is recreated in a new subsection 19AZA(4) (see item 16 below). 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.

Item 12 – Penalty

187. This item is consequent upon the amendments being effected by item 11 above, and proposes to insert the penalty presently applicable to an offence against subsection 19AZA(1), namely 10 penalty units, after subsection 19AZA(1). This is intended to assist the correct interpretation that subsection 19AZA(1) creates a criminal offence

and that the penalty applicable to an offence against this subsection is the penalty described.

Item 13 – Deleting reasonable excuse defence

188. This item proposes to remove the defence of reasonable excuse from subsection 19AZA(2). The defence is recreated in a new subsection 19AZA(4) (see item 16 below). 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.

Item 14 – Penalty

189. This item is consequent upon the amendments being effected by item 13 above, and proposes to insert the penalty presently applicable to an offence against subsection 19AZA(2), namely 10 penalty units, after subsection 19AZA(2). This is intended to assist the correct interpretation that subsection 19AZA(2) creates a criminal offence and that the penalty applicable to an offence against this subsection is the penalty described.

Item 15 – Deleting reasonable excuse defence

190. This item proposes to remove the defence of reasonable excuse from subsection 19AZA(3). The defence is recreated in a new subsection 19AZA(4) (see item 16 below). 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.

Item 16 – Recreating reasonable excuse defence: strict liability applied

191. This item proposes two amendments to section 19AZA. First, this item is consequent upon items 11, 13 and 15 above. It inserts proposed subsection 19AZA(4)

which recreates the defence of reasonable excuse in relation to an offence against subsections 19AZA(1), (2) and (3).

192. This item also adds the standard note after proposed subsection 19AZA(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 19AZA(4).

193. Second, this item inserts proposed subsection 19AZA(5) which applies strict liability to the offences in subsections 19AZA(1) and (2). Subsection 19AZA(1) provides that a person who is served with a summons to appear before a prescribed authority must not fail to appear in obedience to the summons. Subsection 19AZA(2) provides that a person who is served with a summons to produce a document or article to a prescribed authority must not fail to produce the document or article. Both offences attract a fine of 10 penalty units and the defendant can rely upon a defence of reasonable excuse. These are procedural obligations with a low penalty and therefore are the type of offences where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

Item 17 - Amendment of inappropriate fault element

195. Subsection 23XG(2) applies the fault element of recklessness (or “recklessly”) in relation to the proscribed physical element of conduct, namely disclosing the results of the analysis to any person. 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 “recklessly” in subsection 23XG(2). Upon application of the *Criminal Code*, its default fault provision (section 5.6) will

apply the fault element of recklessness to each physical element of circumstance in subsection 23XG(2). It is considered that subsection 23XG(2) will continue to operate in the same manner as at present following this amendment.

Item 18 - Amendment of inappropriate fault element

196. Section 23XH applies the fault element of recklessness (or “recklessly”) in relation to the proscribed physical element of conduct, namely publishing the proscribed information. 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 “recklessly” in section 23XH. Upon application of the *Criminal Code*, its default fault provision (section 5.6) will apply the fault element of recklessness to each physical element of circumstance in section 23XH. It is considered that section 23XH will continue to operate in the same manner as at present following this amendment.

Item 19 – Amendment of inappropriate fault element

197. This item proposes to delete “or recklessly” from the note in section 23YL. The reference to recklessness in the note is inconsistent with the offence in section 23YL, which does not apply the fault element of recklessness.

Item 20 - Amendment of inappropriate fault element

198. Subsection 23YP(2) applies the fault element of recklessness (or “recklessly”) in relation to the proscribed physical element of conduct, namely disclosing the proscribed information. 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 “recklessly” in subsection 23YP(2). Upon application of

the *Criminal Code*, its default fault provision (section 5.6) will apply the fault element of recklessness to each physical element of circumstance in subsection 23YP(2). It is considered that subsection 23YP(2) will continue to operate in the same manner as at present following this amendment.

Item 21 – Deleting reasonable excuse defence

199. This item proposes to remove the defence of reasonable excuse from subsection 23YQ(7). The defence is recreated in a new subsection 23YQ(7A) (see item 22 below). 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.

Item 22 – Recreating reasonable excuse defence

200. This item is consequent upon item 21 above. It inserts proposed subsection 23YQ(7A) which recreates the defence of reasonable excuse in relation to an offence against subsection 23YQ(7).

201. This item also adds the standard note after proposed subsection 23YQ(7A) 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 23YQ(7A).

Item 23 - Clarifying a fault element

202. This item proposes that the phrase “for a purpose intended to be prejudicial to” in the definition of “act of sabotage” in subsection 24AB(1) be replaced by the phrase “with the intention of prejudicing”. For details on the reasons for replacing the phrase “for the purpose of” (and like phrases) see the explanation at item 21 of Schedule 5. In the case of the definition of “act of sabotage” in subsection 24AB(1) the correct interpretation is the destruction, damage or impairment of any article to which paragraphs 24AB(1)(a)-(d) apply with the intention of prejudicing the safety or

defence of the Commonwealth, and this item proposes the appropriate amendment accordingly.

Item 24 - Clarifying a fault element

203. This item proposes that the phrase “a purpose intended to be prejudicial to” in subsection 24AB(3) be replaced by the phrase “an intention to prejudice”. For details on the reasons for replacing the phrase “for the purpose of” (and like phrases) see the explanation at item 21 of Schedule 5. In the case of subsection 24AB(3) the correct interpretation is that the defendant intended to prejudice the safety or defence of the Commonwealth, and this item proposes the appropriate amendment accordingly.

Item 25 - Clarifying a fault element

204. This item proposes that the phrase “purpose was a purpose intended to be prejudicial to” in subsection 24AB(3) be replaced by the phrase “intention was to prejudice”. For details on the reasons for replacing the phrase “for the purpose of” (and like phrases) see the explanation at item 21 of Schedule 5. In the case of subsection 24AB(3) the correct interpretation is that the defendant intended to prejudice the safety or defence of the Commonwealth, and this item proposes the appropriate amendment accordingly.

Item 26 - Clarifying a fault element

205. This item proposes that the phrase “purpose of the defendant was a purpose intended to be prejudicial to” in paragraph 24AB(4)(a) be replaced by the phrase “defendant intended to prejudice”. For details on the reasons for replacing the phrase “for the purpose of” (and like phrases) see the explanation at item 21 of Schedule 5. In the case of paragraph 24AB(4)(a) the correct interpretation is that the defendant intended to prejudice the safety or defence of the Commonwealth, and this item proposes the appropriate amendment accordingly.

Item 27 - Clarifying a fault element

206. This item proposes that the phrase “purpose of the defendant was a purpose intended to be prejudicial to” in subsection 24AB(5) be replaced by the phrase “defendant intended to prejudice”. For details on the reasons for replacing the phrase

“for the purpose of” (and like phrases) see the explanation at item 21 of Schedule 5. In the case of subsection 24AB(5) the correct interpretation is that the defendant intended to prejudice the safety or defence of the Commonwealth, and this item proposes the appropriate amendment accordingly.

Item 28 - Removal of ancillary provisions duplicating the Criminal Code

207. This item proposes the repeal and substitution of section 24C to effect the removal of the references in paragraphs 24C(a)-(c) to agreeing or undertaking to engage in a seditious enterprise, conspiring with any person to carry out a seditious enterprise and counselling, advising or attempting to procure the carrying out of a seditious enterprise. These matters are ancillary to the primary offence provided in section 24C, namely engaging in a seditious enterprise. 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) 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 4 above and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

Item 29 - Amendment of inappropriate fault element

208. Subsection 25(1) applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct, namely committing the various forms of mutiny set out in paragraphs (a), (b) and (c). 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 replacement of “knowingly” in subsection 25(1) by the appropriate and equivalent fault element, namely intention. It

is considered that subsection 25(1) will continue to operate in the same manner as at present following this amendment.

Item 30 - Amendment of inappropriate fault element

209. Section 26 applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct, namely aiding an alien enemy who is a prisoner of war to escape, or in his or escape, from confinement. 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 replacement of “knowingly” in section 26 by the appropriate and equivalent fault element, namely intention. It is considered that section 26 will continue to operate in the same manner as at present following this amendment.

Item 31 - Amendment of inappropriate fault element: lawful authority defence

210. This item proposes two amendments to section 29. First, section 29 uses the fault element “wilfully” in relation to the physical element of conduct, namely destroying or damaging any real or personal property belonging to the Commonwealth or to any public authority under the Commonwealth. This is akin to applying the fault element of intention, which is the equivalent used in the *Criminal Code*. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes that “wilfully” be deleted from section 29 and replaced with “intentionally”.

211. The second amendment proposed by this item is to remove the fault element of “unlawfully” from section 29. Under proposed section 10.5, which is to be included in the *Criminal Code* as part of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 2000*, there is to be a general defence which provides that a person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by a law. The proposed general defence will apply to any situation where a person is presently authorised by Commonwealth law to destroy or damage property described by section 29. For more details on the operation of the lawful excuse defence see the explanation at item 3 of Schedule 2.

212. It is considered that section 29 will continue to operate in the same manner as at present following these amendments.

Item 32 - Absolute liability applied

213. This item proposes to insert subsection 29(2) which provides that absolute liability is applied to the physical elements of circumstance contained in the offence in subsection 29(1) that the property in question belonged to the Commonwealth or to any public authority under the Commonwealth. Subsection 29(1) provides that a person who destroys or damages any property, whether real or personal, belonging to the Commonwealth or to any public authority under the Commonwealth is guilty of an offence.

214. Section 6.2 of the *Criminal Code* provides that absolute liability means that the prosecution is not required to prove any fault element in relation to any offence or physical element of an offence which is expressly provided to be of absolute liability. This differs slightly from an application of strict liability to an offence or physical element of an offence, which similarly provides that the prosecution does not need to demonstrate a defendant’s fault element in relation to that offence or physical element but does leave the defence of mistake of fact available to the defendant (subsection 6.1(2) of the *Criminal Code*). Where absolute liability applies to an element of an offence or the complete offence, the defence of mistake of fact under section 9.2 of the

Criminal Code is not available to the defendant. Absolute liability is more appropriate in situations where it is not sensible to place on the prosecution the onus of demonstrating a fault element and where the mistake of fact defence should not be available to a defendant.

215. Section 6.2 provides that where an offence is intended to be one of absolute liability, then it should be identified as such in the statute.

216. The physical elements in proposed subsection 29(2) are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application.

217. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 33

218. This item repeals subsection 30AA(3) in consequence to the repeal of subsections 30R(1) to (4) inclusive by item 36 below.

Item 34 - Amendment of inappropriate fault element

219. Section 30F applies the fault element of knowledge (or "knowingly") in relation to the proscribed physical element of conduct, namely printing, publishing, selling or exposing for sale, circulating or distributing any of the written materials prescribed by section 30F for or in the interests of any unlawful association. 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 replacement of “knowingly” in section 30F by the appropriate and equivalent fault element, namely intention. It is considered that section 30F will continue to operate in the same manner as at present following this amendment.

Item 35 - Amendment of inappropriate fault element

220. Section 30FC applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct, namely permitting any meeting of an unlawful association or any branch or committee thereof in any building, room, premises or place of which the defendant is the owner, lessee, agent or superintendent. 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 replacement of “knowingly” in section 30FC by the appropriate and equivalent fault element, namely intention. It is considered that section 30FC will continue to operate in the same manner as at present following this amendment.

221. The heading to section 30FC is consequentially amended by deleting “knowingly”.

Item 36 - Averment

222. This item proposes to repeal subsections 30R(1) to (4) inclusive. These subsection provide for the prosecutor to aver matters in relation to the prosecution of certain offences in the Act. This provision will not operate in the same manner following application of the *Criminal Code*, which provides that the prosecution will be required to prove each element of an offence beyond reasonable doubt: sections

13.1 and 13.2. Further, section 13.6 of the *Criminal Code* provides that such a provision shall not be taken to allow the prosecution to aver any fault elements of an offence or to make an averment in prosecuting for an offence that is punishable by imprisonment.

223. The heading of section 30R is also consequentially amended to reflect the remaining function of this section, namely that contained in subsection 30R(5), which states that any book, periodical, pamphlet, handbill, poster or newspaper purporting to be issued by, or on behalf of, or in the interests of, an association, shall be deemed to be issued unless the contrary is proved.

Item 37 – Deleting reasonable excuse defence

224. This item proposes to remove the defence of reasonable excuse from paragraph 34(a). The defence is recreated in a new subsection 34(2) (see item 39 below). 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.

Item 38 - Amendment of inappropriate fault element

225. Paragraph 34(b) uses the fault element “wilfully” in relation to the physical element of conduct, namely exercising federal jurisdiction. This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes the replacement of “wilfully” in paragraph 34(b) by the appropriate and equivalent *Criminal Code* fault element, namely intention. It is considered that paragraph 34(b) will continue to operate in the same manner as at present following this amendment.

Item 39 – Recreating reasonable excuse defence

226. This item is consequent upon item 37 above. It inserts proposed subsection 34(2) which recreates the defence of reasonable excuse in relation to an offence against paragraph 34(1)(b).

227. This item also adds the standard note after proposed subsection 34(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 subsection 34(2).

Item 40 - Clarifying a fault element

228. This item proposes that the phrase “for the purpose” in subsection 35(1) be replaced by the phrase “with the intention”. For details on the reasons for replacing the phrase “for the purpose of” see the explanation at item 21 of Schedule 5. In the case of subsection 35(1) the correct interpretation is that the defendant acted with the intention of instituting a judicial proceeding, and this item proposes the appropriate amendment accordingly.

Item 41 - Amendment of inappropriate fault element

229. Subsection 35(1) applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct, namely giving false testimony. 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 replacement of “knowingly” in subsection 35(1) by the appropriate and equivalent fault element, namely intention. It is considered that subsection 35(1) will continue to operate in the same manner as at present following this amendment.

Item 42 - Strict liability applied

230. This item inserts proposed subsection 35(1A) which applies strict liability to the physical element of circumstance in the offence contained in subsection 35(1) that the matter is material in the proceeding. Subsection 35(1) (as amended) provides that any person who, in any judicial proceeding, or with the intention of instituting any judicial proceeding, intentionally gives false testimony touching any matter, material in that proceeding, is guilty of an offence.

231. 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 materiality. Accordingly strict liability, and not absolute liability, is the appropriate application. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

Items 43 and 44 – Amendment of inappropriate fault element

233. Paragraph 36(b) applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct, namely making use of fabricated evidence. 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 these items propose the deletion of “knowingly” in paragraph 36(b) and its replacement in section 36 by the appropriate and equivalent fault element, namely intention. The application of “intentionally” in relation to paragraph 36(a) is uncontroversial because that is the existing fault element for paragraph 36(a) and the same fault element would be applied to paragraph 36(a) by *Criminal Code* section 5.6 in the absence of this amendment. It is considered that section 36 will continue to operate in the same manner as at present following this amendment.

Item 45 - Removal of ancillary provision duplicating the Criminal Code

234. This item proposes to amend paragraph 37(b) by removing the reference to attempting to commit the primary offence in paragraph 37(b) of doing an act with the intention of inducing a person called or to be called as a witness in any judicial proceeding to give false testimony, or to withhold true testimony. 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 4 of this Schedule and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

Item 46 - Removal of ancillary provision duplicating the Criminal Code

235. This item proposes to amend paragraph 37(c) by removing the reference to attempting to commit the primary offence of receiving or obtaining any property or benefit of any kind for himself, or any other person, upon any agreement or understanding that any person shall as a witness in any judicial proceeding give false testimony or withhold true testimony. 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 4 of this Schedule and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

Item 47 - Amendment of inappropriate fault element

236. Section 38 applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct, namely making or exhibiting any false statement, representation, token or writing. 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 replacement of “knowingly” in section 38 by the appropriate and equivalent fault element, namely intention. It is considered that section 38 will continue to operate in the same manner as at present following this amendment.

Item 48 - Amendment of inappropriate fault element

237. Section 39 uses the fault element “wilfully” in relation to the physical element of conduct, namely destroying or rendering illegible, undecipherable or incapable of identification any book, document or other thing of any kind which is subject to section 39. This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes that “wilfully” be deleted from section 39 and replaced with “intentionally”. It is considered that section 39 will continue to operate in the same manner as at present following this amendment.

Item 49 - Amendment of inappropriate fault element: removal of ancillary provision duplicating the Criminal Code

238. This item proposes two amendments to section 40. First, section 40 uses the fault element “wilfully” in relation to the physical element of conduct, namely preventing another person who has been summoned to attend as a witness in a judicial proceeding from attending as a witness or from producing anything in evidence pursuant to a subpoena or summons. This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes that “wilfully” be deleted from section 40 and replaced with “intentionally”. It is considered that section 40 will continue to operate in the same manner as at present following this amendment.

239. Second, this item proposes to amend section 40 by removing the reference to endeavouring to commit the primary offence of preventing another person who has been summoned to attend as a witness in a judicial proceeding from attending as a witness or from producing anything in evidence pursuant to the subpoena or summons. Endeavouring to commit an act is an equivalent phrase to attempting to commit that act. 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 4 of this Schedule and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

Item 50 – Application of conspiracy principles

240. This item inserts subsections 41(2) to (7) inclusive. These provisions are necessary in order to supply the principles governing conspiracy to section 41. At

present, *Crimes Act* section 4 applies the common law principles of conspiracy in relation to section 41. However section 4 is being disapplied in relation to each offence to which the *Criminal Code* is applied, including section 41: see item 1 of Schedule 1.

241. The *Criminal Code* conspiracy principles, contained in section 11.5, will not apply to section 41 because of the wording of subsection 11.5(1). Subsection 11.5(1) provides that a person who conspires to commit an offence (ie, a primary offence) is guilty of the offence of conspiracy to commit that offence. However the primary offence in section 41 is entering into the proscribed conspiracy. If section 11.5 were to apply to section 41, the conduct would be conspiring to conspire. Such a construction offends common sense. Further, it is clear from the wording of subsection 11.5(1) that such a construction is not intended and that subsection 11.5(1) will not apply to primary offences of conspiracy. Because subsection 11.5(1) will not apply to section 41, the balance of section 11.5 will also not apply. The result is that without the amendment proposed by this item the offence of conspiracy in section 41 would be wholly isolated from the principles that courts have always used to describe conspiracy.

242. The proposed subsections 41(2) to (7) inclusive are drawn from section 11.5, with minor modifications where necessary. The effect of these subsections is that section 11.5 is effectively applied to section 41 as if a person who commits an offence against section 41 has committed an offence against subsection 11.5(1).

Item 51 – Application of principles governing conspiracy: absolute liability applied

243. This item inserts proposed subsections 42(3) to (8) inclusive. These provisions mirror the proposed subsection in item 50 above and apply the principles governing conspiracy to section 42 for the same reasons.

244. This item also proposes to insert subsection 42(2) which provides that absolute liability is applied to the physical element of circumstance contained in the offence in subsection 42(1) that the judicial power referred to in that subsection is the judicial

power of the Commonwealth. Subsection 42(1) provides that a person who conspires with another to obstruct, prevent, pervert, or defeat, the course of justice in relation to the judicial power of the Commonwealth is guilty of an offence.

245. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

246. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 52 – Application of principles governing attempt: absolute liability applied

247. This item proposes two amendments to section 43. First, it proposes to insert subsection 43(2) which provides that absolute liability is applied to the physical element of circumstance contained in the offence in subsection 43(1) that the judicial power referred to in that subsection is the judicial power of the Commonwealth. Subsection 43(1) provides that a person attempts, in any way not specially defined in this Act, to obstruct, prevent, pervert, or defeat, the course of justice in relation to the judicial power of the Commonwealth is guilty of an offence.

248. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available

to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

249. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

250. Second, this item creates subsections 43(3) and (4) which supply to the offence in section 43 the principles governing attempt. This amendment is necessary for the same reason given in item 50 above concerning conspiracy. In this instance, the wording of *Criminal Code* section 11.1, which contains the principles governing attempt, would result in those principles not being applied to section 43 in the absence of this amendment. Proposed subsections 43(3) and (4) are drawn from section 11.1, with minor modifications where necessary. The effect of these subsections is that section 11.1 is effectively applied to section 43 as if a person who commits an offence against section 43 has committed an offence against subsection 11.1.

Item 53 - Removal of ancillary provision duplicating the Criminal Code

251. This item proposes to amend section 44 by removing the references to attempting to commit the primary offence of asking, receiving or obtaining any property or benefit of any kind for himself or any other person upon any agreement or understanding that he will compound or conceal any indictable offence against the law of the Commonwealth or a Territory or will abstain from, discontinue or delay any prosecution for any such offence. 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 4 of this Schedule and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

Item 54 – Application of principles governing aiding the commission of an offence

252. This item creates subsections 46(1A) to (1D) inclusive which supply to the offence in paragraphs 46(1)(a), (aa) and (ab) the principles governing aiding another person in the commission of an offence. This amendment is necessary for the same reason given in item 50 concerning conspiracy. In this instance, the wording of *Criminal Code* section 11.2, which contains the principles governing aiding, abetting, counselling or procuring the commission by another person of an offence, would result in those principles not being applied to paragraphs 46(1)(a), (aa) and (ab) in the absence of this amendment.

253. Proposed subsections 46(1A) to (1D) inclusive are drawn from section 11.2, with minor modifications where necessary. The effect of these subsections is that section 11.2 is effectively applied to paragraphs 46(1)(a), (aa) and (ab) as if a person who commits an offence against paragraph 46(1)(a), (aa) or (ab) has committed an offence against subsection 11.2(1).

Item 55 – Deleting reasonable excuse defence

254. This item proposes to remove the defence of reasonable excuse from paragraph 47B(1)(b). The defence is recreated in a new subsection 47B(1A) (see item 56 below). 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.

Item 56 – Recreating reasonable excuse defence

255. This item is consequent upon item 55 above. It inserts proposed subsection 47B(1A) which recreates the defence of reasonable excuse in relation to an offence against paragraph 47B(1)(b).

256. 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 47B(1A).

Item 57 - Amendment of inappropriate fault element

257. Paragraph 47C(1)(c) uses the fault element “wilfully” in relation to the physical element of conduct, namely permitting another person to escape from lawful custody or detention as defined by paragraph 47C(1)(b). This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes that “wilfully” be deleted from paragraph 47C(1)(c) and replaced with “intentionally”. It is considered that paragraph 47C(1)(c) will continue to operate in the same manner as at present following this amendment.

Item 58 - Amendment of inappropriate fault element

258. Subsection 47C(2) uses the fault element “wilfully” in relation to the physical element of conduct, namely permitting a person who has been lawfully arrested in respect of any offence against a law of the Commonwealth or of a Territory to escape from that arrest. This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes that “wilfully” be deleted from subsection 47C(2) and replaced with “intentionally”. It is considered that subsection 47C(2) will continue to operate in the same manner as at present following this amendment.

Item 59 - Amendment of inappropriate fault element

259. Section 49 applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct, namely receiving, removing, retaining, concealing or disposing of prescribed property. 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 replacement of “knowingly” in section 49 by the appropriate and equivalent fault element, namely intention. It is considered that section 49 will continue to operate in the same manner as at present following this amendment.

260. This item also consequentially reconstructs section 49 in order to bring the fault element of intention together with the relevant physical element of conduct, namely receiving, removing, retaining, concealing or disposing of prescribed property.

Items 60 to 64 - Update cross-references to ancillary provisions

261. Section 50AA is an interpretation provision for Part IIIA which concerns child sex tourism offences. It includes references to ancillary offences, including attempt (section 7), aiding and abetting (section 5) and conspiracy (subsection 86(1)) to make procedures relevant to Part IIIA to apply to them as well as the principal child sex tourism offences. These items update the references to refer to the relevant *Criminal Code* provisions - sections 11.1 (attempt), 11.2 and 11.3 (complicity and innocent agency) and 11.5 (conspiracy).

Item 65 - Absolute liability applied

262. Item 65 proposes that section 50BA be amended to apply absolute liability in relation to the circumstances that sex with the child occurred outside Australia and that the child was in fact under 16 years.

263. The first leg of this amendment (proposed paragraph 50BA(2)(a)) reflects the existing law that the prosecution is not required to prove the defendant knew jurisdictional elements. This issue was considered by the Parliament in the context of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* where it was recognised under the *Criminal Code* it was necessary to specifically apply absolute liability to jurisdictional elements such as Commonwealth ownership of property in the offence of theft of Commonwealth property (see subsection 131.1(3)).

264. The physical element of the crime being outside Australia describes the limits on Commonwealth jurisdiction in relation to sexual activity with children and is in no way concerned with the actual culpability of the defendant. Under the *Criminal Code* and as under the existing law, the prosecution still has to prove the defendant intended to have sex with a child.

265. The application of absolute liability to the age of the child (paragraph 50BA(2)(b)) is included for a different reason. Under section 6.2 of the *Criminal Code* which describes absolute liability, there is no defence of a mistaken but reasonable belief about facts (which exists where there is strict liability). This is appropriate because under section 50CA there is a specific defence in relation to belief about the age of the child. The defence will continue to have effect even though absolute liability applies. Subsection 6.2(3) of the *Criminal Code* provides absolute liability does not make any other defence unavailable.

Items 66 and 67 - Absolute liability applied

266. These items make the same amendments described in item 65 to other child sex offences in sections 50BB and 50BC (inducing a child to engage in sexual intercourse and indecent acts with a child).

267. Item 67 also deals with issue of whether the element that the conduct was an act of indecency should be known by the defendant. Proposed paragraph 50BC(2)(c) provides absolute liability applies to that circumstance. The definition of “act of indecency” in section 50AB makes it clear that it is meant to be an objective fact. Under the existing provisions the prosecution is not expected to prove the defendant knew the conduct was an “act of indecency”.

Item 68 - Penalty

268. This is a technical amendment which simply moves the existing penalty in accordance with policy.

Items 69 and 70 - Absolute liability applied

269. These items make the same amendments described in item 67 to the child sex offence in section 50BD (inducing a child to be involved in an indecent act).

Items 71 and 72 - Notes concerning the evidential burden

270. These insert standard notes in relation to the standard of proof for defences in subsection 13.3(3) of the *Criminal Code* after the defences in relation to belief about age and genuine marriage in sections 50CA and 50CB. These do not change the law, they mere reflect the policy of the Code.

Items 73 and 74 - Absolute liability applied: standard of proof for defences: removal of requirement to demonstrate fault

271. Consistent with item 67, these items propose that the offences in section 50DA (benefiting from a child sex tourism offence) and 50DB (encouraging a child sex

tourism offence) have absolute liability apply to the objective fact of the act or omission being reasonably capable of resulting in the person benefiting from such conduct. It was never intended that the prosecution to should prove the defendant knew this, it is enough, as required in paragraphs 50DA(1)(a) and 50DB(1)(a), it be proved that the act or omission was done with the intention of benefiting from such conduct. If that can be proved, the defendant is sufficiently culpable without a further requirement of proof.

272. Item 73 inserts subsection 50DA(1B), which removes any requirement upon the prosecution to demonstrate, in a prosecution for an offence against subsection 50DA(1), that the defendant knew that the conduct mentioned in paragraph (1)(a) would be of a kind that would constitute an offence against this Part.

273. Item 74 inserts subsection 50DB(1B), which removes any requirement upon the prosecution to demonstrate, in a prosecution for an offence against subsection 50DB(1), that the defendant knew that the conduct mentioned in paragraph (1)(a) would be of a kind that would constitute an offence against this Part (other than this section).

Item 75 – Penalty

274. This item proposes to simplify the language which imposes the penalty for an offence against subsection 76B(3).

Item 76 – Absolute liability applied

275. This item proposes to insert subsection 76B(4) which provides that absolute liability is applied to the physical elements of circumstance contained in the offence in subsections 76B(1), (2) and (3) that the computer in question is a Commonwealth computer or is not a Commonwealth computer, as the case may be. Subsections 76B(1), (2) and (3) variously proscribe a person obtaining access to data stored in a Commonwealth computer or that is stored in a non-Commonwealth computer on behalf of the Commonwealth.

276. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of this Schedule.

277. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 77 - Lawful excuse defence

278. This item proposes to remove the specific defence of lawful excuse from section 76C. Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful excuse defence see the explanation at item 3 of Schedule 2.

Item 78 – Absolute liability applied

279. This item proposes to insert subsection 76C(2) which provides that absolute liability is applied to the physical elements of circumstance contained in the offence in subsection 76C(1) that the computer in question is a Commonwealth computer or is not a Commonwealth computer, as the case may be. Subsection 76C(1) variously proscribes a person altering data stored in a Commonwealth computer or that is stored in a non-Commonwealth computer on behalf of the Commonwealth, interfering with the lawful use of a Commonwealth computer, or impeding or preventing the access to or impairing the use or effectiveness of data stored in a Commonwealth computer or that is stored in a non-Commonwealth computer on behalf of the Commonwealth.

280. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of this Schedule.

281. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 79 – Penalty

282. This item proposes to simplify the language which imposes the penalty for an offence against subsection 76D(3).

Item 80 – Absolute liability applied

283. This item proposes to insert subsection 76D(4) which provides that absolute liability is applied to the physical element of circumstance contained in the offence in subsection 76D(1) that the facility is operated or provided by the Commonwealth or by a carrier. Subsection 76D(1) variously proscribes unlawful access to data in Commonwealth and other computers by means of Commonwealth facility.

284. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the

appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of this Schedule.

285. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 81 - Lawful excuse defence

286. This item proposes to remove the specific defence of lawful excuse from section 76E. Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful excuse defence see the explanation at item 3 of Schedule 2.

Item 82 – Absolute liability applied

287. This item proposes to insert subsection 76E(2) which provides that absolute liability is applied to the physical element of circumstance contained in the offence in subsection 76E(1) that the facility is operated or provided by the Commonwealth or by a carrier. Subsection 76E(1) variously proscribes damaging data in Commonwealth and other computers by means of Commonwealth facility.

288. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of this Schedule.

289. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 83 - Clarifying a fault element

290. This item proposes that the phrase “for a purpose intended to be prejudicial to” in subsection 78(1) be replaced by the phrase “with the intention of prejudicing”. For details on the reasons for replacing the phrase “for the purpose of” (and like phrases) see the explanation at item 21 of Schedule 5. In the case of subsection 78(1) the correct interpretation is that the defendant commits any of the conduct described in paragraphs 78(1)(a)-(c) with the intention of prejudicing the safety or defence of the Commonwealth or a part of the Queen’s dominions, and this item proposes the appropriate amendment accordingly.

Item 84 - Clarifying a fault element

291. This item proposes that the phrase “show a purpose intended to be prejudicial to” in paragraph 78(2)(a) be replaced by the phrase “show an intention to prejudice”. For details on the reasons for replacing the phrase “for the purpose of” (and like phrases) see the explanation at item 21 of Schedule 5. In the case of paragraph 78(2)(a) the correct interpretation is that the defendant commits any of the conduct described in paragraphs 78(1)(a)-(c) with the intention of prejudicing the safety or defence of the Commonwealth or a part of the Queen’s dominions, and this item proposes the appropriate amendment accordingly.

Item 85 - Clarifying a fault element

292. This item proposes that the phrase “purpose was a purpose intended to be prejudicial to” in paragraph 78(2)(a) be replaced by the phrase “intention was to prejudice”. For details on the reasons for replacing the phrase “for the purpose of” (and like phrases) see the explanation at item 21 of Schedule 5. In the case of paragraph 78(2)(a) the correct interpretation is that the defendant commits any of the conduct described in paragraphs 78(1)(a)-(c) with the intention of prejudicing the safety or defence of the Commonwealth or a part of the Queen’s dominions, and this item proposes the appropriate amendment accordingly.

Item 86 - Clarifying a fault element

293. This item proposes that the phrase “for a purpose intended to be prejudicial to” in paragraph 78(2)(b) be replaced by the phrase “with the intention of prejudicing”. For details on the reasons for replacing the phrase “for the purpose of” (and like phrases) see the explanation at item 21 of Schedule 5. In the case of paragraph 78(2)(b) the correct interpretation is that the defendant commits any of the conduct described in paragraphs 78(2)(b) with the intention of prejudicing the safety or defence of the Commonwealth or a part of the Queen’s dominions, and this item proposes the appropriate amendment accordingly.

Item 87 - Clarifying a fault element

294. This item proposes that the phrase “purpose of the defendant was a purpose intended to be prejudicial to” in paragraph 78(3)(a) be replaced by the phrase “defendant intended to prejudice”. For details on the reasons for replacing the phrase “for the purpose of” (and like phrases) see the explanation at item 21 of Schedule 5. In the case of paragraph 78(3)(a) the correct interpretation is that the defendant commits any of the conduct described in paragraphs 78(1)(a)-(c) with the intention of prejudicing the safety or defence of the Commonwealth or a part of the Queen’s dominions, and this item proposes the appropriate amendment accordingly.

Item 88 - Clarifying a fault element

295. This item proposes that the phrase “purpose of the defendant was a purpose intended to be prejudicial to” in subsection 78(4) be replaced by the phrase “defendant intended to prejudice”. For details on the reasons for replacing the phrase “for the purpose of” (and like phrases) see the explanation at item 21 of Schedule 5. In the case of paragraph 78(4) the correct interpretation is that the defendant commits any of the conduct described in paragraphs 78(1)(a)-(c) with the intention of prejudicing the safety or defence of the Commonwealth or a part of the Queen’s dominions, and this item proposes the appropriate amendment accordingly.

Item 89 - Clarifying a fault element

296. This item proposes that the phrase “for a purpose intended to be prejudicial to” in subsection 79(2) be replaced by “with the intention of prejudicing”. For details on the reasons for replacing the phrase “for the purpose of” (and like phrases) see the explanation at item 21 of Schedule 5. In the case of subsection 79(2) the correct interpretation is that the defendant commits any of the conduct described in paragraphs 79(2)(a)-(c) with the intention of prejudicing the safety or defence of the Commonwealth or a part of the Queen’s dominions, and this item proposes the appropriate amendment accordingly.

Item 90 - Clarifying a fault element

297. This item proposes that the phrase “show a purpose intended to be prejudicial to” in subsection 79(7) be replaced by “show an intention to prejudice”. For details on the reasons for replacing the phrase “for the purpose of” (and like phrases) see the explanation at item 21 of Schedule 5. In the case of subsection 79(7) the correct interpretation is that the defendant commits any of the conduct described in paragraphs 79(2)(a)-(c) with the intention of prejudicing the safety or defence of the Commonwealth or a part of the Queen’s dominions, and this item proposes the appropriate amendment accordingly.

Item 91 - Clarifying a fault element

298. This item proposes that the phrase “purpose was a purpose intended to be prejudicial to” in subsection 79(7) be replaced by “intention was to prejudice”. For details on the reasons for replacing the phrase “for the purpose of” (and like phrases) see the explanation at item 21 of Schedule 5. In the case of subsection 79(7) the correct interpretation is that the defendant commits any of the conduct described in paragraphs 79(2)(a)-(c) with the intention of prejudicing the safety or defence of the Commonwealth or a part of the Queen’s dominions, and this item proposes the appropriate amendment accordingly.

Item 92 - Clarifying a fault element

299. This item proposes that the phrase “purpose of the defendant was a purpose intended to be prejudicial to” in paragraph 79(8)(a) be replaced by “defendant intended to prejudice”. For details on the reasons for replacing the phrase “for the purpose of” (and like phrases) see the explanation at item 21 of Schedule 5. In the case of paragraph 79(8)(a) the correct interpretation is that the defendant commits any of the conduct described in paragraphs 79(2)(a)-(c) with the intention of prejudicing the safety or defence of the Commonwealth or a part of the Queen’s dominions, and this item proposes the appropriate amendment accordingly.

Item 93 - Clarifying a fault element

300. This item proposes that the phrase “purpose of the defendant was a purpose intended to be prejudicial to” in subsection 79(9) be replaced by “defendant intended to prejudice”. For details on the reasons for replacing the phrase “for the purpose of” (and like phrases) see the explanation at item 21 of Schedule 5. In the case of subsection 79(9) the correct interpretation is that the defendant commits any of the conduct described in paragraphs 79(2)(a)-(c) with the intention of prejudicing the safety or defence of the Commonwealth or a part of the Queen’s dominions, and this item proposes the appropriate amendment accordingly.

Item 94 - Amendment of inappropriate fault element

301. Paragraphs 81(1)(a) and (b) apply the fault element of knowledge (or “knowingly”) in relation to the respective proscribed physical elements of conduct, namely harbouring any person and permitting any persons to assemble where he or she knows, or has reasonable grounds for supposing, that the person or persons are spies. 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 replacement of “knowingly” in paragraphs 81(1)(a) and (b) by the appropriate and equivalent fault element, namely intention. It is considered that paragraphs 81(1)(a) and (b) will continue to operate in the same manner as at present following this amendment.

Item 95 - Amendment of inappropriate fault element

302. Paragraph 83(1)(c) applies the fault element of knowledge (or “knowingly”) in relation to the respective proscribed physical element of conduct, namely having in possession any record of unlawful soundings. 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 replacement of “knowingly” in paragraph 83(1)(c) by the appropriate and equivalent fault element, namely intention. It is considered that paragraph 83(1)(c) will continue to operate in the same manner as at present following this amendment.

Item 96 - Clarifying a fault element

303. This item proposes that the phrase “for the purpose of” in subsection 83A(1) be replaced by the phrase “with the intention of”. For details on the reasons for replacing the phrase “for the purpose of” see the explanation at item 21 of Schedule 5. In the case of subsection 83A(1) the correct interpretation is that the defendant commits any of the conduct described in paragraphs 83A(1)(a)-(f) with the intention of contravening or assisting another person to contravene a provision of Part VII of the Act, and this item proposes the appropriate amendment accordingly.

Item 97 - Lawful authority defence

304. This item proposes to remove the specific defence of lawful authority from paragraph 83A(1)(a). Reliance may instead be placed upon the general defence of lawful authority, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful authority defence see the explanation at item 3 of Schedule 2.

Item 98 - Amendment of inappropriate fault element

305. Paragraphs 83A(1)(b) and (c) apply the fault element of knowledge (or “knowingly”) in relation to the relevant proscribed physical elements of conduct,

namely the defendant concealing his or her identity or nationality or using or possessing a forged, altered or irregular official permit or paper or anything so closely resembling an official permit or paper as to be likely to deceive, with the intention of contravening or assisting another person to contravene a provision of Part VII (“Espionage and Official Secrets”) or with the intention of gaining admission or assisting another person to gain admission to a prohibited place. 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 replacement of “knowingly” in paragraphs 83A(1)(b) and (c) by the appropriate and equivalent fault element, namely intention. It is considered that paragraphs 83A(1)(b) and (c) will continue to operate in the same manner as at present following this amendment.

Item 99 - Lawful authority and lawful excuse defences

306. This item proposes to remove the specific defences of lawful authority and lawful excuse from paragraph 83A(1)(e). Reliance may instead be placed upon the general defences of lawful authority and lawful excuse, which are being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful authority and lawful excuse defences see the explanation at item 3 of Schedule 2.

Item 100 - Lawful authority and lawful excuse defences

307. This item proposes to remove the specific defences of lawful authority and lawful excuse from subsection 83A(2). Reliance may instead be placed upon the general defences of lawful authority and lawful excuse, which are being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the

amendment proposed by this item. For more details on the operation of the lawful authority and lawful excuse defences see the explanation at item 3 of Schedule 2.

Item 101 - Lawful authority and lawful excuse defences

308. This item proposes to remove the specific defences of lawful authority and lawful excuse from subsections 85G(3), (4) and (5). Reliance may instead be placed upon the general defences of lawful authority and lawful excuse, which are being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful authority and lawful excuse defences see the explanation at item 3 of Schedule 2.

Item 102 – Reasonable excuse defence

309. This item proposes to insert subsection 85G(5A) which provides a defence of reasonable excuse in relation to an offence against subsections 85G(3), (4) and (5). This will replace the present defence of lawful excuse in these subsections, which is being deleted by item 101 above.

310. The offences in subsections 85G(3), (4) and (5) prohibit people, without lawful excuse, making, using, possessing, selling or otherwise disposing of various items which might be used to commit fraud against Australia Post. Under proposed section 10.5, which is being inserted into the *Criminal Code* by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*, there is to be a defence which provides a person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by a law. The proposed defence will cover the situation where a person is for some reason authorised by law to possess etc the proscribed articles, but it does not cover the situation where someone might have some other reasonable excuse for possessing etc those articles. For example, a member of the public might find a paper or article that has affixed to it a mark apparently intended to pass for a postage stamp, knowing it is not a postage stamp. It would be undesirable in those circumstances for the person not to be exempted from the offence if the person merely picked up the paper or article with the

intention of handing it to the AFP or to Australia for appropriate action. It is therefore appropriate to replace lawful excuse with a reasonable excuse exception. It is likely that those who originally drafted the offence expected it to apply to those circumstances.

311. This item also adds the standard note after proposed subsection 85G(5) 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 85G(5).

Item 103

312. The amendment proposed by this item is consequential to the amendment effected by item 81B 104 below.

Item 104 - Removal of ancillary provision duplicating the Criminal Code

313. This item proposes to repeal paragraph 85G(6)(b) to remove the reference to attempting to commit the primary offence in paragraph 85G(6)(a) of tendering or putting off a forged postal stamp. 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 4 of this Schedule and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

Item 105

314. The amendment proposed by this item is consequential to the amendments effected by items 104 and 106.

Item 106 - Removal of ancillary provision duplicating the Criminal Code

315. This item proposes to repeal paragraph 85G(6)(d) to remove the reference to attempting to commit the primary offence in paragraph 85G(6)(c) of using or dealing with a forged postal stamp. 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 4 of this Schedule and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

Item 107 - Lawful authority and lawful excuse defences

316. This item proposes to remove the specific defences of lawful authority and lawful excuse from section 85H. Reliance may instead be placed upon the general defences of lawful authority and lawful excuse, which are being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful authority and lawful excuse defences see the explanation at item 3 of Schedule 2.

Item 108 - Amendment of inappropriate fault elements

317. Paragraphs 85H(a), (b) and (c) apply the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical elements of conduct, namely making, using, possessing, selling or otherwise disposing of any of the items prescribed by paragraphs 85H(a)-(c). 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 replacement of “knowingly or recklessly” in paragraphs 85H(a), (b) and (c) with the appropriate fault element, namely intention. 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 85H(a), (b) and (c): *Criminal Code* section 5.6. It is considered that paragraphs 85H(a), (b) and (c) will continue to operate in the same manner as at present following this amendment.

Item 109 – Reasonable excuse defence

318. This item proposes to insert subsection 85H(2) which provides a defence of reasonable excuse in relation to an offence against subsection 85H(1). This will replace the present defences of lawful authority and lawful excuse, which are being deleted by item 107 above.

319. The offences in subsection 85H variously proscribe the making, use, supply or possession of paper and other materials that could be used to perpetrate fraud against Australia Post. There are existing defences of lawful authority and lawful excuse. Under proposed section 10.5, which is being inserted into the *Criminal Code* by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*, there is to be a defence which provides a person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by a law. The proposed defence will cover the situation where a person is for some reason authorised by law to commit the conduct described in section 85H, but it does not cover the situation where someone might have some other reasonable excuse for doing so. For example, a member of the public might find some paper that has been supplied by Australia Post for the purpose of printing postage stamps but which has been lost. It would be undesirable in those circumstances for the person not to be exempted from the offence if the person merely picked up the paper with the intention of returning it to the appropriate authorities. It is therefore appropriate to replace lawful excuse with a reasonable excuse exception. It is likely that those who originally drafted the offence expected it to apply to those circumstances.

320. This item also adds the standard note after proposed subsection 85H(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 subsection 85H(2).

Item 110 - Amendment of inappropriate fault elements

321. Section 85N applies the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical element of conduct, namely causing an article in the post to be delivered to or received by a person. 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 replacement of “knowingly or recklessly” in section 85N with the appropriate fault element, namely intention. 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 section 85N: *Criminal Code* section 5.6. It is considered that section 85N will continue to operate in the same manner as at present following this amendment.

Item 111

322. The amendment proposed by this item is consequential to the amendment effected by item 112 below.

Item 112 - Removal of ancillary provision duplicating the Criminal Code

323. This item proposes to repeal paragraph 85Q(3)(b) to remove the reference to attempting to commit the primary offence in paragraph 85Q(3)(a) of tendering or putting off a forged postal message. 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 4 of this Schedule and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

Item 113

324. The amendment proposed by this item is consequential to the amendments effected by items 112 and 114.

Item 114 - Removal of ancillary provision duplicating the Criminal Code

325. This item proposes to repeal paragraph 85Q(3)(d) to remove the reference to attempting to commit the primary offence in paragraph 85Q(3)(c) of using or dealing with a forged postal message. 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 4 of this Schedule and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

Item 115 - Amendment of inappropriate fault elements

326. Section 85R applies the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical element of conduct, namely causing a postal message to be delivered to or received by a person. 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 replacement of “knowingly or recklessly” in section 85R with the appropriate fault element, namely intention. 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 section 85R: *Criminal Code* section 5.6. It is considered that section 85R will continue to operate in the same manner as at present following this amendment.

Item 116 - Clarification of physical element of result: amendment of inappropriate fault elements: application of absolute liability

327. This item proposes several amendments to subsection 85S(1), these being effected by the repeal and substitution of the subsection. First, the item amends paragraph 85S(1)(a) by replacing “to menace or harass another person” with “with the result that another person is menaced or harassed”. This amendment is desirable in order to confirm that the outcome of a person using a postal or carriage service as proscribed by section 85S, namely that a person is menaced or harassed, is a physical element of result. The fault element of recklessness will attach to this physical element by operation of the *Criminal Code*’s default fault provision (section 5.6).

328. Second, subsection 85S(1) applies the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical element of conduct, namely using a postal or carriage service. 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 replacement of “knowingly or recklessly” in subsection 85S(1) with the appropriate fault element, namely intention. 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 subsection 85S(1): *Criminal Code* section 5.6. It is considered that subsection 85S(1) will continue to operate in the same manner as at present following this amendment.

329. Finally, this item proposes to insert subsection 85S(1A) which provides that absolute liability is applied to the physical element of circumstance contained in the offence in subsection 85S(1) that the postal or carriage service is supplied by Australia Post.

330. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of this Schedule.

331. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 117 - Amendment of inappropriate fault elements

332. Paragraphs 85T(b) and (d) apply the fault elements of knowledge and recklessness ("knowingly or recklessly") in relation to the physical elements of conduct, namely submitting or causing to be submitted a postal message and writing, issuing or delivering a document purporting to be a postal message. 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 replacement of "knowingly or recklessly" in paragraphs 85T(b) and (d) with the appropriate fault element, namely intention. 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 85T(b) and (d): *Criminal Code* section 5.6. It is considered that paragraphs 85T(b) and (d) will continue to operate in the same manner as at present following this amendment.

Item 118 - Amendment of inappropriate fault elements

333. Section 85U applies the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical element of conduct, namely obstructing or hindering the carriage of any article. 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 replacement of “knowingly or recklessly” in section 85U with the appropriate fault element, namely intention. 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 section 85U: *Criminal Code* section 5.6. It is considered that section 85U will continue to operate in the same manner as at present following this amendment.

Item 119 - Amendment of inappropriate fault elements

334. Subsections 85V(1) and (2) apply the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical elements of conduct, namely tampering or interfering with a post-box or stamp vending machine or tampering, interfering with or obliterating any notice, writing or other marking. 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 replacement of “knowingly or recklessly” in subsections 85V(1) and (2) with the appropriate fault element, namely intention. 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 subsections 85V(1) and (2): *Criminal Code* section 5.6. It is considered that subsections 85V(1) and (2) will continue to operate in the same manner as at present following this amendment.

Item 120 – Absolute liability applied

335. This item proposes to insert subsection 85V(1A) which provides that absolute liability is applied to the physical elements of circumstance contained in the offence in subsection 85V(1) that the post-box or stamp vending machine is erected by Australia Post, or that the property belongs to Australia Post, as the case may be.

336. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of this Schedule.

337. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 121 – Amendment of inappropriate fault elements

338. Subsection 85V(2) applies the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical element of conduct, namely altering, tampering or interfering with, or obliterating any notice, writing or other marking on or attached to property belonging to Australia Post. 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 replacement of “knowingly or recklessly” in subsection 85V(2) with the appropriate fault element, namely intention. 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 subsection 85V(2): *Criminal Code* section 5.6. It is considered that subsection 85V(2) will continue to operate in the same manner as at present following this amendment.

Item 122 – Absolute liability applied

339. This item proposes to insert subsection 85V(3) which provides that absolute liability is applied to the physical element of circumstance contained in the offence in subsection 85V(2) that the notice, writing or other marking is on or attached to property belonging to Australia Post.

340. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of this Schedule.

341. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 123 - Amendment of inappropriate fault elements: lawful authority and lawful excuse defences

342. This item proposes two amendments to subsection 85W(1). First, subsection 85W(1) applies the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical elements of conduct, namely causing to be carried by post an article. 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 replacement of “knowingly or recklessly” in subsection 85W(1) by the appropriate and equivalent fault element, namely intention. 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 subsection 85W(1). It is considered that subsection 85W(1) will continue to operate in the same manner as at present following this amendment.

343. The second amendment proposed by this item is to remove the specific defences of lawful authority and lawful excuse from subsection 85W(1). Reliance may instead be placed upon the general defences of lawful authority and lawful excuse, which are being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful authority and lawful excuse defences see the explanation at item 3 of Schedule 2.

Item 124 - Amendment of inappropriate fault elements

344. Subsections 85X(2) and (3) apply the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical elements of conduct, namely causing an article to be carried by the post. 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 replacement of “knowingly or recklessly” in subsections 85X(2) and (3) by the appropriate and equivalent fault element, namely intention. 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 subsections 85X(2) and (3). It is considered that subsections 85X(2) and (3) will continue to operate in the same manner as at present following this amendment.

Item 125 - Strict liability applied

345. This item proposes to insert subsection 85X(3A) which provides that strict liability is applied to the physical element of circumstance of the offence in subsection 85X(3) that the carriage of the article by post is otherwise than in accordance with the terms and conditions mentioned in paragraph (1)(b). Subsection 85X(3) provides that a person shall not cause to be carried by post, otherwise than in accordance with the terms and conditions mentioned in paragraph (1)(b), an article that consists of, encloses or contains a standard regulated substance or thing.

346. 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 identified physical element of circumstance. Accordingly strict liability, and not absolute liability, is the appropriate application. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

Item 126 - Amendment of inappropriate fault elements

348. Subsection 85X(4) applies the fault elements of knowledge and recklessness ("knowingly or recklessly") in relation to the physical elements of conduct, namely causing an article to be carried by the post. 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 replacement of “knowingly or recklessly” in subsection 85X(4) by the appropriate and equivalent fault element, namely intention. 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 subsection 85X(4). It is considered that subsection 85X(4) will continue to operate in the same manner as at present following this amendment.

Item 127 - Strict liability applied

349. This item proposes to insert subsection 85X(6) which provides that strict liability is applied to the physical element of circumstance of the offence in subsection 85X(4) that the carriage of the article by post is otherwise than in accordance with the requirements mentioned in subsection (5). Subsection 85X(4) provides that a person shall not cause to be carried by post, otherwise than in accordance with the requirements mentioned in subsection (5), an article that consists of, encloses or contains a specially regulated substance or thing.

350. 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 identified physical element of circumstance. Accordingly strict liability, and not absolute liability, is the appropriate application. For more details on the operation of strict liability see the explanation at item 6 of Schedule 1.

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

Item 128 - Amendment of inappropriate fault elements

352. Section 85ZD applies the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical elements of conduct, namely cause a communication in the course of telecommunications carriage to be received by a person or carriage service. 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 replacement of “knowingly or recklessly” in section 85ZD by the appropriate and equivalent fault element, namely intention. 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 subsection 85ZD. It is considered that subsection 85ZD will continue to operate in the same manner as at present following this amendment.

Item 129 - Amendment of inappropriate fault elements: clarification of physical elements: absolute liability applied

353. This item proposes three amendments to section 85ZE(1), which are achieved by the repeal and substitution of subsection 85ZE(1) and adding a new subsection 85ZE(1A).

354. First, subsection 85ZE(1) applies the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical elements of conduct, namely using a carriage service. 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 replacement of “knowingly or recklessly” in subsection 85ZE(1) by the appropriate and equivalent fault element, namely intention. 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 subsection 85ZD. It is considered that subsection 85ZD will continue to operate in the same manner as at present following this amendment.

355. Second, this item proposes to amend paragraph 85ZE(1) by replacing “to menace or harass another person” with “with the result that another person is menaced or harassed”. This amendment is desirable in order to confirm that the outcome of a person using a postal or carriage service as proscribed by subsection 85ZE(1), namely that a person is menaced or harassed, is a physical element of result. The fault element of recklessness will attach to this physical element by operation of the *Criminal Code*’s default fault provision (section 5.6).

356. Finally, this item proposes to insert subsection 85ZE(1A) which provides that absolute liability is applied to the physical element of circumstance contained in the offence in subsection 85ZE(1) that the carriage service is supplied by Australia Post.

357. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of this Schedule.

358. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 130 - Amendment of inappropriate fault elements

359. Subsection 85ZG(1) applies the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical elements of conduct, namely cause a communication in the course of telecommunications carriage to be received by a person or carriage service. 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 replacement of “knowingly or recklessly” in subsection 85ZG(1) by the appropriate and equivalent fault element, namely intention. 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 subsection 85ZG(1). It is considered that subsection 85ZG(1) will continue to operate in the same manner as at present following this amendment.

Item 131 – Clarifying a physical element

360. This item amends subsection 85ZG(1) in order to clarify that the normal operation of a carriage service is hindered as a result of the defendant’s conduct, and accordingly is a physical element of result, to which the fault element of recklessness will apply by operation of the *Criminal Code*’s default fault provision (section 5.6).

Item 132 – Penalty

361. This item is consequent upon the amendment being effected by item 131 and proposes to insert the penalty presently applicable to an offence against subsection 85ZG(1), namely 2 years imprisonment, after subsection 85ZG(1). This is intended to assist the correct interpretation that subsection 85ZG(1) creates a criminal offence and that the penalty applicable to an offence against this subsection is the penalty described.

Item 133 – Absolute liability applied

362. This item proposes to insert subsection 85ZG(1A) which provides that, for the purposes of an offence against subsection 85ZG(1), absolute liability is applied to the physical element of circumstance that the facility is operated by a carrier and that the carriage service is supplied by the carrier.

363. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of this Schedule.

364. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 134 - Amendment of inappropriate fault elements

365. Subsection 85ZG(2) applies the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical elements of conduct, namely using or operating an apparatus or device in such a way as to hinder the normal operation of a carriage service. 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 replacement of “knowingly or recklessly” in subsection 85ZG(2) by the appropriate and equivalent fault element, namely intention. 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 subsection 85ZG(2). It is considered that subsection 85ZG(2) will continue to operate in the same manner as at present following this amendment.

Item 135 – Clarifying a physical element

366. This item amends subsection 85ZG(2) in order to clarify that the normal operation of a carriage service is hindered as a result of the defendant's conduct, and accordingly is a physical element of result, to which the fault element of recklessness will apply by operation of the *Criminal Code's* default fault provision (section 5.6).

Item 136 – Absolute liability applied

367. This item proposes to insert subsection 85ZG(3) which provides that, for the purposes of an offence against subsection 85ZG(2), absolute liability is applied to the physical element of circumstance that the carriage service is supplied by the carrier.

368. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of this Schedule.

369. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 137 - Amendment of inappropriate fault elements: lawful authority and lawful excuse defences

370. This item proposes two amendments to section 85ZH. First, section 85ZH applies the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical elements of conduct, namely transmitting a signal to a satellite. 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*. 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 replacement of “knowingly or recklessly” in section 85ZH by the appropriate fault element, namely intention. The existing fault element of recklessness will apply by operation of the *Criminal Code*’s default fault provision (section 5.6) to each physical element of circumstance or result in section 85ZH. It is considered that section 85ZH will continue to operate in the same manner as at present following this amendment.

371. The second amendment proposed by this item is to remove the specific defences of lawful authority and lawful excuse from section 85ZH. Reliance may instead be placed upon the general defences of lawful authority and lawful excuse, which are being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful authority and lawful excuse defences see the explanation at item 3 of Schedule 2.

Item 138 – Absolute liability applied

372. This item proposes to insert subsection 85ZH(2) which provides that, for the purposes of an offence against subsection 85ZH(1), absolute liability is applied to the physical element of circumstance that the satellite is operated by a carrier.

373. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of this Schedule.

374. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 139 - Amendment of inappropriate fault elements

375. Section 85ZJ applies the fault elements of knowledge and recklessness ("knowingly or recklessly") in relation to the physical elements of conduct, namely tampering or interfering with a facility. 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 replacement of "knowingly or recklessly" in section 85ZJ by the appropriate and equivalent fault element, namely intention. 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 85ZJ. It is considered that section 85ZJ will continue to operate in the same manner as at present following this amendment.

Item 140 – Absolute liability applied

376. This item proposes to insert subsection 85ZJ(2) which provides that, for the purposes of an offence against subsection 85ZJ(1), absolute liability is applied to the physical element of circumstance that the facility belongs to a carrier.

377. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of this Schedule.

378. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 141 – removal of requirement to demonstrate fault

379. This item inserts subsection 85ZK(1A), which removes any requirement upon the prosecution to demonstrate, in a prosecution for an offence against subsection 85ZK(1), that the defendant knew that the offence mentioned in paragraph (1)(a) or (b) would be against a law of the Commonwealth or of a State or Territory.

Item 142 - Evidential burden note

380. This item proposes the insertion of a note after subsection 85ZK(2) which makes it clear that the defendant bears an evidential burden in relation to a defence raised under subsection 85ZK(2). Subsection 13.3(6) of the *Criminal Code* provides that an evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist (as the case may be).

Item 143 - Evidential burden note

381. This item proposes the insertion of a note after subsection 85ZKA(2) which makes it clear that the defendant bears an evidential burden in relation to a defence raised under subsection 85ZKA(2). Subsection 13.3(6) of the *Criminal Code* provides that an evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matters exists or does not exist (as the case may be).

Item 144 - Amendment of inappropriate fault element: clarification of fault element

382. This item proposes two amendments to section 90B. First, section 90B applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct, namely making a statement. 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 replacement of “knowingly” in section 90B by the appropriate and equivalent fault element, namely intention. It is considered that section 90B will continue to operate in the same manner as at present following this amendment.

383. Second, this item proposes the amendment of section 90B to clarify that the fault element of knowledge applies to the physical elements of circumstance that the statement referred to in section 90B is false.

384. If this amendment were not made, it is possible that the incorrect interpretation could be made that the relevant fault element is intention. The proposed amendment puts it beyond doubt that knowledge is the appropriate fault element.

Schedule 11 - Crimes (Aviation) Act 1991

Item 1 - Removal of ancillary provision duplicating the Criminal Code

385. This item proposes to repeal and substitute section 9. The net effect is to repeal paragraphs 9(a) and (b) which respectively concern attempting to commit the primary offence in section 9 and being an accomplice to the commission of the primary offence in section 9. Reliance will instead be placed upon the relevant general ancillary provisions in the *Criminal Code*, namely section 11.1 (attempt) and 11.2 (complicity). These ancillary provisions are present in Chapter 2 of the *Criminal Code*, which is being applied to this Act by item 3 of this Schedule and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

Item 2 - Removal of ancillary provisions duplicating the Criminal Code

386. This item proposes to repeal and substitute section 10, the effect of which is to amend section 10 by removing the references to attempting to commit a primary unlawful act as defined by subsections 10(1) and (2) and references to a person being an accomplice to a person who commits, or attempts to commit, a primary unlawful act as defined by subsections 10(1) and (2). Reliance will instead be placed upon the relevant general ancillary provisions in the *Criminal Code*, namely section 11.1 (attempt) and section 11.2 (aiding, abetting, counselling or procuring the commission of a primary offence). These ancillary provisions are present in Chapter 2 of the *Criminal Code*, which is being applied to this Act by item 3 of this Schedule and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

387. The remainder of section 10 is reconstructed as a necessary consequence and substituted for the present section 10. Section 10, with the complimentary general ancillary *Criminal Code* provisions, will operate in the same manner following this amendment and the application of the *Criminal Code*.

Item 3 - Application of Criminal Code

388. This item inserts proposed section 12A in a new Division 4. Section 12A applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility.

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

Item 4 - Absolute liability applied

390. This item proposes to insert subsection 13(2A) which provides that absolute liability is applied to the physical elements of circumstance contained in paragraphs 13(1)(a), (b), (c) and (d), and in paragraphs 13(2)(a), (b) and (c). Subsection 13(1) provides that a person who hijacks an aircraft is guilty of an offence against subsection 13(1) if any of paragraphs (1)(a)-(d) apply, and subsection 13(2) provides that a person who hijacks an aircraft is guilty of an offence against subsection 13(2) if, amongst other matters, paragraph 13(2)(c) applies. Paragraphs (1)(a)-(d) respectively provide that the aircraft is in flight within the meaning of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (“the Hague Convention”), the aircraft is engaged in a prescribed flight, the aircraft is a Commonwealth aircraft, and the aircraft is a visiting government aircraft. Paragraphs 13(2)(a) and (b) provide that the hijacking is committed outside Australia and that the person who commits the hijacking is an Australian citizen. Paragraph 13(2)(c) provides that the aircraft would be considered to be in flight if the Hague Convention applied. “Hague Convention”, “prescribed aircraft”, “Commonwealth aircraft” and “visiting government aircraft” are all defined in subsection 3(1).

391. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

392. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 5 - Absolute liability applied

393. This item proposes to insert subsection 14(1A) which provides that absolute liability is applied to the physical elements of circumstance contained in paragraphs 14(1)(b)-(g). Subsection 14(1) provides that a person who commits an act of violence against all or any of the passengers or crew on board an aircraft is guilty of an offence against subsection 14(1) if paragraph (1)(b) applies and any of paragraphs (1)(c)-(g) apply. Paragraphs (1)(b)-(g) respectively provide that the act of violence would, if committed in the Jervis Bay Territory, be an offence against a law in force in that Territory; that Article 4 of the Hague Convention requires Australia to establish its jurisdiction over the act of violence; the aircraft is engaged in a prescribed flight; the aircraft is a Commonwealth aircraft; the aircraft is a visiting government aircraft; and the aircraft is outside Australia but the offender is an Australian citizen. “Hague Convention”, “prescribed aircraft”, “Commonwealth aircraft” and “visiting government aircraft” are all defined in subsection 3(1).

394. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not

strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

395. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 6 - Absolute liability applied

396. This item proposes to insert subsection 15(1A) which provide that, for the purposes of the offence in subsections 15(1) absolute liability is applied to the physical element of circumstance that the aircraft is a Division 3 aircraft, and subsection 15(1B), which provides that absolute liability applies to paragraph (1)(b). “Division 3 aircraft” is defined in subsection 3(1) to be either an Australian aircraft as described in paragraph (a) of the definition, a Commonwealth aircraft, a defence aircraft, a foreign aircraft that is in Australia, or a foreign aircraft that is outside Australia while engaged in a flight that started in Australia or was intended to end in Australia when the flight started. Each of these alternatives is in turn further defined in subsection 3(1). Paragraph 15(1)(b) concerns jurisdictional aspects of the offence in subsection 15(1).

397. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

398. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after each provision.

Item 7 - Lawful excuse defence

399. This item proposes to remove the specific defence of lawful excuse from subsections 16(1), (2) and (3). Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful excuse defence see the explanation at item 3 of Schedule 2.

400. The phrases “(whether directly or through an accomplice)” in subsections 16(1), (2) and (3) are also removed as they concerns complicity in the commission of the primary offences created by subsections 16(1), (2) and (3). Reliance will instead be placed upon the relevant general ancillary provision in the *Criminal Code*, namely section 11.2 (complicity). This ancillary provision is present in Chapter 2 of the *Criminal Code*, which is being applied to this Act by item 3 of this Schedule and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

Item 8 - Absolute liability applied

401. This item proposes to insert subsection 16(4) which provides that, for the purposes of an offence against subsections 16(1), (2) and (3), absolute liability is applied to the physical element of circumstance in each of those provisions that the aircraft is a Division 3 aircraft. “Division 3 aircraft” is defined in subsection 3(1) to be either an Australian aircraft as described in paragraph (a) of the definition, a Commonwealth aircraft, a defence aircraft, a foreign aircraft that is in Australia, or a foreign aircraft that is outside Australia while engaged in a flight that started in Australia or was intended to end in Australia when the flight started. Each of these alternatives is in turn further defined in subsection 3(1).

402. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

403. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 9 - Amendment of inappropriate fault element: lawful excuse defence

404. This item proposes two amendments to section 17. First, section 17 uses the fault element "wilfully" in relation to the physical element of conduct, namely destroying a Division 3 aircraft. This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes the replacement of "wilfully" in section 17 by the appropriate and equivalent *Criminal Code* fault element, namely intention. It is considered that section 17 will continue to operate in the same manner as at present following this amendment.

405. The second amendment proposed by this item is to remove the specific defence of lawful excuse from section 17. Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful excuse defence see the explanation at item 3 of Schedule 2.

Item 10 - Absolute liability applied

406. This item proposes to insert subsection 17(2) which provides that, for the purposes of an offence against subsection 17(1), absolute liability is applied to the physical element of circumstance that the aircraft is a Division 3 aircraft. “Division 3 aircraft” is defined in subsection 3(1) to be either an Australian aircraft as described in paragraph (a) of the definition, a Commonwealth aircraft, a defence aircraft, a foreign aircraft that is in Australia, or a foreign aircraft that is outside Australia while engaged in a flight that started in Australia or was intended to end in Australia when the flight started. Each of these alternatives is in turn further defined in subsection 3(1).

407. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

408. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 11 - Clarifying a fault element

409. This item proposes to amend section 18 by replacing the phrase “with reckless indifference to” with “reckless as to”. The substituted phrase, which invokes the *Criminal Code*’s equivalent fault element of recklessness, better applies recklessness to the physical elements of circumstance in section 18. It will also bring the terminology of section 18 into harmony with the *Criminal Code* and obviate the unnecessary need for future courts to examine whether there is a difference between reckless indifference and recklessness.

Item 12 - Absolute liability applied

410. This item proposes to insert subsection 18(2) which provides that, for the purposes of an offence against subsection 18(1), absolute liability is applied to the physical element of circumstance that the aircraft is a Division 3 aircraft. “Division 3 aircraft” is defined in subsection 3(1) to be either an Australian aircraft as described in paragraph (a) of the definition, a Commonwealth aircraft, a defence aircraft, a foreign aircraft that is in Australia, or a foreign aircraft that is outside Australia while engaged in a flight that started in Australia or was intended to end in Australia when the flight started. Each of these alternatives is in turn further defined in subsection 3(1).

411. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

412. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 13 - Absolute liability applied

413. This item proposes to insert subsection 19(2) which provides that, for the purposes of an offence against subsection 19(1), absolute liability is applied to the physical element of circumstance that the aircraft is a Division 3 aircraft. “Division 3 aircraft” is defined in subsection 3(1) to be either an Australian aircraft as described in paragraph (a) of the definition, a Commonwealth aircraft, a defence aircraft, a foreign aircraft that is in Australia, or a foreign aircraft that is outside Australia while engaged in a flight that started in Australia or was intended to end in Australia when the flight started. Each of these alternatives is in turn further defined in subsection 3(1).

414. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

415. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 14 - Clarifying a fault element

416. This item proposes to amend paragraph 20(b) by replacing the phrase “with reckless indifference to” with “reckless as to”. The substituted phrase, which invokes the *Criminal Code*'s equivalent fault element of recklessness, better applies recklessness to the physical elements of circumstance in paragraph 20(b). It will also bring the terminology of paragraph 20(b) into harmony with the *Criminal Code* and obviate the unnecessary need for future courts to examine whether there is a difference between reckless indifference and recklessness.

Item 15 - Absolute liability applied

417. This item proposes to insert subsection 20(2) which provides that, for the purposes of an offence against subsection 20(1), absolute liability is applied to the physical element of circumstance that the aircraft is a Division 3 aircraft. “Division 3 aircraft” is defined in subsection 3(1) to be either an Australian aircraft as described in paragraph (a) of the definition, a Commonwealth aircraft, a defence aircraft, a foreign aircraft that is in Australia, or a foreign aircraft that is outside Australia while engaged in a flight that started in Australia or was intended to end in Australia when the flight started. Each of these alternatives is in turn further defined in subsection 3(1).

418. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

419. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 16 - Clarifying a fault element

420. This item proposes that the phrase "so as to" in section 21 be replaced by the phrase "in a manner that results in". The phrase "so as to" creates the same interpretative difficulties as does the phrase "for the purpose of", and is being amended for the same reasons. For details on the reasons for replacing the phrase "for the purpose of" see the explanation at item 21 of Schedule 5. In the case of section 21 the correct interpretation is that the defendant makes the false representation or commits fraud being reckless as to whether his or her conduct will result in an interference with the crew member's performance of functions or duties connected with the operation of the aircraft or will result in a lessening of the crew member's ability to perform those functions or duties, and this item proposes the appropriate amendment accordingly.

Item 17 - Consequential amendment

421. This item proposes that "interfere" in paragraph 21(a) be replaced by "an interference". This amendment is consequential upon the amendment proposed by item 16 above.

Item 18 - Consequential amendment

422. This item proposes that “lessen” in paragraph 21(b) be replaced by “a lessening of”. This amendment is consequential upon the amendment proposed by item 16 above.

Item 19 - Absolute liability applied

423. This item proposes to insert subsection 21(2) which provides that, for the purposes of an offence against subsection 21(1), absolute liability is applied to the physical element of circumstance that the aircraft is a Division 3 aircraft. “Division 3 aircraft” is defined in subsection 3(1) to be either an Australian aircraft as described in paragraph (a) of the definition, a Commonwealth aircraft, a defence aircraft, a foreign aircraft that is in Australia, or a foreign aircraft that is outside Australia while engaged in a flight that started in Australia or was intended to end in Australia when the flight started. Each of these alternatives is in turn further defined in subsection 3(1).

424. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

425. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 20 - Clarifying a fault element: absolute liability applied

426. This item proposes to repeal and substitute section 22, thereby achieving two amendments. First, section 22 is to be amended by replacing the phrase “that, to the person’s knowledge, is likely to” with “reckless as to”. The substituted phrase, which invokes the *Criminal Code*’s equivalent fault element of recklessness, better applies recklessness to the physical elements of circumstance in section 22. It will also bring the terminology of section 22 into harmony with the *Criminal Code* and obviate the

unnecessary need for future courts to examine whether there is a difference between the old phrase and the fault element of recklessness.

427. This item further proposes to insert subsection 22(2) which provides that, for the purposes of an offence against subsection 22(1), absolute liability is applied to the physical element of circumstance that the aircraft is a Division 3 aircraft. “Division 3 aircraft” is defined in subsection 3(1) to be either an Australian aircraft as described in paragraph (a) of the definition, a Commonwealth aircraft, a defence aircraft, a foreign aircraft that is in Australia, or a foreign aircraft that is outside Australia while engaged in a flight that started in Australia or was intended to end in Australia when the flight started. Each of these alternatives is in turn further defined in subsection 3(1).

428. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

429. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 21 - Clarifying a fault element

430. This item proposes that the phrase “for a purpose of” in paragraph 23(1)(b) be replaced by the phrase “with the intention of”. For details on the reasons for replacing the phrase “for the purpose of” see the explanation at item 21 of Schedule 5. In the case of paragraph 23(1)(b) the correct interpretation is that the defendant delivers dangerous goods to anyone else with the intention of placing the goods on board a Division 3 aircraft, and this item proposes the appropriate amendment accordingly.

Item 22 - Absolute liability applied

431. This item proposes to insert subsection 23(3) which provides that, for the purposes of an offence against paragraphs 23(1)(a), (b) or (c), absolute liability is applied to the physical element of circumstance that the aircraft is a Division 3 aircraft. “Division 3 aircraft” is defined in subsection 3(1) to be either an Australian aircraft as described in paragraph (a) of the definition, a Commonwealth aircraft, a defence aircraft, a foreign aircraft that is in Australia, or a foreign aircraft that is outside Australia while engaged in a flight that started in Australia or was intended to end in Australia when the flight started. Each of these alternatives is in turn further defined in subsection 3(1).

432. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

433. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 23 - Absolute liability applied

434. This item proposes to insert subsection 24(3) which provides that, for the purposes of an offence against subsections 24(1) or (2), absolute liability is applied to the physical element of circumstance that the aircraft is a Division 3 aircraft. “Division 3 aircraft” is defined in subsection 3(1) to be either an Australian aircraft as described in paragraph (a) of the definition, a Commonwealth aircraft, a defence aircraft, a foreign aircraft that is in Australia, or a foreign aircraft that is outside

Australia while engaged in a flight that started in Australia or was intended to end in Australia when the flight started. Each of these alternatives is in turn further defined in subsection 3(1).

435. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

436. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 24 - Absolute liability applied

437. This item proposes to insert subsection 25(2A) which provides that absolute liability is applied to the physical elements of circumstance in paragraphs 25(1)(a)-(c) and 25(2)(a)-(d). Subsection 25(1) provides that a person who commits an unlawful act of the kind mentioned in subsection 10(1) is guilty of an offence if any of paragraphs 25(1)(a), (b) or (c) apply. Subsection 10(1), which is being amended by item 2 of this Schedule, provides that a person commits an unlawful act if he or she, without lawful excuse, commits an act of violence against anyone on board an aircraft in flight which is likely to endanger the safety of the aircraft, or destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight, or attempts to do any of these acts or is an accomplice of anyone who does such an act. Paragraphs 25(1)(a)-(c) respectively provide the physical elements of circumstance that the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation requires Australia

to make the act punishable, that the aircraft concerned is an aircraft in service in the course of, or in connection with, a prescribed flight, a Commonwealth aircraft, a defence aircraft, or a visiting government aircraft, or that the person is an Australian citizen who commits the act outside Australia.

438. Subsection 25(2) provides that a person who commits an unlawful act of the kind mentioned in subsection 10(2) is guilty of an offence if any of paragraphs 25(2)(a)-(d) apply. Subsection 10(2) defines various acts to be unlawful acts, including placing a substance or thing on board an aircraft that is likely to destroy the aircraft or damage the aircraft so as to render it incapable of flight or which is likely to endanger its safety in flight, destroying or damaging any navigational facilities or interfering with their operation being destruction, damage or interference that is likely to endanger the safety of an aircraft in flight, communication information that he or she knows to be false and thereby endangering the safety of an aircraft in flight, or attempting to do any such act or being an accomplice to anyone who does such an act. Paragraphs 25(2)(a)-(d) provide the same physical elements of circumstance as do paragraphs 25(1)(a)-(c) but additionally paragraph 25(2)(c) provides that in relation to an act connected with air navigation facilities, the facilities are used in connection with prescribed flights or flights of Commonwealth, defence or visiting government aircraft.

439. Many of the terms used in paragraphs 25(1)(a)-(c) and paragraphs 25(2)(a)-(d) are in turn further defined in subsection 3(1).

These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is

the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

440. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 25 - Lawful excuse defence: reconstruction to clarify physical elements of circumstance: absolute liability applied

441. This item proposes four amendments to section 26. First, it removes the specific defence of lawful excuse from paragraphs 26(1)(a) and 26(2)(a). Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful excuse defence see the explanation at item 3 of Schedule 2.

442. Second, this item proposes to amend subsection 26(1) by converting two physical elements of circumstance into discrete paragraphs. The physical elements concerned are that the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, when read with the Protocol to the Convention, requires Australia to make an act described by paragraphs 26(1)(a)-(c) punishable as an offence and that Article 5 of the Convention, when so read, requires Australia to establish its jurisdiction over the offence.

443. The rationale for this amendment is to render the two physical elements into a form better placed for the application of absolute liability (see next paragraphs).

444. The third amendment proposed by this item is to insert subsection 26(2A) which provides that, for the purposes of an offence against subsections 26(1) or (2), absolute liability is applied to the physical element of circumstance that the airport is a prescribed airport. The term “prescribed airport” is not defined by the Act, but an airport may be prescribed by virtue of regulations made pursuant to section 52.

445. Finally, this item inserts subsection 26(2B) which provides that absolute liability applies to the physical elements of circumstance described by paragraphs 26(1)(c) and (d) and paragraphs 26(2)(c). Paragraphs 26(1)(c) and (d) are created by virtue of this item and provide that the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, when read with the Protocol to the Convention, requires Australia to make an act described by paragraph 26(1)(a) punishable as an offence and that Article 5 of the Convention, when so read, requires Australia to establish its jurisdiction over the offence. Paragraph 26(2)(c) provides that the Montreal Convention, when read with the Protocol to the Convention, requires Australia to make an act described by paragraphs 26(2)(a) punishable as an offence, and that if the act relates to an aircraft then the aircraft is in Australia, or is a Commonwealth aircraft or defence aircraft, or the act is committed by an Australian citizen whether in Australia or not.

446. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

447. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after subsections 26(2A) and (2B).

Item 26

448. The amendment proposed by this item is consequential upon the amendments made by item 25.

Item 27 - Clarifying a fault element

449. This item proposes to amend section 27 by replacing the phrase “anything that he or she knows is likely to” with “an act, reckless as to whether the act will”. The substituted phrase, which invokes the *Criminal Code*’s equivalent fault element of recklessness, better applies recklessness to the physical elements of circumstance in section 27. It will also bring the terminology of section 27 into harmony with the *Criminal Code* and obviate the unnecessary need for future courts to examine whether there is a difference between the old phrase and recklessness.

Item 28 - Absolute liability applied

450. This item proposes to insert subsection 27(2) which provides that, for the purposes of an offence against subsection 27(1), absolute liability is applied to the physical element of circumstance that the aerodrome is a Commonwealth aerodrome or that the air navigation facilities are Commonwealth air navigation facilities, as the case may be. The terms “Commonwealth aerodrome” and “Commonwealth air navigation facilities” are defined in subsection 3(1).

451. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

452. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 29 – Penalty

453. This item is consequent upon the amendment being effected by item 30 below and proposes to insert the penalty presently applicable to an offence against subsection 28(1), namely imprisonment for 2 years, after subsection 28(1). This is intended to assist the correct interpretation that subsection 28(1) creates a criminal offence and that the penalty applicable to an offence against this subsection is the penalty described.

Item 30 - Absolute liability applied

454. This item proposes to insert subsection 28(3) which provides that, for the purposes of an offence against subsections 28(1) or (2), absolute liability is applied to the physical element of circumstance that the aerodrome is a Commonwealth aerodrome or that the air navigation facilities are Commonwealth air navigation facilities, as the case may be. The terms “Commonwealth aerodrome” and “Commonwealth air navigation facilities” are defined in subsection 3(1).

455. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

456. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Schedule 12 - Crimes (Biological Weapons) Act 1976***Item 1 - Application of Criminal Code***

457. 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.

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

Item 2 - Replacing references to certain Crimes Act 1914 provisions

459. Certain *Crimes Act 1914* provisions, including sections 5, 7 and 7A, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001: see items 1 of Schedule 1 and 4 of Schedule 51. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the references in subsection 10(1) to sections 5, 7 and 7A of the *Crimes Act 1914*, which concern aiding, abetting, counselling and procuring the commission of primary offences, attempting to commit primary offences, and incitement to commit primary offences, be replaced by references to the *Criminal Code* provisions which deal with these matters (sections 11.1, 11.2 and 11.4). These *Criminal Code* provisions will apply to this Act by virtue of this Bill: see item 1 of this Schedule.

Schedule 13 - Crimes (Currency) Act 1981***Item 1 - Application of Criminal Code***

460. 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.

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

Items 2 and 3 - Clarifying reasonable excuse defence

462. These items propose to remove the defence of reasonable excuse from subsection 8(1) and recreate it in a new subsection 8(1A). 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.

463. The standard note is added after proposed subsection 8(1A) 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 8(1A).

Items 4 and 5 - Lawful authority defence: clarifying reasonable excuse defence

464. These items proposes two amendments to subsection 9(1). First, it removes the specific defence of lawful authority from subsection 9(1). Reliance may instead be placed upon the general defence of lawful authority, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful authority defence see the explanation at item 3 of Schedule 2.

465. Secondly, these items propose to remove the defence of reasonable excuse from subsection 9(1) and recreate it in a new subsection 9(1A). 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.

466. The standard note is added after proposed subsection 9(1A) 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 9(1A).

Items 6, 8 and 9 – Clarifying reasonable excuse defence

467. These items propose to remove the defences of reasonable excuse from subsections 11(1) and (2) and recreate them in a new subsection 11(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.

468. The standard note is added after proposed subsection 11(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 11(3).

Item 7 – Penalty

469. This item is consequent upon the amendments being effected by items 6, 8 and 9, and proposes to insert the penalties presently applicable to an offence against subsection 11(1), namely imprisonment for 10 years (natural person) and 500 penalty units (corporate), after subsection 11(1). This is intended to assist the correct interpretation that subsection 11(1) creates a criminal offence and that the penalty applicable to an offence against this subsection is the penalty described.

Items 10 and 11 - Amendment of inappropriate fault element: lawful authority defence: reasonable excuse defence

470. This item proposes three amendments to section 13. First, section 13 applies the fault element of knowledge (“knowingly”) in relation to the physical elements of conduct, namely conveying any of the items described in paragraphs 13(a)-(g) out of any premises. 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 replacement of “knowingly” in section 13 by the appropriate and equivalent fault element, namely intention. It is considered that section 13 will continue to operate in the same manner as at present following this amendment.

471. The second amendment proposed by these items is to remove the specific defence of lawful authority from section 13. Reliance may instead be placed upon the general defence of lawful authority, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful authority defence see the explanation at item 3 of Schedule 2.

472. Finally, these items propose to remove the defence of reasonable excuse from section 13 and recreate it in a new subsection 13(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, and puts it beyond doubt that it is a defence to the offence.

473. The standard note is added after proposed subsection 13(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 subsection 13(2).

Items 12 and 13 – Clarifying reasonable excuse defence

474. These items propose to remove the defence of reasonable excuse from section 14 and recreate it in a new subsection 14(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, and puts it beyond doubt that it is a defence to the offence.

475. The standard note is added after proposed subsection 14(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 subsection 14(2).

Items 14 and 15 – Clarifying reasonable excuse defence

476. These items propose to remove the defence of reasonable excuse from section 15 and recreate it in a new subsection 15(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, and puts it beyond doubt that it is a defence to the offence.

477. The standard note is added after proposed subsection 15(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 subsection 15(2).

Item 16 - Amendment of inappropriate fault element

478. Section 16 uses the fault element “wilfully” in relation to the physical element of conduct, namely defacing, disfiguring, mutilating or destroying coin or paper money. This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes the replacement of “wilfully” in section 16 by the appropriate and equivalent *Criminal Code* fault element, namely intention. It is considered that section 16 will continue to operate in the same manner as at present following this amendment.

Items 17 and 19 – Clarifying reasonable excuse defence

479. These items propose to remove the defence of reasonable excuse from subsection 21(1) and recreate it in a new subsection 21(1A). 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.

480. The standard note is added after proposed subsection 21(1A) 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 21(1A).

Item 18 – Clarifying a fault element

481. This item proposes that the phrase “the purpose of” in subsection 21(1) be deleted. The rationale is to prevent incorrect interpretation to the effect that the phrase “for the purpose of” imports an element of intention. In the case of subsection 21(1) the correct interpretation is that the defendant makes or sells an article with the intention that it be used in substitution for currency to operate a machine that is designed to receive currency, and this item proposes the appropriate amendment accordingly.

Item 20 - Clarifying a fault element

482. This item proposes that the phrase “the purpose of” in subsection 21(2) be deleted. The rationale is to prevent incorrect interpretation to the effect that the phrase “for the purpose of” imports an element of intention. In the case of subsection 21(2) the correct interpretation is that the defendant imports or exports an article that, to his knowledge, has been made for use in substitution for a current coin or current paper money to operate a machine that is designed to receive current coins or current paper money, and this item proposes the appropriate amendment accordingly.

Items 21 and 23– Clarifying reasonable excuse defence

483. These items propose to remove the defence of reasonable excuse from subsection 21(3) and recreate it in a new subsection 21(3A). 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.

484. The standard note is added after proposed subsection 21(3A) 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 21(3A).

Item 22 - Clarifying a fault element

485. This item proposes that the phrase “the purpose of” in subsection 21(3) be deleted. The rationale is to prevent incorrect interpretation to the effect that the phrase “for the purpose of” imports an element of intention. In the case of subsection 21(3) the correct interpretation is that the defendant possesses an article with the intention that the article be used (whether by himself or by another person), in substitution for a current coin or current paper money, to operating a machine that is designed to receive current coins or current paper money.

Item 24 - Clarifying a fault element

486. This item proposes that the phrase “for the purpose of” in subsection 21(4) be replaced by the phrase “with the intention of”. For details on the reasons for replacing the phrase “for the purpose of” see the explanation at item 21 of Schedule 5. In the case of subsection 21(4) the correct interpretation is that the defendant uses the article, in substitution for a current coin or current paper money, with the intention of operating a machine that is designed to receive current coins or current paper money, and this item proposes the appropriate amendment accordingly.

Item 25 - Replacing references to certain Crimes Act 1914 provisions

487. Certain *Crimes Act 1914* provisions, including sections 7 and 7A, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001: see items 1 of Schedule 1 and 4 of Schedule 51. It will be necessary to replace references to these *Crimes Act*

provisions with references to relevant *Criminal Code* provisions. This item proposes that the references in section 22 to sections 7 and 7A of the *Crimes Act 1914*, which concern attempt and incitement to commit primary offences, be replaced by references to the *Criminal Code* provisions which deal with these matters (sections 11.1 and 11.4). These *Criminal Code* provisions will apply to this Act by virtue of this Bill: see item 1 of this Schedule.

Item 26 - Amendment of inappropriate fault element

488. Subparagraphs 29(1)(b)(ii) and 29(1)(c)(ii) apply the fault element of knowledge (or “knowingly”) in relation to their respective physical elements of conduct. 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 replacement of “knowingly” in subparagraphs 29(1)(b)(ii) and 29(1)(c)(ii) by the appropriate and equivalent fault element, namely intention. It is considered that subparagraphs 29(1)(b)(ii) and 29(1)(c)(ii) will continue to operate in the same manner as at present following this amendment.

Schedule 14 - Crimes (Foreign Incursions and Recruitment) Act 1978

Item 1 - Application of Criminal Code

489. This item inserts proposed section 3A which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility.

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

Item 2 - Clarifying a fault element

491. This item proposes that the phrase “for the purpose” in subsection 6(3) be replaced by the phrase “with the intention”. For details on the reasons for replacing the phrase “for the purpose of” see the explanation at item 21 of Schedule 5. In the case of subsection 6(3) the correct interpretation is that engaging in a hostile activity in a foreign State consists of doing an act with the intention of achieving any one or more of the objectives described in paragraphs 6(3)(a)-(d), and this item proposes the appropriate amendment accordingly.

492. The heading of this section is also amended by replacing “for purpose” with “with intention” to reflect the change.

Item 3 - Clarifying a fault element

493. This item proposes that the phrase “for the purpose of the commission of” in paragraph 7(1)(b) be replaced by the phrase “with the intention of committing”. For details on the reasons for replacing the phrase “for the purpose of” see the explanation at item 21 of Schedule 5. In the case of paragraph 7(1)(b) the correct interpretation is that the defendant accumulates, stockpiles or otherwise keeps arms, explosives, munitions, poisons or weapons with the intention of committing an offence against section 6 (whether by the defendant or by another person), and this item proposes the appropriate amendment accordingly.

Item 4 - Clarifying a fault element

494. This item proposes that the phrase “for the purpose” in paragraph 7(1)(c) be replaced by the phrase “with the intention”. For details on the reasons for replacing the phrase “for the purpose of” see the explanation at item 21 of Schedule 5. In the case of paragraph 7(1)(c) the correct interpretation is that the defendant trains or drills or participates in training or drilling, or is present at a meeting or assembly of persons with intent to train or drill or to participate in training or drilling, any other person in the use of arms or explosives, or the practice of military exercises, movements or evolutions, with the intention of preparing that other person to commit an offence against section 6, and this item proposes the appropriate amendment accordingly.

Item 5 - Clarifying a fault element

495. This item proposes that the phrase “for the purpose of the commission of” in paragraph 7(1)(d) be replaced by the phrase “with the intention of committing”. For details on the reasons for replacing the phrase “for the purpose of” (or like phrases) see the explanation at item 21 of Schedule 5. In the case of paragraph 7(1)(d) the correct interpretation is that the defendant allows himself or herself to be trained or drilled, or be present at a meeting or assembly of persons with intent to allow himself or herself to be trained or drilled, in the use of arms or explosives, or the practice of military exercises, movements or evolutions, with the intention of committing an offence against section 6, and this item proposes the appropriate amendment accordingly.

Item 6 - Clarifying a fault element

496. This item proposes that the phrase “for the purpose” in paragraphs 7(1)(e) and (f) be replaced by the phrase “with the intention”. For details on the reasons for replacing the phrase “for the purpose of” see the explanation at item 21 of Schedule 5. In the case of paragraph 7(1)(e) the correct interpretation is that the defendant gives money or goods to, or performs services for, any other person or any body or persons or association of persons, with the intention of supporting or promoting the commission of an offence against section 6. In the instance of paragraph 7(1)(f) the correct interpretation is that the defendant receives or solicits money or goods, or the performance of services, with the intention of supporting or promoting the commission of an offence against section 6. This item proposes the appropriate amendments accordingly.

Item 7 - Amendment of inappropriate fault element: clarifying a fault element

497. This item proposes two amendments to paragraph 7(1)(g). First, paragraph 7(1)(g) applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct, namely permitting a meeting or assembly of persons to be held in any building, room, premises or place of which the defendant is

the owner, lessee, occupier, agent or superintendent, for the purpose of committing, or supporting or promoting the commission of, an offence against paragraphs 7(1)(a)-(f). Paragraphs 7(1)(a)-(f) proscribe various conduct related to preparation for incursions into foreign States for the purposes of engaging in hostile activities in those States. 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 replacement of “knowingly” in paragraph 7(1)(g) by the appropriate and equivalent fault element, namely intention. It is considered that subsection paragraph 7(1)(g) will continue to operate in the same manner as at present following this amendment.

498. The second amendment proposed by this item is that the phrase “for a purpose of” in paragraph 7(1)(g) be replaced by the phrase “with the intention of”. For details on the reasons for replacing the phrase “for the purpose of” see the explanation at item 21 of Schedule 5. In the case of paragraph 7(1)(g) the correct interpretation is that the defendant permits any building, room, premises or place of which he or she is the owner, lessee, occupier, agent or superintendent to be used with the intention of committing, or supporting or promoting the commission of, an offence against paragraph 7(1)(a), (b), (c), (d), (e) or (f). This item proposes the appropriate amendment accordingly.

Item 8 - Amendment of inappropriate fault element

499. This item proposes two amendments to paragraph 7(1)(h). First, paragraph 7(1)(h) applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct, namely permitting a vessel of which the defendant is the owner, charterer, lessee, operator, agent or master, or an aircraft of which the defendant is the owner, charterer, lessee, operator or pilot to be used for the purpose of committing, or supporting or promoting the commission of, an offence

against paragraphs 7(1)(a)-(f). Paragraphs 7(1)(a)-(f) proscribe various conduct related to preparation for incursions into foreign States for the purposes of engaging in hostile activities in those States. 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 replacement of “knowingly” in paragraph 7(1)(h) by the appropriate and equivalent fault element, namely intention. It is considered that subsection paragraph 7(1)(h) will continue to operate in the same manner as at present following this amendment.

500. The second amendment proposed by this item is that the phrase “for a purpose of” in paragraph 7(1)(h) be replaced by the phrase “with the intention of”. For details on the reasons for replacing the phrase “for the purpose of” see the explanation at item 21 of Schedule 5. In the case of paragraph 7(1)(h) the correct interpretation is that the defendant permits a vessel of which he or she is the owner, charterer, lessee, operator, agent or master, or an aircraft of which he or she is the owner, charterer, lessee, operator or pilot, to be used with the intention of committing, or supporting or promoting the commission of, an offence against paragraph 7(1)(a), (b), (c), (d), (e) or (f). This item proposes the appropriate amendment accordingly.

Item 9 - Clarifying a fault element

501. This item proposes that the phrase “reckless as to whether the advertisement is” be inserted before “for the purpose” in paragraph 9(1)(b). This is designed to clarify the fault element that will apply to the physical element of circumstance following “for the purpose of”, namely recruiting persons to serve in any capacity in or with an armed force. For details on the reasons for replacing the phrase “for the purpose of” (and like phrases) see the explanation at item 21 of Schedule 5. In the case of paragraph 9(1)(b) the correct interpretation is that the defendant publishes an advertisement being

reckless whether the advertisement will result in persons being recruited. This item proposes the appropriate amendment accordingly.

Item 10- Clarifying a fault element

502. This item proposes that the phrase “for the purpose” in paragraphs 9(1)(d) be replaced by the phrase “with the intention”. For details on the reasons for replacing the phrase “for the purpose of” see the explanation at item 21 of Schedule 5. In the instance of paragraph 7(1)(d) the correct interpretation is that the defendant does any other act or thing with the intention of facilitating or promoting the recruitment of persons to serve in any capacity in such an armed force. This item proposes the appropriate amendments accordingly.

Items 11 and 12 - Replacing references to certain Crimes Act 1914 provisions

503. Certain *Crimes Act 1914* provisions, including sections 7 and 86, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001: see items 1 of Schedule 1 and 4 of Schedule 51. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the references in subparagraphs 9A(3)(a) and (b) to sections 7 and 86 of the *Crimes Act 1914*, which concern attempting to commit primary offences and conspiring to commit primary offences, be replaced by reference to the *Criminal Code* ancillary provisions. These *Criminal Code* provisions will apply to this Act by virtue of this Bill: see item 1 of this Schedule.

Item 13 - Replacing references to certain Crimes Act 1914 provisions

504. Certain *Crimes Act 1914* provisions, including sections 7, 7A and 86, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001: see items 1 of Schedule 1 and 4 of Schedule 51. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This

item proposes that the references in subsection 10(4) to sections 7, 7A and 86 of the *Crimes Act 1914*, which concern attempting to commit primary offences, incitement to commit primary offences, and conspiring to commit primary offences, be replaced by references to the *Criminal Code* provisions which deal with these matters (sections 11.1, 11.4 and 11.5). These *Criminal Code* provisions will apply to this Act by virtue of this Bill: see item 1 of this Schedule.

Item 14 - Replacing references to certain Crimes Act 1914 provisions

505. Certain *Crimes Act 1914* provisions, including sections 7, 7A and 86, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001: see items 1 of Schedule 1 and 4 of Schedule 51. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the references in subsection 11(4) to sections 7, 7A and 86 of the *Crimes Act 1914*, which concern attempting to commit primary offences, incitement to commit primary offences, and conspiring to commit primary offences, be replaced by references to the *Criminal Code* provisions which deal with these matters (sections 11.1, 11.4 and 11.5). These *Criminal Code* provisions will apply to this Act by virtue of this Bill: see item 1 of this Schedule.

Schedule 15 – Crimes (Hostages) Act 1989

Item 1 - Replacing references to certain Crimes Act 1914 provisions

506. Certain *Crimes Act 1914* provisions, including sections 7 and 86, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001: see items 1 of Schedule 1 and 4 of Schedule 51. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the references in paragraph (b) of the definition of “offence against this Act” in subsection 3(1) to sections 7 and 86 of the *Crimes Act 1914*, which concern attempting and conspiring to commit primary offences, be replaced by references to the *Criminal*

Code provisions which deal with these matters (sections 11.1 and 11.5). These *Criminal Code* provisions will apply to this Act by virtue of this Bill: see item 3 of this Schedule.

Item 2 - Replacing references to certain Crimes Act 1914 provisions

507. Certain *Crimes Act 1914* provisions, including section 7A, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001: see items 1 of Schedule 1 and 4 of Schedule 51. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the reference in subsection 3(3) to section 7A of the *Crimes Act 1914*, which concerns incitement to commit primary offences, be replaced by a reference to the *Criminal Code* provision which deals with this matter (section 11.4). This *Criminal Code* provision will apply to this Act by virtue of this Bill: see item 3 of this Schedule.

Item 3 - Application of Criminal Code

508. 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.

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

Item 4 - Clarifying a fault element

510. This item proposes that the phrase “in order to compel ” in section 7 be replaced by the phrase “with the intention of compelling”. For details on the reasons for replacing the phrase “for the purpose of” (and like phrases, which includes “in order to”) see the explanation at item 21 of Schedule 5. In the case of section 7 the correct interpretation is that the defendant commits an act of hostage-taking if the person commits the acts described in paragraphs 7(a) and (b) with the intention of compelling

any of the matters described in paragraphs 7(c), (d) or (e), and this item proposes the appropriate amendment accordingly.

Schedule 16 - Crimes (Internationally Protected Persons) Act 1976

Item 1 - Application of Criminal Code

511. 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.

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

Item 2 - Absolute liability applied

513. This item proposes to insert subsection 8(4A) which provides that, for the purposes of an offence against subsections 8(1), (2), (3), (3A), (3B), (3C) or (4), absolute liability is applied to the physical elements of circumstance that the person who is murdered or kidnapped or whose person or liberty is otherwise attacked is an internationally protected person, that the premises or property are official premises or private accommodation or means of transport of an internationally protected person, that the premises or property are premises or property in or upon which an internationally protected person is present or likely to be present, and that the person whose life is intended to be endangered by destruction or damage is an internationally protected person, as each is relevant to the offence in point. The term “internationally protected person” is defined by subsection 3(3) to be the term used in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, which forms the Schedule to the Act. Subsection 3(2) refines the definition used in the Convention by providing that the reference in the definition to a Head of State included, in relation to Australia, the Governor-General.

514. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not

possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

515. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 3 - Replacing references to certain Crimes Act 1914 provisions

516. Certain *Crimes Act 1914* provisions, including sections 5 and 7, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001: see items 1 of Schedule 1 and 4 of Schedule 51. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the references in subsection 8(5) to sections 5 and 7 of the *Crimes Act 1914*, which concern aiding, abetting, counselling and procuring the commission of primary offences and attempting to commit primary offences, be replaced by references to the *Criminal Code* provisions which deal with these matters (sections 11.1 and 11.2). These *Criminal Code* provisions will apply to this Act by virtue of this Bill: see item 1 of this Schedule.

Item 4 - Replacing references to certain Crimes Act 1914 provisions

517. Certain *Crimes Act 1914* provisions, including section 7, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001: see items 1 of Schedule 1 and 4 of Schedule 51. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the reference in subsection 8(6) to section 7 of the *Crimes Act 1914*, which

concerns attempting to commit primary offences, be replaced by reference to the *Criminal Code* provision which deals with attempt (section 11.1). Section 11.1 will apply to this Act by virtue of this Bill: see item 1 of this Schedule.

Schedule 17 - Crimes (Ships and Fixed Platforms) Act 1992

Item 1 – Definition

518. This item inserts into subsection 3(1) a definition of “engage in conduct”, which is defined to comprise doing an act and omitting to perform an act. The definition mirrors the same definition in the *Criminal Code*. The phrase “engage in conduct” is utilised in a number of provisions in this Act.

Item 2 - Application of Criminal Code

519. This item inserts proposed section 5A. Subsection 5A(1) provides that Chapter 2 of the *Criminal Code* applies to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility.

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

521. Subsection 5A(2) provides that section 10.5 of the *Criminal Code* applies to an offence against subsections 10(1) or 11(1) or sections 21, 23 or 24 as if it covered conduct that is justified or excused by a law of the Commonwealth, a State or a Territory. This is consequent upon the amendments proposed by items 18, 19 and 20 of this Schedule which remove the defence of lawful excuse from these sections and subsections and place reliance upon section 10.5 of the *Criminal Code*. Section 10.5, which is being inserted into the *Criminal Code* by virtue of the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999, creates a general defence of lawful excuse which will be applicable to all offences against Commonwealth law. However the defence established by section 10.5 is limited to instances where “the offence is justified or excused by a law”. The *Criminal Code*’s Dictionary defines “law” to be “a law of the Commonwealth, and includes this Code”.

It follows that it is necessary to expand the scope of section 10.5 in relation to those offence provisions where a lawful excuse may arise under State or Territory law, and this is achieved by subsection 3A(2) in relation to subsections 10(1) and 11(1) and sections 21, 23 and 24. An example of where this situation might arise is in relation to the destruction of a private ship contrary to subsection 10(1) by an officer of a State agency, which was necessitated by the discovery of unsecured Ebola bacillus on board.

522. Proposed subsection 5A(3) amends and replaces subsection 6(2). See item 112A below.

Item 3

523. The amendment made by this item is consequential upon the amendments made by items 2 and 4 of this Schedule.

Item 4 - Replacing references to certain Crimes Act 1914 provisions

524. Certain *Crimes Act 1914* provisions, including sections 5 and 7, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001: see items 1 of Schedule 1 and 4 of Schedule 51. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that subsection 6(2) be repealed and re-enacted as subsection 5A(3), and that the references in subsection 6(2) to sections 5 and 7 of the *Crimes Act 1914*, which concern aiding, abetting, counselling and procuring the commission of primary offences and attempting to commit primary offences, be replaced by references to the *Criminal Code* provisions which deal with these matters (sections 11.1 and 11.2). These *Criminal Code* provisions will apply to this Act by virtue of this Bill: see item 2 of this Schedule.

Item 5 - Lawful excuse defence

525. This item proposes to remove the specific defence of lawful excuse from section 8. Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful excuse defence see the explanation at item 3 of Schedule 2.

Item 6 - Amendment of inappropriate physical element of conduct: lawful excuse defence

526. This item proposes to repeal and replace subsection 10(1) in order to achieve two amendments. First, subsection 10(1) is being amended to remove the word “destroy” as the active verb and rephrased to proscribe the actions of a person who “engages in conduct that causes the destruction of” the prescribed property. The rationale for this amendment is that a person does not destroy something - rather the destruction is the result of the person’s conduct and is not in itself a physical element of conduct. It follows that retaining “destroy” 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 destruction, 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 destruction.

527. The second amendment proposed by this item is to remove the specific defence of lawful excuse from subsection 10(1). Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful excuse defence see the explanation at item 3 of Schedule 2.

Item 7 - Amendment of inappropriate physical element of conduct

528. This item proposes to amend subsection 10(2) in order to remove the word “damage” as the active verb and rephrase it to proscribe the actions of a person who “engages in conduct that causes damage to” the prescribed property. The rationale for this amendment is that a person does not damage something - rather the damage is the result of the person’s conduct and is not in itself a physical element of conduct. It follows that retaining “damage” 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 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 damage.

Item 8 - Lawful excuse defence

529. This item proposes to remove the specific defence of lawful excuse from subsection 11(1). Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful excuse defence see the explanation at item 3 of Schedule 2.

Item 9 - Amendment of inappropriate physical element of conduct

530. This item proposes to repeal and substitute section 12 in order to remove the words “destroy” and “damage” as the active verbs and rephrase them to proscribe the actions of a person who “engages in conduct that causes the destruction” or “damage” as the case may be to the prescribed property. The rationale for this amendment is that a person does not destroy or damage something - rather the destruction or damage is

the result of the person's conduct and is not in itself a physical element of conduct. It follows that retaining "destroy" or "damage" 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 destruction 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 destruction or damage.

Item 10 - Clarifying physical elements of conduct and result

531. This item proposes the repeal and substitution of section 13 in order to clarify the physical elements of conduct and result. Following application of the *Criminal Code*, it is possible that future courts may variously interpret "endanger the safe navigation of a private ship" or "communicate false information" respectively as the physical elements of conduct and result, or as the reverse. This variation would have a profound effect on the future prosecution of offences against section 13 because physical elements of conduct and result attract different fault elements, namely intention and recklessness respectively. It follows that the provision must be reconstructed in order to clarify these matters. The correct interpretation of section 13 is that the physical element of conduct is communicating false information and the physical element of result is that the communication will endanger the safe navigation of a private ship (with a prescribed fault element of knowledge), and the substituted section 13 puts this beyond doubt.

Item 11 - Amendment of inappropriate physical element of conduct

532. This item proposes to amend section 14 by removing the word "kill" as the active verb and instead proscribing the actions of a person "who engages in conduct

that causes the death of” another person. The rationale for this amendment is that a person does not kill another - rather the death is the result of the person’s conduct and is not in itself a physical element of conduct. It follows that retaining “kill” 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 death, 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 death.

Item 12 - Amendment of inappropriate physical element of conduct

533. This item proposes to amend section 15 by clarifying that the offence proscribes the actions of a person “who engages in conduct that causes grievous bodily harm to another person”. The rationale for this amendment is that a person does not grievously harm another person - rather the grievous bodily harm is the result of the person’s conduct and is not in itself a physical element of conduct. It follows that retaining the present phraseology of this provision 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 grievous bodily harm, 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 grievous bodily harm.

Item 13 - Amendment of inappropriate physical element of conduct

534. This item proposes to amend section 16 by removing the word “injures” as the active verb and instead proscribing the actions of a person who “who engages in conduct that causes injury ” to another person. The rationale for this amendment is that a person does not injure another person - rather the injury is the result of the person’s conduct and is not in itself a physical element of conduct. It follows that retaining “injure” 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, 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.

Item 14 - Replacing references to certain Crimes Act 1914 provisions

535. Certain *Crimes Act 1914* provisions, including sections 5 and 7, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001: see items 1 of Schedule 1 and 4 of Schedule 51. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the references in the definition of “offence against this Division” in subsection 18(5) to sections 5 and 7 of the *Crimes Act 1914*, which concern aiding, abetting, counselling and procuring the commission of primary offences and attempting to commit primary offences, be replaced by references to the *Criminal Code* provisions which deal with these matters (sections 11.1 and 11.2). These *Criminal Code* provisions will apply to this Act by virtue of this Bill: see item 2 of this Schedule.

Items 15 and 16 – Clarifying reasonable excuse defence

536. These items propose to remove the defence of reasonable excuse from subsection 20(5) and recreate it in a new subsection 20(5A). 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.

537. The standard note is added after proposed subsection 20(5A) 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 20(5A).

Item 17 - Replacing references to certain Crimes Act 1914 provisions

538. Certain *Crimes Act 1914* provisions, including sections 5 and 7, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001: see items 1 of Schedule 1 and 4 of Schedule 51. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the references in the definition of “offence against Division 1” in subsection 20(6) to sections 5 and 7 of the *Crimes Act 1914*, which concern aiding, abetting, counselling and procuring the commission of primary offences and attempting to commit primary offences, be replaced by references to the *Criminal Code* provisions which deal with these matters (sections 11.1 and 11.2). These *Criminal Code* provisions will apply to this Act by virtue of this Bill: see item 2 of this Schedule.

Item 18 - Lawful excuse defence

539. This item proposes to remove the specific defence of lawful excuse from section 21. Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act

simultaneous with the amendment proposed by this item. For more details on the operation of the lawful excuse defence see the explanation at item 3 of Schedule 2.

Item 19 – Lawful excuse defence: amendment of inappropriate physical element of conduct

540. This item proposes two amendments to section 23. First, it removes the specific defence of lawful excuse from section 23. Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful excuse defence see the explanation at item 3 of Schedule 2.

541. Secondly, this item amends section 23 in order to remove the words “destroy” and “damage” as the active verbs and rephrase them to proscribe the actions of a person who “engages in conduct that the destruction” or “damage” as the case may be to the prescribed property. The rationale for this amendment is that a person does not destroy or damage something - rather the destruction or damage is the result of the person’s conduct and is not in itself a physical element of conduct. It follows that retaining “destroy” or “damage” 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 destruction 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 destruction or damage.

Item 20 - Lawful excuse defence

542. This item proposes to remove the specific defence of lawful excuse from section 24. Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful excuse defence see the explanation at item 3 of Schedule 2.

Item 21 - Amendment of inappropriate physical element of conduct

543. This item proposes to amend section 25 by removing the word “kill” as the active verb and instead proscribing the actions of a person “who engages in conduct that causes the death of” another person. For more details on the rationale for this amendment see the explanation at item 11 above.

Item 22 - Amendment of inappropriate physical element of conduct

544. This item proposes to amend section 26 by clarifying that the offence proscribes the actions of a person “who engages in conduct that causes grievous bodily harm to another person”. For more details on the rationale for this amendment see the explanation at item 12 above.

Item 23 - Amendment of inappropriate physical element of conduct

545. This item proposes to amend section 27 by removing the word “injures” as the active verb and instead proscribing the actions of a person “who engages in conduct that causes injury to” another person. For more details on the rationale for this amendment see the explanation at item 13 above.

Item 24 - Replacing references to certain Crimes Act 1914 provisions

546. Certain *Crimes Act 1914* provisions, including sections 5 and 7, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001: see items 1 of Schedule 1 and 4 of Schedule 51. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes

that the references in the definition of “offence against this Part” in subsection 29(5) to sections 5 and 7 of the *Crimes Act 1914*, which concern aiding, abetting, counselling and procuring the commission of primary offences and attempting to commit primary offences, be replaced by references to the *Criminal Code* provisions which deal with these matters (sections 11.1 and 11.2). These *Criminal Code* provisions will apply to this Act by virtue of this Bill: see item 2 of this Schedule.

Item 25 - Replacing references to certain Crimes Act 1914 provisions

547. Certain *Crimes Act 1914* provisions, including sections 5 and 7, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001: see items 1 of Schedule 1 and 4 of Schedule 51. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the references in paragraph 30(1)(b) to sections 5 and 7 of the *Crimes Act 1914*, which concern aiding, abetting, counselling and procuring the commission of primary offences and attempting to commit primary offences, be replaced by references to the *Criminal Code* provisions which deal with these matters (sections 11.1 and 11.2). These *Criminal Code* provisions will apply to this Act by virtue of this Bill: see item 2 of this Schedule.

Item 26 - Replacing references to certain Crimes Act 1914 provisions

548. Certain *Crimes Act 1914* provisions, including sections 5 and 7, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001: see items 1 of Schedule 1 and 4 of Schedule 51. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the references in paragraph 31(b) to sections 5 and 7 of the *Crimes Act 1914*, which concern aiding, abetting, counselling and procuring the commission of primary offences and attempting to commit primary offences, be replaced by references to the *Criminal Code* provisions which deal with these matters (sections 11.1 and 11.2).

These *Criminal Code* provisions will apply to this Act by virtue of this Bill: see item 2 of this Schedule.

Schedule 18 - Crimes (Superannuation Benefits) Act 1989

Item 1 - Application of Criminal Code

549. This item inserts proposed section 12A which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility.

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

Item 2 - Amendment of inappropriate fault element

551. Subsection 35(1) applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct, namely contravening a restraining order by disposing of, or otherwise dealing with, property. 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 replacement of “knowingly” in subsection 35(1) by the appropriate and equivalent fault element, namely intention. It is considered that subsection 35(1) will continue to operate in the same manner as at present following this amendment.

Schedule 19 - Crimes (Torture) Act 1988

Item 1 - Application of Criminal Code

552. 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.

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

Item 2 - Absolute liability applied

554. This item proposes to insert subsection 6(1A) which provides that absolute liability is applied to the physical elements of circumstance contained in the offence in subsection 6(1) that the act of torture is done outside Australia and that the act of torture, if done by the person at the relevant time in a part of Australia, would constitute an offence against a law then in force in that part of Australia.

555. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

556. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Schedule 20 - Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990

Item 1 – Definition

557. This item inserts into section 3 a definition of “engage in conduct”, which is defined to comprise doing an act and omitting to perform an act. The definition mirrors the same definition in the *Criminal Code*. The phrase “engage in conduct” is utilised in a number of provisions in this Act.

Item 2 - Application of Criminal Code

558. 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.

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

Item 3 - Clarifying a fault element

560. This item proposes that the phrase “for the purpose of” in subsections 6(1)(a), (d), (e) and (f) be replaced by the phrase “with the intention of”. For details on the reasons for replacing the phrase “for the purpose of” see the explanation at item 21 of Schedule 5. In the case of subsection 6(1)(a) the correct interpretation is that the defendant cultivates the opium poppy, coca bush or cannabis plant with the intention of producing narcotic drugs. Paragraphs 6(1)(d), (e) and (f) have the same construction, and this item proposes the appropriate amendments accordingly.

Item 4 - Absolute liability applied

561. This item proposes to insert subsection 9(2) which provides that, for the purposes of an offence against section 9, absolute liability is applied to the physical elements of circumstance listed in proposed paragraphs 9(2)(a), (b) and (c).

562. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

563. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 5 - Absolute liability applied

564. This item proposes to insert subsection 10(3) which provides that, for the purposes of an offence against section 10, absolute liability is applied to the physical elements of circumstance listed in proposed paragraphs 10(3)(a), (b), (c) and (d).

565. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

566. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 6 - Absolute liability applied

567. This item proposes to insert subsection 11(2) which provides that, for the purposes of an offence against section 11, absolute liability is applied to the physical elements of circumstance listed in proposed paragraphs 11(2)(a), (b), (c) and (d).

568. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact

should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

569. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 7 - Absolute liability applied

570. This item proposes to insert subsection 12(3) which provides that, for the purposes of an offence against section 12, absolute liability is applied to the physical elements of circumstance listed in proposed paragraphs 12(3)(a), (b), (c), (d) and (e).

571. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

572. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 8 - Absolute liability applied

573. This item proposes to insert subsection 13(2) which provides that, for the purposes of an offence against section 13, absolute liability is applied to the physical elements of circumstance listed in proposed paragraphs 13(2)(a), (b), (c) and (d).

574. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not

possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

575. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 9 - Absolute liability applied

576. This item proposes to insert subsection 14(2) which provides that, for the purposes of an offence against section 14, absolute liability is applied to the physical elements of circumstance listed in proposed paragraphs 14(2)(a), (b), (c), (d) and (e).

577. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

578. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 10 - Clarifying a fault element

579. This item proposes that the phrase "for the purpose" (wherever occurring) in paragraph 15(6)(a) be replaced by the phrase "with the intention". For details on the

reasons for replacing the phrase “for the purpose of” see the explanation at item 21 of Schedule 5.

Item 11 - Clarifying a fault element

580. This item proposes that the phrase “for the purpose” in section 15A be replaced by the phrase “with the intention”. For details on the reasons for replacing the phrase “for the purpose of” see the explanation at item 21 of Schedule 5. In the case of section 15A the correct interpretation is that the defendant converts or transfers the property with the intention of concealing or disguising that the property was derived from the offence or assisting another person involved in the commission of the offence to evade the legal consequences of that involvement, and this item proposes the appropriate amendment accordingly.

Item 12 - Absolute liability applied

581. This item proposes to insert subsection 15A(2) which provides that, for the purposes of an offence against section 15A, absolute liability is applied to the physical elements of circumstance that the relevant conversion or transfer of property takes place in a State other than a prescribed State or a Territory other than a prescribed Territory.

582. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

583. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

584. The heading of this section is also amended by replacing “Knowingly” with “Intentionally” to reflect the appropriate fault element.

Item 13 - Absolute liability applied

585. This item proposes to insert subsection 15B(2) which provides that, for the purposes of an offence against section 15B, absolute liability is applied to the physical elements of circumstance that the relevant concealing or disguising takes place in a State other than a prescribed State or a Territory other than a prescribed Territory.

586. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

587. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

588. The heading of this section is also amended by replacing “Knowingly” with “Intentionally” to reflect the appropriate fault element.

Item 14 - Absolute liability applied

589. This item proposes to insert subsection 15C(2) which provides that, for the purposes of an offence against section 15C, absolute liability is applied to the physical elements of circumstance that the relevant possession is, or the relevant acquisition or

use takes place in, a State other than a prescribed State or a Territory other than a prescribed Territory.

590. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 32 of Schedule 10.

591. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

592. The heading of this section is also amended by replacing "Knowingly" with "Intentionally" to reflect the appropriate fault element.

Item 15 - Clarifying a fault element

593. This item proposes that the phrase "for the purpose" (wherever occurring) in section 17 be replaced by the phrase "with the intention". For details on the reasons for replacing the phrase "for the purpose of" see the explanation at item 21 of Schedule 5.

Schedule 21 - Customs Act 1901

Item 1 - Replacing references to certain Crimes Act 1914 provisions

594. Certain *Crimes Act 1914* provisions, including sections 7, 7A and 86, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001. It will be necessary to replace references to these *Crimes Act* provisions with references to

relevant *Criminal Code* provisions. This item proposes that the references in subparagraphs (b)(i) and (ii) of the definition of “records offence” in subsection 4(1) to sections 7, 7A and 86 of the *Crimes Act 1914*, which concern attempting to commit primary offences, incitement to commit primary offences, and conspiring to commit primary offences, be replaced by references to the *Criminal Code* provisions which deal with these matters (sections 11.1, 11.4 and 11.5). These *Criminal Code* provisions will apply to this Act by virtue of this Bill: see Schedule 1.

Item 2 - Application of the Criminal Code

595. Proposed section 5AA differs from equivalent provisions in other Acts because of the unusual nature of most offences in the *Customs Act 1901*. While there are some offences that are purely criminal in nature, such as the narcotic drug import and export offences under Part XIV of the Act, the offences that have monetary penalties are, with the exception of Queensland, dealt with as criminal matters in the lower courts (standard of proof – beyond reasonable doubt) and as civil matters in the superior courts. This is because the provisions that deal with the procedure for these offences diverge (see sections 247 and 248). While this anomaly is not logical, and the status of these offences is currently being reviewed by the Australian Law Reform Commission (which will report in March 2002), the purpose of this Bill is to harmonise offences with the *Criminal Code*. It is therefore considered that the least complex solution is to apply critical aspects of the general principles in Chapter 2 of the *Criminal Code* to all Customs prosecutions so that the same principles apply to basic concepts such as intention and the defences regardless of where the offence is heard. At the same time the provision will not apply Parts 2.4, 2.5 and 2.6 of Chapter 2 of the *Criminal Code* in recognition that those aspects may not translate easily to ‘Customs prosecutions’. For example, the fundamental difference between criminal and civil matters – the burden and standard of proof - will be left to the existing law rather than applying the codified provisions in Part 2.6. As is the case now, the standard of proof will depend on the court in which the matter is heard. If it is dealt with as a criminal matter, the standard of proof will remain beyond reasonable doubt.

596. Proposed subsection 5AA(1) applies Chapter 2 of the *Criminal Code* to all offences in the *Customs Act 1901*, but this is subject to proposed subsection 5AA(2).

597. Proposed paragraph 5AA(2)(a) applies Parts 2.1, 2.2 and 2.3 of the *Criminal Code* to Customs prosecutions. These Parts concern general codification of criminal responsibility principles, physical and fault elements in offences, and circumstances in which there is no criminal responsibility.

598. Proposed paragraph 5AA(2)(b) provides that Parts 2.4 (which deals with criminal ancillary offences such as attempt and complicity and is not designed for use in the civil context - reliance can be had on existing sections 236 and 237 of the Act); Part 2.5 (which deals with corporate criminal responsibility and is consistent with what was said when the *Criminal Code* was introduced, is disapplied where the Act already has a separate provision (in this case section 257)); and Part 2.6 (which deals with the burden and standard of proof) do not apply to Customs prosecutions.

599. Proposed paragraph 5AA(2)(c) provides that where the *Criminal Code* general principles apply to a 'Customs prosecutions' they shall be taken to refer to 'responsibility' rather than 'criminal responsibility'. This is because in some situations they will be used to determine responsibility in the civil context. The term responsibility is preferred in that it is suitable for both criminal and civil matters.

600. Proposed subsections 5AA(3) and (4) make it clear the application of the *Criminal Code* is in no way meant to change the way in which Customs prosecutions are dealt with in the courts (including the standard and burden of proof).

601. Proposed subsection 5AA(5) defines 'Customs prosecution' in relation to the existing definition.

Items 3 and 4 – Clarification of exception to the offence

602. These items propose to remove the exception of “without the permission of the CEO given under subsection (2)” from subsection 5A(1) and recreate it as subsection 5A(1A). The rationale for this amendment is to prevent future interpretation that the

exception 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 an exception to the offence.

Items 5 and 6 – Clarification of exception to the offence

603. These items propose to remove the exception of “without the permission of the CEO given under subsection (2)” from subsection 5B(1) and recreate it as subsection 5B(1A). The rationale for this amendment is to prevent future interpretation that the exception 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 an exception to the offence.

Items 7 and 8 – Clarifying reasonable excuse defence

604. These items propose to remove the defence of reasonable excuse from subsection 20(7) and recreate it in a new subsection 20(7A). 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.

Item 9 – Removal of exception to the offence

605. This item proposes to remove the exception of “Except with permission in force under subsection (2)” from subsection 33A(1) and remove it to a separate subsection. The rationale for this amendment is to prevent future interpretation that the exception 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 an exception to the offence.

Item 10 – Strict liability applied: recreation of exception to the offence

606. This item proposes to insert two subsections. First, proposed subsection 33A(1A) applies strict liability to the offence in subsection 33A(1) of the Act. Subsection 33A(1) provides that a person shall not use an Australian resources

installation that is subject to the control of the Customs in, or in any operations or activities associated with, or incidental to, exploring or exploiting the Australian seabed. This obligation is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

608. Second, proposed subsection 33A(1B) is consequent upon item 8. It proposes to recreate the exception to the offence in subsection 33A(1) that the offence in that provision does not apply if the person has permission in force under subsection (2).

Item 10 – Removal of exception to the offence

609. This item proposes to remove the exception of “Except with permission in force under subsection (2)” from subsection 33B(1) and remove it to a separate subsection. The rationale for this amendment is to prevent future interpretation that the exception 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 an exception to the offence.

Item 11 – Strict liability applied: recreation of exception to the offence

610. This item proposes to insert two subsections. First, proposed subsection 33B(1A) applies strict liability to the offence in subsection 33B(1) of the Act. Subsection 33B(1) provides that a person shall not use an Australian sea installation that is subject to the control of the Customs. This obligation is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

612. Second, proposed subsection 33B(1B) is consequent upon item 10. It proposes to recreate the exception to the offence in subsection 33B(1) that the offence in that provision does not apply if the person has permission in force under subsection (2).

Item 12 – Provision reconstructed: strict liability applied: absolute liability applied: definition

613. This item proposes several amendments to subsection 50(4). First, it repeals subsection 50(4) and recreates it as two separate offence provisions, which respectively concern non-narcotic goods (subsection 50(4)) and narcotic goods (subsection 50(7)).

614. Second, this item inserts proposed subsection 50(5) which applies strict liability to the offence in new subsection 50(4) of the Act. Subsection 50(4) imposes an obligation to comply with a condition or requirement under which a licence or permission is granted. The offence carries a fine of \$10000. This form of regulatory obligation is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

616. Third, this item proposes to insert subsections 50(6) and (9) which provides that absolute liability is applied to the physical element of circumstance contained in the offence in new subsections 50(4) and (7) that a licence or permission has been granted, after the commencement of this subsection, under the regulations.

617. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 31 of Schedule 10.

618. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

619. Finally, this item inserts as subsection 50(10) a definition of “engage in conduct”, which is defined to comprise doing an act and omitting to perform an act. The definition mirrors the same definition in the *Criminal Code*. The phrase “engage in conduct” is utilised in a number of provisions in this Act.

Items 13 and 14 – Clarification of exception to the offence

620. These items propose to remove the exception of “without the permission of a Collector given under subsection (2)” from subsection 58(1) and recreate it as subsection 58(1A). The rationale for this amendment is to prevent future interpretation that the exception 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 an exception to the offence.

Item 15 - Strict liability applied

621. This item inserts proposed subsection 58A(5A) which applies strict liability to the offence in subsections 58A(2), (3), (4) and (5) of the Act. Subsections (2), (3), (4) and (5) variously proscribe the passage of persons and goods between various sites, including sea installations, resources installations and external places via a ship or aircraft, where the persons have not been available for questioning in Australia and the goods have not been available for examination in Australia. Criminal liability attaches to several persons in relation to each of these infringements, including the person who travelled or sent the goods in question and the owners and permit holders for the installations and the owners and operators of the ship or aircraft. The offence carries a

fine of \$10,000. A defendant can rely upon appropriate defences and exceptions in subsection (6). These are regulatory obligations with a relatively low penalty and are therefore the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 16 - Strict liability applied

623. This item inserts proposed subsection 58B(5A) which applies strict liability to the offence in subsections 58A(2), (3), (4) and (5) of the Act. Subsections (2), (3), (4) and (5) variously proscribe the passage of persons and goods between sea and resources installations and external places via a ship or aircraft, where the persons have not entered Australia or East Timor. Criminal liability attaches to several persons in relation to each of these infringements, including the person who travelled or sent the goods in question and the owners and permit holders for the installations and the owners and operators of the ship or aircraft. The offence carries a fine of \$10,000. A defendant can rely upon appropriate defences and exceptions in subsection (6). These are regulatory obligations with a relatively low penalty and are therefore the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 17 - Strict liability applied

625. This item inserts proposed subsection 60(1A) which applies strict liability to the offence in subsection 60(1) of the Act. Subsection 60(1) provides that the master of every ship from a place outside Australia bound to or calling at any port shall bring his

ship to for boarding at a boarding station appointed for that port and shall permit his ship to be boarded. The offence carries a fine of \$10,000. In addition, the ship's master would be able to rely on the defence in subsection (4) that he was prevented from complying with the provision by stress of weather or other reasonable cause. This form of obligation with a relatively low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 18 - Strict liability applied

627. This item proposes to insert subsection 60(2A) which provides that strict liability is applied to the identified physical elements of circumstance, which are contained in the offence in subsection 60(2). Subsection 60(2) provides that the pilot of an aircraft from a place outside Australia arriving in Australia shall not suffer the aircraft to land at any other airport until the aircraft has first landed at an airport described in paragraphs 60(2)(a) or (b).

628. These physical elements are appropriate candidates for the application of strict liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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 and accordingly strict liability is the appropriate application. For more details on the operation of absolute liability see the explanation at item 6 of Schedule 2.

629. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 19

630. The amendment proposed by this item is consequential upon item 18.

Item 20 - Strict liability applied

631. This item inserts proposed subsection 61(2) which applies strict liability to the offence in subsection 61(1) of the Act. Subsection 61(1) provides that the master of any ship or the pilot of any aircraft permitting his ship or aircraft to be boarded, the master of a resources installation, or the owner of a sea installation, shall, by all reasonable means, facilitate the boarding of the ship, aircraft or installation by a person who is authorised under the Act to board that ship, aircraft or installation. The offence carries a fine of \$5,000. This form of obligation with a relatively low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 21 - Strict liability applied

633. This item inserts proposed subsection 62(2) which applies strict liability to the offence in subsection 62(1) of the Act. Subsection 62(1) provides that when a ship has been brought to at a boarding station and boarded by an officer, the master of the ship shall, subject to any direction given under section 275A, bring the ship to the proper place of mooring or unloading, without touching at any other place, as quickly as it is practicable for him lawfully to do so. The offence carries a fine of \$5,000. This form of obligation with a relatively low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 22 and 23 - Strict liability applied: clarification of exception to the offence

635. These items propose two amendments to section 63. First, they remove the exception of “except by authority or by direction of the harbour or aerial authority” from section 63 and recreate it as subsection 63(2). The rationale for this amendment is to prevent future interpretation that the exception 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 an exception to the offence.

636. Second, item 23 inserts proposed subsection 63(3) which applies strict liability to the offence in subsection 63(1) of the Act. Subsection 63(1) provides that no ship or aircraft after arrival at the proper place of mooring or unloading shall except by authority or by direction of the harbour or aerial authority be removed therefrom before the discharge of the cargo intended to be discharged at the port or airport. The offence carries a fine of \$5,000. This form of obligation with a relatively low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 24 - Strict liability applied

638. This item inserts proposed subsection 64AE(1A) which applies strict liability to the offence in subsection 64AE(1) of the Act. Subsection 64AE(1) provides that the master and owner of a ship to which section 64, 64AA, 64AB or 64AC applies must each answer questions asked by a Collector relating to the ship or the ship's cargo, crew, passengers, stores or voyage and, at the request of a Collector, produce documents relating to the ship or the ship's cargo, crew, passengers, stores or voyage that are in his or her possession or control at the time of the request. The offence carries a fine of \$500. This form of obligation with a relatively low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 25 - Strict liability applied

640. This item inserts proposed subsection 64AE(2A) which applies strict liability to the offence in subsection 64AE(2) of the Act. Subsection 64AE(2) provides that the pilot and owner of an aircraft to which section 64, 64AA, 64AB or 64AC applies must each answer questions asked by a Collector relating to the aircraft or the aircraft's cargo, crew, passengers, stores or flight and, at the request of a Collector, produce documents relating to the aircraft or the aircraft's cargo, crew, passengers, stores or flight that are in his or her possession or control at the time of the request. The offence carries a fine of \$500. This form of obligation with a relatively low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 26 - Strict liability applied

642. This item inserts proposed subsection 64A(3A) which applies strict liability to the offence in subsections 64A(1), (2) and (3) of the Act. Subsections 64A(1), (2) and (3) provide that the master of a relevant ship or the pilot of a relevant aircraft shall, if required to do so by a Collector:

- (a) make a report within such time as is specified by the Collector and in such form as is specified by the Collector, of the ship or aircraft and of the cargo of the ship or aircraft;
- (b) answer questions relating to the ship or aircraft, to its cargo, crew, passengers or stores or to its voyage or flight; and

- (c) produce documents relating to the matters referred to in subsection (2).

643. The offences carry fines of \$2,000 and \$1,000. These forms of obligation with a relatively low penalty are the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 27 - Strict liability applied

645. This item inserts proposed subsection 65(3) which applies strict liability to the offence in subsections 65(1) and (2) of the Act. Subsections 65(1) and (2) prescribe reporting obligations for the master and owners of lost or wrecked ships and the pilots and owners of aircraft that are lost or wrecked whilst flying to Australia. The offences carry fines of \$5,000. These forms of obligation with a relatively low penalty are the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 28 and 29 – Clarification of exception to the offence

647. These items propose to remove the exception of “except by authority” from section 67 and recreate it as subsection 67(2). The rationale for this amendment is to prevent future interpretation that the exception 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 an exception to the offence. A note is added to point to the definition of “by authority” in subsection 4(1).

Item 30 - Strict liability applied

648. This item inserts proposed subsection 70(7A) which applies strict liability to the offence in subsection 70(7) of the Act. Subsection 70(7) prescribes obligations concerning reports in relation to applicable goods, payment of duty and compliance with conditions to which a relevant permission is subject. The offence carries a fine of \$5,000. These forms of obligation with a relatively low penalty are the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 31 and 32 – Clarifying reasonable excuse defence: strict liability applied

650. These items propose two amendments to section 71E. First, they remove the defence of reasonable excuse from subsection 71E(3A) and recreate it in a new subsection 71E(3AB). 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.

651. Second, item 32 inserts proposed subsection 71E(3AA) which applies strict liability to the offence in subsection 71E(3A) of the Act. Subsection 71E(3A) provides that a person to whom a permission has been given under subsection (3) must not move the goods to which the permission relates otherwise than in accordance with the permission. The offence carries a fine of \$5000, and the person can rely on the defence of reasonable excuse. This form of obligation with a relatively low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 33 and 34 – Clarifying of exception to the offence: strict liability applied

653. These items propose two amendments to section 73. First, they propose to remove the exception of “except with the permission of a Collector” from subsections 73(1) and (2) and recreate it as subsection 73(2B). The rationale for this amendment is to prevent future interpretation that the exception 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 an exception to the offence.

654. Second, item 34 inserts proposed subsection 73(2A) which applies strict liability to the offences in subsections 73(1) and (2) of the Act. Subsections 73(1) and (2) proscribe the breaking of bulk cargo of a ship or aircraft travelling to or from

Australia. The offence carries a fine of \$25000, and the person can rely on the exception to the offences where an authority has been given under section 71B. This form of obligation with a relatively low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 35 - Clarifying a fault element

656. This item proposes that the word “for” in subsection 86(6) be replaced by the phrase “with the intention of”. For details on the reasons for replacing the phrase “for the purpose of” (and equivalent words and phrases) see the explanation at item 21 of Schedule 5. In the case of subsection 86(6) the correct interpretation is that the defendant uses the warehouse with the intention of warehousing goods, and this item proposes the appropriate amendment accordingly.

Item 36 - Strict liability applied

657. This item inserts proposed subsection 87(8) which applies strict liability to the offence in subsection 87(7) of the Act. Subsection 87(7) provides that where a warehouse licence is cancelled under this section, the holder of the licence shall, if requested by the CEO to do so, surrender the licence to the CEO. The offence carries a fine of \$100. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 37 - Strict liability applied

659. This item inserts proposed subsection 90(1A) which applies strict liability to the offence in subsection 90(1) of the Act. Subsection 90(1) prescribes certain obligations on the holder of a warehouse licence to stack and arrange goods, and provide adequate space, facilities, labour and materials to Customs officers for the performance of duties under the Act. The offence carries a fine of \$1,000. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 38 - Strict liability applied

661. This item inserts proposed subsection 96A(11A) which applies strict liability to the offence in subsection 96A(11) of the Act. Subsection 96A(11) provides that a person is guilty of an offence if he or she, being a person who is required to comply with a condition imposed in respect of a permission under subsection (2), fails to comply with the condition. The offence carries a fine of \$5,000. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 39 - Strict liability applied

663. This item inserts proposed subsection 96B(11) which applies strict liability to the offence in subsection 96B(11) of the Act. Subsection 96B(11) provides that a person is guilty of an offence if he or she, being a person who is required to comply with a condition imposed in respect of a permission under subsection (3), fails to comply with the condition. The offence carries a fine of \$5,000. This form of obligation with

a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 40 - Strict liability applied

665. This item inserts proposed subsection 100(3) which applies strict liability to the offence in subsection 100(2) of the Act. Subsection 100(2) provides that where a person makes a further entry in accordance with subsection (1) in respect of goods that have been entered for warehousing, he shall (a) at the time of lodging the further entry, give the Collector particulars of the entry for warehousing; and (b) as soon as practicable, give particulars of the further entry to the holder of the warehouse licence relating to the warehouse in which the goods were intended to be warehoused in accordance with the entry for warehousing. The offence carries a fine of \$1,000. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 41 - Strict liability applied

667. This item inserts proposed subsection 101(2) which applies strict liability to the offence in subsection 101(1) of the Act. Subsection 101(1) provides that where the owner of goods receives written authority for warehousing goods in pursuance of an entry for warehousing or written permission under this Act to warehouse the goods, he shall, as soon as practicable, before the goods are delivered to the warehouse nominated in the authority or permission, deliver the authority or permission to the holder of the warehouse licence by leaving it at the warehouse with a person

apparently participating in the management or control of the warehouse. The offence carries a fine of \$1,000. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 41 - Strict liability applied

669. This item inserts proposed subsection 101(2) which applies strict liability to the offence in subsection 101(1) of the Act. Subsection 101(1) provides that where the owner of goods receives written authority for warehousing goods in pursuance of an entry for warehousing or written permission under this Act to warehouse the goods, he shall, as soon as practicable, before the goods are delivered to the warehouse nominated in the authority or permission, deliver the authority or permission to the holder of the warehouse licence by leaving it at the warehouse with a person apparently participating in the management or control of the warehouse. The offence carries a fine of \$1,000. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 42-43 – Penalty

671. Item 42 provides for 10 penalty units to replace the existing penalty of \$1,000. Each penalty unit is worth \$110. The penalty is placed immediately after the offence in subsection 102(1). This is intended to assist the correct interpretation that subsection 102(1) creates the offence. Item 43 does the same thing at the end of section 102.

Item 44 - Strict liability applied

672. This item inserts proposed subsection 102(3) which applies strict liability to the offence in subsections 102(1) and (2) of the Act. Subsections 101(1) and (2) impose obligations on the holder of a warehouse licence to advise a Collector of certain information. The offences carry a fine of \$1,000. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 45 – Provision reconstructed: strict liability applied: absolute liability applied: definition

674. This item proposes several amendments to subsection 112(2B). First, it repeals subsection 112(2B) and recreates it as two separate offence provisions, which respectively concern non-narcotic goods (subsection 112(2B)) and narcotic goods (subsection 112(2BC)).

675. Second, this item inserts proposed subsection 112(2BA) which applies strict liability to the offence in new subsection 112(2B) of the Act. Subsection 112(2B) imposes an obligation to comply with a condition or requirement under which a licence or permission is granted. The offence carries a fine of \$10000. This form of regulatory obligation is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

677. Third, this item proposes to insert subsections 112(2BB) and (2BE) which provides that absolute liability is applied to the physical element of circumstance contained in the offence in new subsections 112(2B) and (2BC) that a licence or

permission has been granted, after the commencement of this subsection, under the regulations.

678. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 31 of Schedule 10.

679. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 46 – Definition

680. This item adds as subsection 112(4) a definition of “engage in conduct”, which is defined to comprise doing an act and omitting to perform an act. The definition mirrors the same definition in the *Criminal Code*. The phrase “engage in conduct” is utilised in a number of provisions in this Act.

Items 47 and 48 – Clarifying reasonable excuse defence: strict liability applied

681. These items propose to remove the defence of reasonable excuse from subsection 114B(7) and recreate it in a new subsection 114B(7A). 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.

682. Second, item 48 inserts proposed subsection 114B(7B) which applies strict liability to the offence in subsection 114B(7) of the Act. Subsection 114B(7) provides

that where a person granted a confirming exporter status in respect of information and goods fails to comply with a condition to which the grant is subject, he or she is guilty of an offence. The offence carries a fine of \$1000, and the person can rely on the defence of reasonable excuse. This form of obligation with a relatively low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 49 - Strict liability applied

684. This item inserts proposed subsection 123(3) which applies strict liability to the offence in subsections 123(1) and (2) of the Act. Subsections 101(1) and (2) provide that the master of every ship departing from any port, and the pilot of every aircraft departing from any airport, shall bring his ship or aircraft to a boarding station appointed for the port or airport and by all reasonable means facilitate boarding by the officer, and shall not depart with his ship or aircraft from any port or airport without the consent of the officer. The offences carry a fine of \$500. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 50 - Strict liability applied

686. This item inserts proposed subsection 124(2) which applies strict liability to the offence in subsection 124(1) of the Act. Subsection 124(1) provides that the master of every ship and the pilot of every aircraft after clearance shall on demand by an officer produce the Certificate of Clearance and account to the satisfaction of the Collector for any goods specified or referred to in the Outward Manifest and not on board his ship

or aircraft. The offence carries a fine of \$10,000. This form of obligation with a relatively low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 51 and 52 – Clarification of exception to the offence: strict liability applied

688. These items propose to remove the exception of “without the permission of the Collector” from section 125 and recreate it as subsection 125(2). The rationale for this amendment is to prevent future interpretation that the exception 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 an exception to the offence.

689. Second, item 52 inserts proposed subsection 125(3) which applies strict liability to the offence in subsection 125(1) of the Act. Subsection 125(1) provides that no goods shipped for export shall be unshipped or landed without the permission of the Collector except in parts beyond the seas. The offence carries a fine of \$25,000. This form of obligation with a relatively low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 53 and SM54 – Clarifying of exception to the offence: strict liability applied

691. These items propose two amendments to section 126C. First, they propose to remove the exception of “without the written permission of the CEO” from section 126C and recreate it as subsection 126C(3). The rationale for this amendment is to prevent future interpretation that the exception 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 an exception to the offence.

692. Second, item 54 inserts proposed subsection 126C(2) which applies strict liability to the offence in subsection 126C(1) of the Act. Subsection 126C(1) provides that goods subject to the control of Customs must not be exported in a ship of less than 50 tons gross registered. The offence carries a fine of \$1000, and the person can rely on the exception to the offence where he or she has the written permission of the CEO. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 55 - 57 – Clarifying of exception to the offence: strict liability applied

694. These items propose amendments to section 127. First, they propose to remove the exceptions of “without the consent of the Collector” and “except with the consent of the Collector” from paragraphs 127(a) and (b) and recreate them as subsection 127(3). The rationale for this amendment is to prevent future interpretation that the exception 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 an exception to the offence.

695. Item 57 inserts proposed subsection 127(2) which applies strict liability to the offence in subsection 127(1) of the Act. Subsection 127(1) provides that ships' stores and aircraft's stores, whether shipped in a place outside Australia or in Australia, shall not be unshipped or unloaded and shall not be used before the departure of the ship or aircraft from its last port of departure in Australia otherwise than for the use of the passengers or crew, or for the service, of the ship or aircraft. The offence carries a fine of \$2000, and the person can rely on the exception to the offence where the Collector has given consent. This form of obligation with a low penalty is the type of offence

where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 58 - Strict liability applied

697. This item inserts proposed subsection 129(3A) which applies strict liability to the offence in subsection 129(3) of the Act. Subsection 129(3) provides that a person to whom an approval has been granted under subsection (1) in relation to any goods is guilty of an offence if he or she fails to comply with a requirement specified in the approval. The offence carries a fine of \$2,000. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 59 - Strict liability applied

699. This item inserts proposed subsection 130B(3A) which applies strict liability to the offence in subsection 130B(3) of the Act. Subsection 130B(3) provides that a person who fails to comply with a direction under subsection (2) or (2A) is guilty of an offence. The offence carries a fine of \$2,000. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 60 - Strict liability applied

701. This item inserts proposed subsection 164AC(14A) which applies strict liability to the offence in subsection 164AC(14) of the Act. Subsection 164AC(14) provides that the occupier or person in charge of premises entered, or the person in control of a vessel boarded, must provide the authorised officer with all reasonable facilities and assistance for the effective exercise of the officer's powers. The offence carries a fine of 10 penalty units. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 61 - 66 – Clarification of exceptions to the offence: strict liability applied

703. These items propose amendments to section 175. First, they propose to remove the exception of “except with the permission of a Collector or for the purpose of securing the safety of a ship or an aircraft or saving life” and from subsections 175(2), (3), (3A) and (3B), and recreate it as subsection 175(3C) and (9). The rationale for this amendment is to prevent future interpretation that the exception 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 an exception to the offence.

704. Item 62 proposes to insert subsection 175(3BA) which provides that strict liability is applied to the physical elements of circumstance described in proposed paragraphs 175(3BA)(a) and (b) and which comprise elements of the offence in subsections 175(2), (3), (3A) and (3B). Subsections 175(2), (3), (3A) and (3B) proscribe the transfer of goods in certain circumstances.

705. These physical elements are appropriate candidates for the application of strict liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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 matters in proposed paragraphs 175(3BA)(a) and (b). Accordingly strict liability, and not absolute liability, is the appropriate application. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

707. Item 66 also inserts proposed subsection 175(8) which applies strict liability to the offence in subsection 175(7) of the Act. Subsection 175(7) provides that if, in relation to the transfer of any goods, a person required to comply with a condition imposed in respect of a permission under subsection (4) fails to comply with the condition, he or she is guilty of an offence. The offence carries a fine of 100 penalty units, and the person can rely on the exception to the offence where the Collector has given consent. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 67 - Strict liability applied

709. This item inserts proposed subsection 181(6) which applies strict liability to the offence in subsection 181(5) of the Act. Subsection 181(5) provides a person who contravenes subsection 181(4) is guilty of an offence. Subsection 181(4) provides that a person, other than the owner of goods or a person authorised to act in the stead of the owner, shall not perform the matters required of the owner. The offence carries a fine of \$1,000. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 68 - 70 – Clarifying reasonable excuse defence

711. These items propose to remove the defence of reasonable cause from paragraphs 183P(a) and (c) and recreate it in a new subsection 183P(2). Reasonable cause is akin to the defence of reasonable excuse. The rationale for this amendment is to prevent future interpretation that the reasonable cause 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.

Items 71 - 72 – Clarifying reasonable excuse defence

712. These items propose to remove the defence of reasonable excuse from subsection 184A(12) and recreate it in a new subsection 184A(13). 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.

713. The standard note is added after proposed subsection 184A(13) 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 184A(13).

Items 73 - 74 – Clarifying reasonable excuse defence

714. These items propose to remove the defence of reasonable excuse from subsection 184D(6) and recreate it in a new subsection 184D(6A). 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.

715. The standard note is added after proposed subsection 184D(6A) 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 184D(6A).

Items 75 and 76 – Clarifying reasonable excuse defence

716. These items propose to remove the defence of reasonable excuse from subsection 185(4) and recreate it in a new subsection 185(4AA). 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.

Item 77 - Strict liability applied

717. This item inserts proposed subsection 188(2) which applies strict liability to the offence in subsection 188(1) of the Act. Subsection 188(1) provides that the master or pilot of a ship, aircraft or installation shall provide sleeping accommodation in the cabin and suitable and sufficient food for an officer stationed on the ship, aircraft or installation. The offence carries a fine of \$500. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 78 and 79 – Clarifying of exception to the offence: strict liability applied

719. These items propose two amendments to section 191. First, they propose to remove the exception of “except by authority” from section 191 and recreate it as subsection 191(3). The rationale for this amendment is to prevent future interpretation that the exception 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 an exception to the offence. A note is added to point to the definition of “by authority” in subsection 4(1).

720. Second, item 79 inserts proposed subsection 191(2) which applies strict liability to the offence in subsection 191(1) of the Act. Subsection 191(1) relevantly provides that no fastening, lock, mark, or seal placed by an officer upon any goods or upon any door hatchway opening or place upon any ship, aircraft or installation shall be opened, altered, broken or erased. The offence carries a fine of \$5000, and the person can rely on the exception to the offence where the conduct is authorised. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 80 and 81 – Clarifying of exception to the offence: strict liability applied

722. These items propose two amendments to section 192. First, they propose to remove the exception of “except by authority” from section 192 and recreate it as subsection 192(3). The rationale for this amendment is to prevent future interpretation that the exception 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 an exception to the offence. A note is added to point to the definition of “by authority” in subsection 4(1).

723. Second, item 81 inserts proposed subsection 192(2) which applies strict liability to the offence in subsection 192(1) of the Act. Subsection 192(1) relevantly provides that if the prescribed fastening, lock, mark or seal on board a ship or aircraft is opened, altered, broken or erased, and the ship or aircraft enters any port or airport, the master or pilot is guilty of an offence. The offence carries a fine of \$5000, and the person can rely on the exception to the offence where the conduct is authorised. This form of obligation with a low penalty is the type of offence where strict liability is applied

under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 82 - Strict liability applied

725. This item inserts proposed subsection 195(3) which applies strict liability to the offence in subsection 195(2) of the Act. Subsection 195(2) provides that a person shall answer questions put to him or her by a Customs officer under subsection (1). The offence carries a fine of \$1,000. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 83 and 84 – Clarifying reasonable excuse defence

727. These items propose to remove the defence of reasonable excuse from subsection 196C(2) and recreate it in a new subsection 196C(2A). 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.

Items 85 and 86 – Clarification of exception to the offence

728. These items propose to remove the exception of “unless that judicial officer issued the warrant” from paragraph 203Q(a) and recreate it as subsection 203Q(2). The rationale for this amendment is to prevent future interpretation that the exception 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 an exception to the offence. The

standard note concerning the imposition of an evidential burden on the defendant by subsection 13.3(3) of the *Criminal Code* is added.

Items 87 and 88 – Clarifying reasonable excuse defence

729. These items propose to remove the defence of reasonable excuse from subsection 214B(9) and recreate it in a new subsection 214B(10). 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.

Items 89 and 90 – Clarification of exception to the offence

730. These items propose to remove the exception of “without written permission of an officer” from subsection 227E(5) and recreate it as subsection 227E(7). The rationale for this amendment is to prevent future interpretation that the exception 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 an exception to the offence.

Item 91 - Clarifying a fault element

731. This item proposes that the phrase “for the purpose” in subsection 231(1) be replaced by the phrase “with the intention”. For details on the reasons for replacing the phrase “for the purpose” see the explanation at item 21 of Schedule 5. In the case of subsection 231(1) the correct interpretation is that the persons assemble with the intention of importing prohibited imports, or smuggling, or preventing the seizure, or rescuing after seizure, of any prohibited imports or smuggled goods, and this item proposes the appropriate amendment accordingly.

Item 92 - Strict liability applied

732. This item inserts proposed subsection 233(1AB) which applies strict liability to the offences in paragraphs 233(1)(b), (c) and (d) of the Act. These prohibit the import,

export, possession or conveyance of certain goods. The offences carry monetary penalties and strict liability has been applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 93 - Clarifying a fault element

734. This item replaces “to prevent” in paragraph 232A(a) with “with the intention of preventing” in order to clarify that the defendant acts in contravention of paragraph 232A(a) with the fault element of intending of preventing the seizure or securing of prescribed items or the proof of an offence.

Item 94 – Clarifying a fault element

735. This item proposes the repeal and substitution of paragraph 233(1)(d). The substituted paragraph repeats the wording of the existing paragraph but places the two physical elements of conduct in separate paragraphs. This amendment is necessary to assist in the interpretation of the appropriate fault elements that attach to the respective new paragraphs (d) and (e) by virtue of subsection (2) and (3). Subsection (3) differs from subsection (2) in that it supplies additional fault elements of “intent to export them or knowing that they are intended to be unlawfully exported”. The amendment effected by this item will make it clear that these additional fault elements do not apply to the physical element of conduct in new paragraph (1)(d).

Items 95 and 96 - Amendment of inappropriate fault element

736. Subsection 233A(1) applies the fault element of knowledge (“knowingly”) in relation to the physical element of conduct, namely smuggling, conveying, importing or exporting certain goods contrary to the Act. Following application of the Criminal Code, it will not be possible to apply fault elements of knowledge to a physical element consisting of conduct. Section 5.3 of the Criminal Code restricts the application of these fault elements to physical elements of circumstance or result, and

the only fault element that may be applied to a physical element of conduct is intention (section 5.2 of the Criminal Code). Accordingly item 95 proposes the deletion of “knowingly” from subparagraph 233A(1) by the appropriate and equivalent fault element, namely intention. The fault element of intention is the direct Criminal Code equivalent of “knowingly” where the latter has been applied to physical elements of conduct. It is noted that the definition of 'smuggling' includes requirement of proof of intention (section 4). This was another tension within subsection 233A(1) which would be corrected by the proposed amendment. It is considered that subsection 233A(1) will continue to operate in the same manner as at present following this amendment.

737. Item 94 consequentially amends subsection 233A(1) to expressly provide the relevant fault element of intention in relation to the physical element of conduct of using a ship or aircraft.

Items 96 - 98 - exclusion of narcotic goods from the allow smuggling offence

738. These amendments separate the more serious offence of a master using or allowing the use of a ship for smuggling from the general offence. It is proposed that the general offence, subsection 233A(1), which currently only has a monetary penalty (which in many cases can be enforced as a civil matter) where the goods are not narcotics, should be restricted to that purpose. The more serious offence deals with the situation where narcotic goods are involved. It is proposed it be inserted after section 233A by item 99.

Item 99 - New allowing smuggling of narcotic goods offence

739. As mentioned above, it is proposed that this more serious offence, section 233AA be inserted after section 233A. This recognises the different and more serious nature of this offence. It is drafted in the same terms to section 233A as proposed by this Bill.

Items 100 - 106 – Removal of ancillary provisions

740. Section 233B contains the most significant offences in the *Customs Act 1901*. These offences concern the illicit import and export of narcotic drugs and under section 235 of that Act carry maximum penalties of up to life imprisonment. These offences are regularly prosecuted and a high proportion of Federal offenders in prison are people who have been convicted of offences in this section. These offences have attracted notable litigation, including the landmark High Court cases of *He Kaw Teh v The Queen* (1985) 157 CLR 523 and *Kingswell* (1985) 159 CLR 264. While these cases are critical of the provision, the aim of this Bill is to make the provision work as it does now once the *Criminal Code* principles apply. The complete redrafting of these offences is a key part of *Criminal Code* reform program, which now that the theft, fraud, bribery and related offences exercise has been completed with the passage of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*, together with computer offences, is the next major area of work. However, the Government cannot be confident that the replacement *Criminal Code* serious drug offences will be in place by the date that Chapter 2 of the *Criminal Code* will apply to all Commonwealth offences: 15 December 2001.

741. Notwithstanding their importance, and the litigation on these offences, harmonising them with the *Criminal Code* did not require as much change as many other offences. Item 100 is true of this. It proposed that paragraph 233B(1)(aa) be amended to remove references to attempt and the built in complicity provision 'causes to be brought' from the offence of without reasonable excuse bringing 'prohibited imports' (narcotic goods) into Australia. Attempt and complicity are dealt with in sections 11.1 and 11.2 of the *Criminal Code*. Once they apply to an offence it will be unnecessary to refer to those concepts in the body of offences.

742. Items 101 to 105 remove references to attempt in the offences of importation or exportation of illicit narcotic goods (paragraph 233B(1)(b)); possession of illicit narcotic goods imported into Australia (paragraph 233B(1)(c)); conveying illicit narcotic goods which have been imported in Australia (paragraph 233B(1)(caa)); and

possession of illicit narcotic goods which are reasonably suspected of having been imported into Australia (paragraph 233B(1)(ca)).

743. Item 106 proposes that paragraphs 233B(1)(cb) and (d) be removed because they provide for conspiracy and complicity ('aiding and abetting') in relation to the various illicit narcotic goods offences in subsection 233B(1). Conspiracy and complicity and incitement are dealt with in sections 11.5 and 11.2 of the *Criminal Code*. Once they apply to an offence it will be unnecessary to refer to those concepts in the body of provisions like section 233B.

Item 107 - Absolute liability applied

744. Subsection 233B(1A) provides that on a prosecution for the possession of illicit narcotic goods imported into Australia offence (paragraph 233B(1)(c) it is not necessary to prove that the person knew that the goods in his or her possession had been imported into Australia, but it is a defence if the person proves lack of knowledge. Item 107 modifies subsection 233B(1A) and inserts proposed subsections 233B(1AA), (1AB) and (1AC) to reflect the existing law that the prosecution is not required to prove the defendant knew jurisdictional elements and details of the law. This issue was considered by the Parliament in the context of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* where it was recognised under the *Criminal Code* it was necessary to specifically apply absolute liability to jurisdictional elements such as Commonwealth ownership of property in the offence of theft of Commonwealth property (see subsection 131.1(3)).

745. The jurisdictional physical elements of these offences are that possession of the narcotic goods is on board a ship or aircraft for the purposes of the legislation; that the narcotic goods has been imported into Australia in contravention of the Act; and that the narcotic goods are reasonably suspected of having been imported into Australia. Clearly these are matters that describe the limits on Commonwealth jurisdiction in the regulation of drug trafficking and are in now way concerned with the actual culpability of the defendant. Under the *Criminal Code* and as under the existing law, the

prosecution still has to prove the defendant intended to possess or convey prohibited imports.

746. The proposed amendment to paragraph 233B(1A) reflects the inclusion of proposed subsection 233B(1AB) which removes the need to prove knowledge about the legislation because it applies absolute liability. However, because there is no equivalent defence where absolute liability is applied, the defence where the person can prove he or she did not know that the goods in his or her possession had been imported into Australia in contravention of the Act is preserved.

Item 108 - Amendment of inappropriate fault elements

747. Subparagraph 233BAA(4)(a) applies the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical elements of conduct, namely importing certain harmful goods, (such as certain performance enhancing drugs). Following application of the *Criminal Code*, it will not be possible to apply fault elements of knowledge or recklessness to a physical element consisting of conduct. Section 5.3 of the *Criminal Code* restricts the application of these fault elements to physical elements of circumstance or result, and the only fault element that may be applied to a physical element of conduct is intention (section 5.2 of the *Criminal Code*). Accordingly this item proposes the deletion of “knowingly or recklessly” from subparagraph 233BAA(4)(a) and replaced it with the appropriate fault element, namely intention. 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 be expressed to apply appropriately to the physical element of the circumstance in which conduct occurs, namely paragraph 233BAA(4)(b) which is that the goods were tier 1 goods. It is considered that subsection 233BAA(4)) will continue to operate in the same manner as at present following this amendment.

Item 109 - Clarification of fault element

748. This item amends paragraph 233BAA(4)(b) to clarify that recklessness will apply to the physical element of circumstance that the goods were tier 1 goods.

Item 110 - Absolute and strict liability applied

749. Item 110 inserts new subsection 233BAA(4A) which applies absolute liability to the matters in paragraph 233BAA(4)(c). This is appropriate because knowledge that the harmful good is specifically prohibited under the Act is not currently required to be proved and mistake is not a defence (subsection 6.1(2) of the *Criminal Code*). However, where the prohibition is focused on whether there had been approval, it is appropriate to apply strict liability. Strict liability provides for a defence where the person considered whether the importation was approved and was under a reasonable but mistaken belief that it was compliant (see sections 6.1 and 9.2 of the *Criminal Code*).

Item 111- Amendment of inappropriate fault elements

750. This proposes subsection 233BAA(5) which prohibits the export of tier 1 goods be amended in the same way as provided for in item 109.

Item 112 - Clarification of fault element

751. This item amends paragraph 233BAA(5)(b) to clarify that recklessness will apply to the physical element of circumstance that the goods were tier 1 goods.

Items 113 - Absolute and strict liability applied

752. This proposes subsection 233BAA(5) which prohibits the export of tier 1 goods be amended in the same way as provided for in item 110.

Item 114- Amendment of inappropriate fault elements

753. This proposes subsection 233BAB(5) which prohibits the import of tier 2 goods (for example child pornography and specified firearms) be amended in the same way as provided for in item 108.

Item 115 - Clarification of fault element

754. This item amends paragraph 233BAB(5)(b) to clarify that recklessness will apply to the physical element of circumstance that the goods were tier 2 goods.

Items 116 - Absolute and strict liability applied

755. This proposes subsection 233BAB(5) which prohibits the import of tier 2 goods be amended in the same way as provided for in item 110.

Item 117 - Amendment of inappropriate fault elements

756. This proposes subsection 233BAB(6) which prohibits the export of tier 2 goods be amended in the same way as provided for in item 108.

Item 118- Clarification of fault element

757. This item amends paragraph 233BAB(6)(b) to clarify that recklessness will apply to the physical element of circumstance that the goods were tier 2 goods.

Items 119 - Absolute and strict liability applied

758. This proposes subsection 233BAB(6) which prohibits the export of tier 2 goods be amended in the same way as provided for in items 110.

Items 120 - 121 - Amendment of inappropriate fault elements: clarification of fault elements

759. Subsection 234(1) contains offences relevant to the evasion of the payment of duty. Paragraphs 234(1)(c) and (d) apply the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical elements of conduct, namely obtaining or retaining the diesel fuel rebate and making a statement.

Following application of the *Criminal Code*, it will not be possible to apply fault elements of knowledge or recklessness to a physical element consisting of conduct. Section 5.3 of the *Criminal Code* restricts the application of these fault elements to physical elements of circumstance or result, and the only fault element that may be applied to a physical element of conduct is intention (section 5.2 of the *Criminal Code*). Accordingly these items propose the deletion of “knowingly or recklessly” from paragraphs 234(1)(c) and (d) and replaced it with the appropriate fault element, namely intention. The fault element of intention is the direct *Criminal Code* equivalent of “knowingly” where the latter has been applied to physical elements of conduct.

760. The fault element of recklessness is expressed to apply appropriately to the physical element of the circumstance in which conduct occurs, namely subparagraph 234(1)(d)(i) which is that the statement was false and misleading in a material particular. It is considered that paragraphs 234(1)(c) and (d) will continue to operate in the same manner as at present following this amendment.

761. This item also proposes the amendment of paragraphs 234(1)(c) and (d) to clarify that the fault element of recklessness applies to the following physical elements of circumstance:

- (a) that the person is not entitled to the rebate under section 164 (paragraph 234(1)(c));
- (b) that the statement referred to in paragraph 234(1)(d) is false or misleading in a material particular; and
- (c) that the fact that without the matter or thing, the statement referred to in paragraph 234(1)(d) is misleading in a material particular.

762. If these amendments were not made, it is possible that the incorrect interpretation could be made that the relevant fault element is intention. The proposed amendments put it beyond doubt that recklessness is the appropriate fault element.

Item 122 – Absolute liability applied

763. This item proposes to insert subsection 234(2AA) which provides that absolute liability is applied to the physical element of circumstance contained in the offence in paragraph 234(1)(c) that the lack of entitlement is a lack of entitlement under section 164.

764. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application.

765. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 123 - Amendment of inappropriate fault elements

766. Subsection 234(4) (added in 1997) contains an offence which concerns entries in statements about the nature and purpose of certain fuel. It is relevant to the payment of a fuel rebate. Subsection 234(4) applies the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical elements of conduct, namely the entry in the statement. Following application of the *Criminal Code*, it will not be possible to apply fault elements of knowledge or recklessness to a physical element consisting of conduct. Section 5.3 of the *Criminal Code* restricts the application of these fault elements to physical elements of circumstance or result, and the only fault element that may be applied to a physical element of conduct is intention (section 5.2 of the *Criminal Code*). Accordingly these items propose the deletion of “knowingly or recklessly” from subsection 234(1)(4) and replaced it with the appropriate fault element, namely intention. The fault element of intention is the direct *Criminal Code* equivalent of “knowingly” where the latter has been applied to physical elements of conduct. The fault element of recklessness will be expressed to apply appropriately to the physical element of the circumstance in which conduct occurs, namely recklessness as to whether the entry is correct. It is considered that subsection 234(4) will continue to operate in the same manner as at present following this amendment.

Item 124 - Amendment of inappropriate fault elements

767. Item 124 amends an offence concerning the entry of statements about fuel which is in the same terms as that amended by item 123. The amendment is the same and is made for the same reasons.

Item 125 – Repeal of note

768. This item repeals the note following subsection 234(6), which provides that the offence in subsection 234(6) is of strict liability. The *Criminal Code* provides that where an offence is of strict liability, this must be expressly provided.

Item 126 – Strict liability applied

769. This item reapplies strict liability to the offence in subsection 234(6).

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

Item 127 – Repeal of note

771. This item repeals the note following subsection 234(7), which provides that the offence in subsection 234(7) is of strict liability. The *Criminal Code* provides that where an offence is of strict liability, this must be expressly provided.

Item 128 – Strict liability applied

772. This item reapplies strict liability to the offence in subsection 234(7).

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

Item 129 - Drafting amendment

774. This simply brings the provision into line with existing drafting policy.

Items 130 - 131 - Clarifying an authorisation exception

775. Section 234A prohibits unauthorised entry to sensitive places near the Customs barrier, including on ships, aircraft and wharves. The exception to this is where such entry is authorised. Items 130 - 131 amends subsection 234A(1) and inserts subsection 234A(1A) to make it clear the exception is not an element of the offence but an exception to the offence.

Item 132 - Drafting amendment

776. This simply brings the provision into line with existing drafting policy.

Items 133 - 134 - Clarifying reasonable excuse defence and strict liability

777. Item 133 proposes to remove the defence of reasonable excuse from subsection 234AB(3). The defence is recreated in a new subsection 234AB(3A) by item 134. The rationale for this amendment is to prevent any misinterpretation 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. Currently reasonable excuse is treated as a defence under section 14 of the *Crimes Act 1914*.

778. Item 134 also inserts proposed subsection 234AB(3B) which applies strict liability to the offence in subsection 234AB(3) of the Act. Subsection 234AB(3) prohibits failure to comply with a direction given by an officer in relation to the operation of cameras and other electronic devices. The defendant has a defence if he or she has a reasonable excuse, and the offence carries a maximum fine of \$1,000). This is an administrative obligation with a relatively low penalty and is therefore the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2. Item 134 also inserts the standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability.

Items 135 - 136

779. These items update cross-references.

Items 137 - 138 - limitation of ancillary provisions

780. These items propose that sections 236 (which provides an offence for aiding and abetting under the Act) and 237 (an offence for attempts under the Act) be limited in their application to 'Customs prosecutions.' Attempt and complicity are dealt with in sections 11.1 and 11.2 of the *Criminal Code*, but as explained at item 2, it is proposed these provisions should be retained in relation to offences which are dealt with by

'Customs prosecution' because of their unusual nature. It is proposed that sections 236 and 237 should not longer apply to other offences in the Act.

Item 139 - Amendment of inappropriate fault element

781. Subsection 243K(1) contains an offence which prohibits contraventions of restraining orders in relation to property which may be required to recover pecuniary penalties for dealings in narcotic drugs. Subsection 234(4) applies the fault element of knowledge (“knowingly”) in relation to the physical elements of conduct, namely the contravention of the restraining order. Following application of the *Criminal Code*, it will not be possible to apply fault elements of knowledge to a physical element consisting of conduct. Section 5.3 of the *Criminal Code* restricts the application of these fault elements to physical elements of circumstance or result, and the only fault element that may be applied to a physical element of conduct is intention (section 5.2 of the *Criminal Code*). Accordingly these items propose the deletion of “knowingly” from subsection 243K(1) and replaced it with the appropriate fault element, namely intention. The fault element of intention is the direct *Criminal Code* equivalent of “knowingly” where the latter has been applied to physical elements of conduct.

Item 140 - Strict liability applied

782. Item 140 also inserts proposed subsection 275A(2A) which applies strict liability to the offence in subsection 275A(2) of the Act. Subsection 275A(2) prohibits 'masters' from disobeying a direction given by an officer in relation to the movement of a ship or aircraft from a boarding station. The offence carries a maximum fine of \$10,000). This is an administrative obligation with a penalty that is a monetary one and not very significant when viewed in the context of the particular industry. It is therefore the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2. Item 140 also inserts the standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability.

Schedule 22 - Customs Administration Act 1985

Item 1 - Application of all Criminal Code principles except corporate criminal responsibility

783. This item inserts proposed section 3A which applies Chapter 2 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 (sections 16AA). 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, and those similar to it, 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.

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

Item 2 - Replacing references to certain Crimes Act 1914 provisions

785. Certain *Crimes Act 1914* provisions, including sections 5, 7, 7A and 86, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the references in subsection 16AA(1) to sections 5, 7, 7A and 86 of the *Crimes Act 1914*, which concern aiding, abetting, counselling and procuring the commission of primary offences, attempting to commit primary offences, incitement to commit primary offences, and conspiracy to commit primary offences, be replaced by references to the

Criminal Code provisions which deal with these matters (sections 11.1, 11.2, 11.4 and 11.5). These *Criminal Code* provisions will apply to this Act by virtue of this Bill.

Schedule 23 - Defence Force Discipline Appeals Act 1955

Item 1 - Application of Criminal Code

786. 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.

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

Items 2 and 3 – Clarifying reasonable excuse defence: strict liability applied

788. These items propose two amendments to section 43. First, they remove the defence of reasonable excuse from section 43 and recreate it in a new subsection 43(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, and puts it beyond doubt that it is a defence to the offence.

789. The standard note is added after proposed subsection 43(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 subsection 43(2).

790. Second, item 3 inserts proposed subsection 43(3) which applies strict liability to the offence in subsection 43(1) of the Act. Subsection 43(1) provides that a person served with a summons under this Act to attend the Tribunal, or to attend a person appointed to receive evidence on behalf of the Tribunal, shall not (a) fail to attend the Tribunal or the person so appointed; or (b) fail to produce any document, book or writing in his custody or control which he was required by the summons to produce.

The offence carries a penalty of \$1000 or imprisonment for 6 months, and the person can rely on the defence of reasonable excuse. This is a procedural obligation with a low penalty and is therefore the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 4 - Strict liability applied

792. This item inserts proposed subsection 44(2) which applies strict liability to the offence in subsection 44(1) of the Act. Subsection 44(1) provides that a person who has been summonsed under this Act to attend the Tribunal or to attend a person appointed to receive evidence on behalf of the Tribunal as a witness shall appear and report himself from day to day unless excused or until released from further attendance by a member of the Tribunal or the person so appointed. The offence carries a fine of \$1000 or imprisonment for 6 months. This is a procedural obligation with a low penalty and is therefore the type of offence where strict liability is applied under the existing law.

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

Items 5 and 6 – Clarifying reasonable excuse defence

794. These items propose to remove the defence of reasonable excuse from section 45 and recreate it in a new subsection 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, and puts it beyond doubt that it is a defence to the offence.

795. The standard note is added after proposed subsection 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 subsection 45(2).

Item 7 - Amendment of inappropriate fault element

796. Paragraph 46(a) uses the fault element “wilfully” in relation to the physical element of conduct, namely insulting or disturbing the Tribunal. This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes the replacement of “wilfully” in paragraph 46(a) by the appropriate and equivalent *Criminal Code* fault element, namely intention. It is considered that paragraph 46(a) will continue to operate in the same manner as at present following this amendment.

Schedule 24 - Disability Discrimination Act 1992

Item 1 - Application of all Criminal Code principles except corporate criminal responsibility

797. This item inserts proposed section 12A which applies Chapter 2 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 separate provisions in relation to corporate criminal responsibility in relation to offences under that Act (subsections 123(1) and (2)). 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, and those similar to it, 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.

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

Item 2 - Removal of ancillary provision duplicating the Criminal Code

799. This item proposes to amend section 43 by repealing paragraph 43(b), which will remove the reference to inciting another person to commit a primary offence created under a provision of Part 2, Division 4 of the Act. Reliance will instead be placed upon the relevant general ancillary provision in the *Criminal Code*, namely section 11.4 (inciting the commission of a primary offence). This ancillary provision is present in Chapter 2 of the *Criminal Code*, which is being applied to this Act by this Bill and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

Items 3 and 4 – Clarifying reasonable excuse defence: strict liability applied

800. These items propose two amendments to section 107. First, they remove the defence of reasonable excuse from subsection 107(1) and recreate it in a new subsection 107(1A). 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.

801. The standard note is added after proposed subsection 107(1A) 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 107(1A).

802. Second, item 4 inserts proposed subsection 107(1B) which applies strict liability to the offence in subsection 107(1) of the Act. Subsection 107(1) provides that a person who engages in an act of discrimination for the purposes of section 107 and

who receives a notice requiring him or her to disclose to the Commissioner or the Commission the source of the actuarial or statistical data on which the act of discrimination was based must comply with that notice. The person can claim a defence if he or she has a reasonable excuse, and the offence carries a fine of \$1000. 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 5 - 7 – Clarification of exception to the offence

804. These items propose to remove the exception of “except in the performance of a duty or in connection with this Act or in the performance or exercise of such a function or power” from subsection 127(1) and recreate it as subsection 127(3A). The rationale for this amendment is to prevent future interpretation that the exception 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 an exception to the offence. The standard note concerning the imposition of an evidential burden on the defendant by subsection 13.3(3) of the *Criminal Code* is added.

Schedule 25 - Evidence Act 1995

Item 1 - Application of Criminal Code

805. This item inserts proposed section 8A which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility.

806. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision. A further note is added stating that section 8A is not mirrored in the NSW Act because the *Criminal Code* only applies to the Commonwealth Act.

Item 2 - Strict liability applied

807. This item inserts proposed subsection 195(2) which applies strict liability to the offence in subsection 195(1) of the Act. Subsection 195(1) provides that a person who prints or publishes any of the matters listed in paragraphs 195(1)(a), (b) or (c) without the express permission of a court is guilty of an offence. The offence carries a fine of 60 penalty units. 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

808. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision. A further note is added stating that subsection 195(2) is not mirrored in the NSW Act because the *Criminal Code* only applies to the Commonwealth Act.

Schedule 26 - Evidence and Procedure (New Zealand) Act 1994***Item 1 - Application of Criminal Code***

809. 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.

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

Item 2 - Amendment of inappropriate fault element

811. Paragraphs 37(b) and (c) use the fault element “wilfully” in relation to the physical elements of conduct, namely threatening, intimidating or insulting any of the persons described by subparagraphs 37(b)(i)-(iii) who are taking part in relevant court proceedings or interrupting or obstructing such a court proceeding. This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows

the use of new fault elements (subsection 5.1(2)) and the present offences would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes that “wilfully” be deleted from paragraphs 37(b) and (c) and replaced with “intentionally”. It is considered that paragraphs 37(b) and (c) will continue to operate in the same manner as at present following this amendment.

Item 3 - Amendment of inappropriate fault element: lawful excuse defence

812. This item proposes two amendments to paragraph 37(d). First, paragraph 37(d) uses the fault element “wilfully” in relation to the physical element of conduct, namely disobeying an order or direction of a relevant New Zealand court. This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes that “wilfully” be deleted from paragraph 37(d) and replaced with “intentionally”. It is considered that paragraph 37(d) will continue to operate in the same manner as at present following this amendment.

813. The second amendment proposed by this item is to remove the specific defence of lawful excuse from paragraph 37(d). Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful excuse defence see the explanation at item 3 of Schedule 2.

Schedule 27 - Family Law Act 1975

Item 1 - Application of Criminal Code

814. This item inserts proposed section 7A which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility.

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

Item 2 - Amendment of inappropriate fault element: removal of ancillary provision duplicating the Criminal Code

816. This item proposes two amendments to subsection 65Y(1). First, subsection 65Y(1) applies the fault elements of intention and recklessness (identified as “intentionally or recklessly”) to the physical element of conduct, namely taking or sending a child from Australia in contravention of this subsection. 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 subsection 65Y(1). Similarly, the fault element of intention will still continue to apply to the physical element of conduct by virtue of section 5.6. It is considered that subsection 65Y(1) will continue to operate in the same manner as at present following this amendment.

817. The second amendment proposed by this item is to amend subsection 65Y(1) by removing the reference to attempting to commit a primary offence against this

subsection, namely attempting to take or send a child from Australia if a Part VII order is in force in relation to the child and the person is a party to the proceedings in which the order was made or the person is acting on behalf of or at the request of a party. Reliance will instead be placed upon the relevant general ancillary provision in the *Criminal Code*, namely section 11.1 (attempting to commit a primary offence).

Item 3 - Note

818. This item adds a note after subsection 65Y(1) stating that the ancillary offence provisions of the *Criminal Code*, including section 11.1 (attempts), apply in relation to the offence created by subsection 65Y(1). This item is consequent upon the amendment proposed by item 2 which deletes the reference to attempting to take or send a child from Australia in contravention of subsection 65Y(1). It is felt that the nature of this provision warrants adding an explicit note to draw attention to the fact that the deletion of the reference to attempt does not limit the scope of criminal responsibility in relation to a person attempting to contravene subsection 65Y(1).

Item 4 - Removal of ancillary provision duplicating the Criminal Code

819. This item proposes to amend subsection 65Y(2) by removing the reference to attempting to commit the primary offence created by subsection 65Y(1). The amendment is consequent upon the amendment being made to subsection 65Y(1) by item 3 of this Bill.

Item 5 - Evidential burden note

820. This item proposes the insertion of a note after subsection 65Y(2) which makes it clear that the defendant bears an evidential burden in relation to a defence raised under subsection 65Y(2). Subsection 13.3(6) of the *Criminal Code* provides that an evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist (as the case may be).

Item 6 - Amendment of inappropriate fault element: removal of ancillary provision duplicating the Criminal Code

821. This item proposes two amendments to subsection 65Z(1). First, subsection 65Z(1) applies the fault elements of intention and recklessness (identified as “intentionally or recklessly”) to the physical element of conduct, namely taking or sending a child from Australia in contravention of this subsection. 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 subsection 65Z(1). Similarly, the fault element of intention will still continue to apply to the physical element of conduct by virtue of section 5.6. It is considered that subsection 65Z(1) will continue to operate in the same manner as at present following this amendment.

822. The second amendment proposed by this item is to amend subsection 65Z(1) by removing the reference to attempting to commit a primary offence against this subsection, namely attempting to take or send a child from Australia if proceedings for a Part VII order are pending in relation to the child and the person is a party to the proceedings or the person is acting on behalf of or at the request of a party. Reliance will instead be placed upon the relevant general ancillary provision in the *Criminal Code*, namely section 11.1 (attempting to commit a primary offence).

Item 7 - Note

823. This item adds a note after subsection 65Z(1) stating that the ancillary offence provisions of the *Criminal Code*, including section 11.1 (attempts), apply in relation to

the offence created by subsection 65Z(1). This item is consequent upon the amendment proposed by item 6 which deletes the reference to attempting to take or send a child from Australia in contravention of subsection 65Z(1). It is felt that the nature of this provision warrants adding an explicit note to draw attention to the fact that the deletion of the reference to attempt does not limit the scope of criminal responsibility in relation to a person attempting to contravene subsection 65Z(1).

Item 8 - Removal of ancillary provision duplicating the Criminal Code

824. This item proposes to remove amend subsection 65Z(2) by removing the reference to attempting to commit the primary offence created by subsection 65Z(1). The amendment is consequent upon the amendment being made to subsection 65Z(1) by item 7 of this Bill.

Item 9 - Evidential burden note

825. This item proposes the insertion of a note after subsection 65Z(2) which makes it clear that the defendant bears an evidential burden in relation to a defence raised under subsection 65Z(2). Subsection 13.3(6) of the *Criminal Code* provides that an evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matters exists or does not exist (as the case may be).

Items 10 - 11 - Amendment of inappropriate fault element: clarifying reasonable excuse defence

826. These items propose two amendments to section 65ZA. First, subsection 65ZA(2) applies the fault elements of intention and recklessness (identified as “intentionally or recklessly”) to the physical element of conduct, namely permitting a prescribed child to leave Australia in contravention of this subsection. 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 subsection 65ZA(2). Similarly, the fault element of intention will still continue to apply to the physical element of conduct by virtue of section 5.6. It is considered that subsection 65ZA(2) will continue to operate in the same manner as at present following this amendment.

827. Second, these items propose to remove the defence of reasonable excuse from subsection 65ZA(2) and recreate it in a new subsection 65ZA(2A). 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.

828. The standard note is added after proposed subsection 65ZA(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 65ZA(2A).

Item 12 - Evidential burden note

829. This item proposes the insertion of a note after subsection 65ZA(3) which makes it clear that the defendant bears an evidential burden in relation to a defence raised under subsection 65ZA(3). Subsection 13.3(6) of the *Criminal Code* provides that an evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist (as the case may be).

Items 13 - 14 - Amendment of inappropriate fault element: clarifying reasonable excuse defence

830. These items propose two amendments to section 65ZB. First, subsection 65ZB(2) applies the fault elements of intention and recklessness (described in the phrase “intentionally or recklessly”) to the physical element of conduct, namely permitting a prescribed child to leave Australia in contravention of this subsection. 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 subsection 65ZB(2). Similarly, the fault element of intention will still continue to apply to the physical element of conduct by virtue of section 5.6. It is considered that subsection 65ZB(2) will continue to operate in the same manner as at present following this amendment.

831. Second, these items propose to remove the defence of reasonable excuse from subsection 65ZB(2) and recreate it in a new subsection 65ZB(2A). 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.

832. The standard note is added after proposed subsection 65ZB(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 65ZB(2A).

Item 15 - Evidential burden note

833. This item proposes the insertion of a note after subsection 65ZB(3) which makes it clear that the defendant bears an evidential burden in relation to a defence raised under subsection 65ZB(3). Subsection 13.3(6) of the *Criminal Code* provides that an evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist (as the case may be).

Item 16 - Amendment of inappropriate fault element

834. Subsection 67P(1) applies the fault elements of intention and recklessness (described in the phrase “intentionally or recklessly”) to the physical element of conduct, namely disclosure of prescribed information by the Registrar or by any other person who obtains the information because of the provision of the information to the Registrar in contravention of this subsection, except in the circumstances stated by paragraphs 67P(1)(a)-(e). 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 subsection 67P(1). Similarly, the fault element of intention will still continue to apply to the physical element of conduct by virtue of section 5.6. It is considered that subsection 67P(1) will continue to operate in the same manner as at present following this amendment.

Schedule 28 - Federal Court of Australia Act 1976

Item 1 - Application of Criminal Code

835. 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.

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

Item 2 - Amendment of inappropriate fault element

837. Paragraphs 32ZE(a) and (b) use the fault element “wilfully” in relation to the physical elements of conduct, namely threatening, intimidating or insulting any of the persons described by subparagraphs 32ZE(a)(i)-(iv) who are taking part in relevant court proceedings or interrupting or obstructing such a court proceeding. This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes the replacement of “wilfully” in paragraphs 32ZE(a) and (b) by the appropriate and equivalent *Criminal Code* fault element, namely intention. It is considered that paragraphs 32ZE(a) and (b) will continue to operate in the same manner as at present following this amendment.

Item 3 - Amendment of inappropriate fault element: lawful excuse defence

838. This item proposes two amendments to paragraph 32ZE(c). First, paragraph 32ZE(c) uses the fault element “wilfully” in relation to the physical element of conduct, namely disobeying an order or direction of the High Court of New Zealand sitting in Australia. This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes that “wilfully” be deleted from paragraph 32ZE(c) and replaced with “intentionally”. It is considered that paragraph 32ZE(c) will continue to operate in the same manner as at present following this amendment.

839. The second amendment proposed by this item is to remove the specific defence of lawful excuse from paragraph 32ZE(c). Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful excuse defence see the explanation at item 3 of Schedule 2.

Items 4 and 5 – Clarifying reasonable excuse defence: strict liability applied

840. These items propose two amendments to section 42. First, they remove the defence of reasonable excuse from subsection 42(1) and recreate it in a new subsection 42(1B). 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.

841. The standard note is added after proposed subsection 42(1B) 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 42(1B).

842. Second, item 5 inserts proposed subsection 42(1A) which applies strict liability to the offence in subsection 42(1) of the Act. Subsection 42(1) provides that a person who has been served with a summons to attend as a juror or otherwise lawfully appointed to serve as a juror shall not fail to attend in accordance with the summons or appointment, and having attended in accordance with the summons or appointment shall not withdraw himself or herself from the Court without the permission of the Sheriff before being discharged or excused by a Judge or the Sheriff. The offence carries a fine of \$200 or 1 month imprisonment, and the person can rely on the defence of reasonable excuse. This form of obligation with a relatively low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 6 - Clarifying a fault element: removal of ancillary provision duplicating the Criminal Code

844. This item proposes two amendments to subsection 42(2). First, that the phrase “for the purpose of” in subsection 42(2) be replaced by the phrase “with the intention of”. For details on the reasons for replacing the phrase “for the purpose of” see the explanation at item 21 of Schedule 5. In the case of subsection 42(2) the correct interpretation is that the defendant personates a juror with the intention of sitting as that person on a jury, and this item proposes the appropriate amendment accordingly.

845. The second amendment proposed by this item is to amend subsection 42(2) by removing the reference to attempting to commit a primary offence against this subsection, namely personating a juror for the purpose of sitting as that person on a jury. Reliance will instead be placed upon the relevant general ancillary provision in the *Criminal Code*, namely section 11.1 (attempting to commit a primary offence). This ancillary provision is present in Chapter 2 of the *Criminal Code*, which is being applied to this Act by this Bill and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

Item 7 - Removal of ancillary provision duplicating the Criminal Code

846. This item proposes to amend subsection 42(3)(a) by removing the reference to attempting to commit a primary offence against this subsection, namely corrupting a juror. Reliance will instead be placed upon the relevant general ancillary provision in the *Criminal Code*, namely section 11.1 (attempting to commit a primary offence). This ancillary provision is present in Chapter 2 of the *Criminal Code*, which is being applied to this Act by this Bill and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

Items 8 - 11 – Clarifying reasonable excuse defence and strict liability

847. These items propose to remove the defence of reasonable excuse from subsections 58(1) and (2) and recreate it in a new subsection 58(2A). 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.

848. The standard note is added after proposed subsection 58(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 58(2A).

849. Item 9 inserts proposed subsection 58(1A) which applies strict liability to the offence in subsection 58(1) of the Act. Subsection 58(1) provides that a person who has been served with a summons to appear as a witness before the Court shall not fail to attend as required by the summons or fail to appear and report from day to day unless excused or released from further attendance by the Court. The person can claim a defence if he or she has a reasonable excuse, and the offence carries a fine of \$1000 or imprisonment for 3 months. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Schedule 29 - Financial Transaction Reports Act 1988

Item 1 - Application of all Criminal Code principles except corporate criminal responsibility

851. This item inserts proposed section 6A which applies Chapter 2 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 34). 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, and those similar to it, 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.

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

Item 2 - Lawful authority defence

853. This item proposes to remove the specific defence of lawful authority from subsections 16(5A) and 16(5AA), which appears in these provisions as “unless required to do so under this Act or any other Act”. Reliance may instead be placed upon the general defence of lawful authority, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful authority defence see the explanation at item 3 of Schedule 2.

Item 3 - Strict liability applied

854. This item inserts proposed subsection 18(9A) which applies strict liability to the offence in subsection 18(9) of the Act. Subsection 18(9) provides that a person, being a cash dealer, who contravenes subsection 18(8) or 18(8A) is guilty of an offence. Subsections 18(8) and 18(8A) require a cash dealer to give written notice to the Director in the event that an account other than an RSA account has been blocked for 12 months after the infringement day, or in the event that after such blockage the account ceases to be blocked as a result of the cash dealer’s actions. The offence

created by subsection 18(9) attracts a fine of 10 penalty units. This is the type of administrative obligation offence where strict liability is applied under the existing law because it utilises the imperative “must”, it does not contain any express or necessarily implied fault elements, and the relevant penalty is of a very low order. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 4 and 5 – Clarification of fault element: amendment of inappropriate fault elements

856. This item proposes the repeal and substitution of paragraphs 21(3A)(a) and (b) to clarify that the fault element of recklessness applies to the following physical elements of circumstance:

- (a) that the statement referred to in paragraph 21(3A)(a) is false or misleading in a material particular; and
- (b) that the reference referred to in paragraph 21(3A)(b) is misleading in a material particular.

857. If these amendments were not made, it is possible that the incorrect interpretation could be made that the relevant fault element in relation to these physical elements is intention. The proposed amendments put it beyond doubt that recklessness is the appropriate fault element.

858. Further, subsection 21(3A) applies the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical elements of conduct, namely making a statement in a change of name statement or omitting from a change of name statement any matter or thing. 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” from subsection 21(3A) and substitution of the appropriate fault element, namely intention. 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 operation of this amendment to each physical element of circumstance in subsection 21(3A). It is considered that subsection 21(3A) will continue to operate in the same manner as at present following this amendment.

Items 6 and 7 – Clarification of fault element: amendment of inappropriate fault elements

859. This item proposes the repeal and substitution of paragraphs 21A(3)(a) and (b) to clarify that the fault element of recklessness applies to the following physical elements of circumstance:

- (a) that the statement referred to in paragraph 21A(3)(a) is false or misleading in a material particular; and
- (b) that the change of name statement referred to in paragraph 21A(3)(b) is misleading in a material particular.

860. If these amendments were not made, it is possible that the incorrect interpretation could be made that the relevant fault element is intention. The proposed amendments put it beyond doubt that recklessness is the appropriate fault element.

861. Further, subsection 21A(3) applies the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical elements of conduct, namely making a statement in a change of name statement or omitting from a change of name statement any matter or thing. 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” from subsection 21A(3) and substitution of the appropriate fault element, namely intention. 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 to each physical element of circumstance in subsection 21A(3) by operation of this amendment. It is considered that subsection 21A(3) will continue to operate in the same manner as at present following this amendment.

Item 8 - Amendment of inappropriate fault element

862. Subsection 23A(3) applies the fault element of recklessness (or “recklessly”) in relation to the proscribed physical element of conduct, contravening subsection (2). Subsection (2) imposes record transfer obligations on a transferor ADI. 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 “recklessly” in subsection 23A(3). Upon application of the *Criminal Code*, its default fault provision (section 5.6) will apply the fault element of recklessness to each physical element of circumstance in subsection 23A(3). It is considered that subsection 23A(3) will continue to operate in the same manner as at present following this amendment.

Items 9 and 10 – Clarifying reasonable excuse defence: strict liability applied

863. These items propose two amendments to section 27B. First, they remove the defence of reasonable excuse from subsection 27B(3) and recreate it in a new subsection 27B(4A). 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.

864. The standard note is added after proposed subsection 27B(4A) 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 27B(4A).

865. Second, item 10 inserts proposed subsection 27B(4B) which applies strict liability to the offence in subsection 27B(4) of the Act. Subsection 27B(4) provides that a person who contravenes subsections 27B(2) or 27B(3) is guilty of an offence. Subsections 27B(2) and 27B(3) require a person who ceases to be an authorised officer to return his or her identity card to the Director as soon as practicable. The offence created by subsection 27B(4) attracts a fine of 1 penalty unit, and the person can rely upon the reasonable excuse defence. This is the type of administrative obligation offence where strict liability is applied under the existing law: it does not contain any express or necessarily implied fault elements, and the relevant penalty is of a very low order. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 11 and 12 – Clarification of fault element: amendment of inappropriate fault element

867. This item proposes the repeal and substitution of paragraphs 29(1)(a) and (b) to clarify that the fault element of knowledge applies to the following physical elements of circumstance:

- (a) that the statement referred to in paragraph 29(1)(a) is false or misleading in a material particular; and
- (b) that the statement referred to in paragraph 29(1)(b) is misleading in a material particular.

868. If these amendments were not made, it is possible that the incorrect interpretation could be made that the relevant fault element is intention. The proposed amendments put it beyond doubt that knowledge is the appropriate fault element.

869. Further, subsection 29(1) applies the fault elements of knowledge (“knowingly”) in relation to the physical elements of conduct, namely making a statement in a change of name statement or omitting from a change of name statement any matter or thing. 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” from subsection 29(1) and substitution of the appropriate fault element, namely intention. The fault element of intention is the direct *Criminal Code* equivalent of “knowingly” where the latter has been applied to physical elements of conduct. It is considered that subsection 29(1) will continue to operate in the same manner as at present following this amendment.

Items 13 and 14 – Clarification of fault element: amendment of inappropriate fault element

870. This item proposes the repeal and substitution of paragraphs 29(2)(a) and (b) to clarify that the fault element of knowledge applies to the following physical elements of circumstance:

- (a) that the statement referred to in paragraph 29(2)(a) is false or misleading in a material particular; and
- (b) that the statement referred to in paragraph 29(2)(b) is misleading in a material particular.

871. If these amendments were not made, it is possible that the incorrect interpretation could be made that the relevant fault element is intention. The proposed amendments put it beyond doubt that knowledge is the appropriate fault element.

872. Further, subsection 29(2) applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical elements of conduct, namely making a statement or omitting from a statement any matter or thing. 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 replacement of “knowingly” in subsection 29(2) by the appropriate and equivalent fault element, namely intention. It is considered that subsection 29(2) will continue to operate in the same manner as at present following this amendment.

Items 15 and 16 – Clarification of fault element: amendment of inappropriate fault element

873. This item proposes the repeal and substitution of paragraphs 29(2A)(a) and (b) to clarify that the fault element of knowledge applies to the following physical elements of circumstance:

- (a) that the statement referred to in paragraph 29(2A)(a) is false or misleading in a material particular; and
- (b) that the statement referred to in paragraph 29(2A)(b) is misleading in a material particular.

874. If these amendments were not made, it is possible that the incorrect interpretation could be made that the relevant fault element is intention. The proposed amendments put it beyond doubt that knowledge is the appropriate fault element.

875. Further, subsection 29(2A) applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical elements of conduct, namely making a statement or omitting from a statement any matter or thing. 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 replacement of “knowingly” in subsection 29(2A) by the appropriate and equivalent fault element, namely intention. It is considered that subsection 29(2A) will continue to operate in the same manner as at present following this amendment.

Item 17 – Clarification of fault element: amendment of inappropriate fault element

876. This item proposes the amendment of paragraphs 29(3)(a) and (b) to clarify that the fault element of knowledge applies to the physical element of circumstance that the report, statement or declaration is false or misleading in a material particular.

877. If this amendment were not made, it is possible that the incorrect interpretation could be made that the relevant fault element is intention. The proposed amendment puts it beyond doubt that knowledge is the appropriate fault element.

878. Further, subsection 29(3) applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical elements of conduct, namely making a report, statement or declaration or omitting from such a report, statement or declaration any matter or thing. 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 replacement of “knowingly” in subsection 29(3) by the appropriate and equivalent fault element, namely intention. It is considered that

subsection 29(3) will continue to operate in the same manner as at present following this amendment.

Item 18 - Amendment of inappropriate fault element

879. Subsections 30(1), 30(2) and 30(3) apply the fault element of knowledge (or “knowingly”) in relation to the proscribed physical elements of conduct, namely communicating information or maintaining an institution’s exemption register. 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” from subsections 30(1), 30(2) and 30(3) and the appropriate fault element, namely intention, will apply automatically by virtue of the *Criminal Code*’s default fault provision (section 5.6). The fault element of knowledge (here: “knows”) is inserted in relation to the physical elements of circumstance in subsections 30(1), 30(2) and 30(3) that the information or register (as the case may be) is incomplete. It is considered that subsections 30(1), 30(2) and 30(3) will continue to operate in the same manner as at present following this amendment.

Item 19 - Replacing references to certain Crimes Act 1914 provisions

880. Certain *Crimes Act 1914* provisions, including sections 7, 7A and 86, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the references in the definition of “offence against section 15” in subsection 33(10) to sections 7, 7A and 86 of the *Crimes Act 1914*, which concern attempting to commit primary offences, incitement to commit primary offences, and conspiring to commit primary offences, be

replaced by references to the *Criminal Code* provisions which deal with these matters (sections 11.1, 11.4 and 11.5). These *Criminal Code* provisions will apply to this Act by virtue of this Bill.

Schedule 30 - Geneva Conventions Act 1957

Item 1 - Application of Criminal Code

881. 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.

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

Item 2 - Removal of ancillary provisions duplicating the Criminal Code

883. This item proposes to amend subsection 7(1) by removing the references to aiding, abetting or procuring another person to commit a primary offence against this subsection, namely a grave breach of any of the Geneva Conventions. 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). These ancillary provisions are present in Chapter 2 of the *Criminal Code*, which is being applied to this Act by this Bill and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

Item 3 - Amendment of inappropriate fault element

884. Paragraph 7(4)(a) uses the fault element “wilful” in relation to the physical element of conduct, namely killing a person protected by the relevant Geneva Convention or by Protocol 1 to those Conventions. This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes the replacement of “wilful” in paragraph 7(4)(a) by the appropriate and equivalent *Criminal Code* fault element, namely intention. It is

considered that paragraph 7(4)(a) will continue to operate in the same manner as at present following this amendment.

Item 4 - Strict liability applied

885. This item inserts proposed subsection 15(1A) which applies strict liability to the offences in subsection 15(1) of the Act. Subsection 15(1) provides that a person shall not use for any purpose whatsoever any of the emblems specified in paragraphs 15(1)(a) to (d) or any design or wording resembling any such emblem without the consent in writing of the Minister or of a person authorised in writing by the Minister to give consent. The offences attract a fine of \$100. This is the type of offence where strict liability is applied under the existing law because it utilises the imperative “shall”, does not contain any express or necessarily implied fault elements, and the penalty is of a very low order. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Schedule 31 - High Court of Australia Act 1979

Item 1 - Application of Criminal Code

887. 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.

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

Item 2 - Strict liability applied

889. This item inserts proposed subsection 19(6A) which applies strict liability to the offence in subsection 19(6) of the Act. Subsection 19(6) provides that a person who contravenes or fails to comply with a direction in force under subsection 19(2) is

guilty of an offence. The offence attracts a fine of \$100. Subsection 19(2) relevantly provides that the Clerk of the Court has power to give directions in writing for the purpose of regulating the conduct of persons on any land or in any building connected with the operation of the Court. This type of obligation 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 3 - Strict liability applied

891. This item inserts proposed subsection 43(8) which applies strict liability to the offence in subsection 43(7) of the Act. Subsection 43(7) provides that a person who contravenes subsection 43(6) is guilty of an offence. The offence attracts a fine of \$200. Subsection 43(6) relevantly provides that the Auditor-General, or an authorised person, may require a person to furnish such information in the possession of the person or to which the person has access as the Auditor-General or authorised person considers necessary for the purposes of the functions of the Auditor-General under this Act. This type of administrative obligation 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Schedule 32 - Human Rights and Equal Opportunity Commission Act 1986

Item 1 - Application of Criminal Code

893. 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.

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

Item 2 - Strict liability applied

895. This item inserts proposed subsection 14(7A) which applies strict liability to the offence in subsection 14(7) of the Act. Subsection 14(7) provides that a person shall not contravene a direction given by the Commission under subsection 14(2) or (3). The offence attracts a fine of \$1000 for a natural person or \$5000 for a body corporate. Subsection 14(2) provides that in the circumstances prescribed by subsection 14(2) the Commission may give directions prohibiting the disclosure of the identity of the prescribed person. Subsection 14(3) states that the Commission may direct that any evidence or information given before or to the Commission and the contents of any document produced to the Commission shall not be published except in such manner as the Commission specifies. This is the type of directed 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 3 and 4 – Clarifying reasonable excuse defence

897. These items propose to remove the defence of reasonable excuse from subsections 23(1) and (2) and recreate it in a new subsection 23(2A). 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.

898. The standard note is added after proposed subsection 23(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 23(2A).

Items 5 and 6 – Clarifying reasonable excuse defence: strict liability applied

899. These items propose two amendments to section 46PL. First, they remove the defence of reasonable excuse from section 46PL and recreate it in a new subsection 46PL(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, and puts it beyond doubt that it is a defence to the offence.

900. The standard note is added after proposed subsection 46PL(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 subsection 46PL(2).

901. Second, item 6 inserts proposed subsection 46PL(3) which applies strict liability to the offence in subsection 46PL(1) of the Act. Subsection 46PL(1) provides that a person who has been given a direction under section 46PJ to attend a conference must not fail to attend as directed or fail to attend and report from day to day unless excused or released from further attendance by the person presiding at the conference. The

person can claim a defence if he or she has a reasonable excuse, and the offence carries a fine of 10 penalty units. This is the type of directed 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 presence of a “reasonable excuse” defence, and the penalty, which in this case is very low. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 7 and 8 – Clarifying reasonable excuse defence

903. These items propose to remove the defence of reasonable excuse from subsection 46PM(1) and recreate it in a new subsection 46PM(1A). 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.

904. The standard note is added after proposed subsection 46PM(1A) 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 46PM(1A).

Item 9

905. The amendment proposed by this item is consequential to the other amendments made by items 7 and 8.

Items 10 and 13 – Clarification of exception to the offence

906. These items propose to remove the exception of “except in the performance of a duty under or in connection with this Act or in the course of acting on behalf of the

Commission” from subsection 49(1) and recreate it as subsection 49(4B). The rationale for this amendment is to prevent future interpretation that the exception 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 an exception to the offence. The standard note concerning the imposition of an evidential burden on the defendant by subsection 13.3(3) of the *Criminal Code* is added.

907. Items 12 and 13 propose the insertion of a notes after subsection 49(3) and (4A) which makes it clear that the defendant bears an evidential burden in relation to a defence raised under subsection 49(3). Subsection 13.3(6) of the *Criminal Code* provides that an evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matters exists or does not exist (as the case may be).

Schedule 33 - International War Crimes Tribunals Act 1995

Item 1 - Application of Criminal Code

908. 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.

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

Item 2 - Amendment of inappropriate fault elements

910. Paragraphs 43(a) and (b) apply the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to the physical elements of conduct, namely contravening an order or hindering a Tribunal. 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” from paragraphs 43(a) and (b) and substitution of the appropriate fault element, namely intention. 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 paragraphs 43(a) and (b): see *Criminal Code* section 5.6. It is considered that paragraphs 43(a) and (b) will continue to operate in the same manner as at present following this amendment.

Schedule 34 - Marriage Act 1961

Item 1 - Application of Criminal Code

911. 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.

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

Item 2 - Strict liability applied

913. This item inserts proposed subsection 94(1A) which applies strict liability to the physical element of circumstance in subsection 94(1) that the person was married when the ceremony took place. Subsection 94(1) provides that a person who is married shall not go through a form of ceremony of marriage with any person. The offence carries a penalty of 5 years imprisonment. Whilst a penalty of this magnitude would ordinarily be indicative of a wholly fault-based offence, in this instance the defendant can rely upon the broad defences prescribed by subsection 94(2) in addition to the general mistake of fact defence in the *Criminal Code* (section 9.2). In any case the prosecution would be obliged to prove that the person possessed a relevant fault element, namely that he or she intended to go through a form or ceremony of marriage.

914. This physical element is an appropriate candidate for the application of strict liability because 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 a person who made a reasonable mistake as to whether he or she is married. Accordingly strict liability, and not absolute liability, is the appropriate application. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 3 - Application of defence of mistake of fact

916. This item proposes to insert subsection 94(3A) which puts beyond doubt that the defence of mistake of fact applies to an offence against subsection 94(1). This amendment is made necessary by the operation of subsection 94(2), which raises specified defences that are of the character of mistakes of fact pertaining to the issue of whether the person was married. Subsection 94(3A) confirms that the operation of the *Criminal Code* general mistake of fact defence (section 9.2) also applies to subsection 94(1). It also specifies that section 9.2 does not apply in relation to the specified mistake of fact defences raised by operation of subsections 94(2) and (3), namely that there cannot be a mistake of fact defence pertaining to the operation of another defence.

Item 4 - Strict liability applied

917. This item inserts proposed subsection 95(1A) which applies strict liability to the physical element of circumstance in subsection 95(1) that the person was not of marriageable age. Subsection 95(1) provides that a person shall not go through a form or ceremony of marriage with a person who is not of marriageable age. The offence carries a penalty of 5 years imprisonment. Whilst a penalty of this magnitude would ordinarily be indicative of a wholly fault-based offence, in this instance the defendant

can rely upon the broad defence prescribed by subsection 95(3) in addition to the general mistake of fact defence in the *Criminal Code* (section 9.2). In any case the prosecution would be obliged to prove that the person possessed a relevant fault element, namely that he or she intended to go through a form or ceremony of marriage.

918. 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 a person who made a reasonable mistake as to whether the other person was of marriageable age. Accordingly strict liability, and not absolute liability, is the appropriate application. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 5 - Strict liability applied

920. This item inserts proposed subsection 95(2A) which applies strict liability to the to the physical element of circumstance in subsection 95(2) that the other party to the marriage was a minor. Subsection 95(2) provides that a person shall not go through a form or ceremony of marriage with a person who is a minor unless the minor has been previously married or the written consent of those person(s) whose consent is required by the Act has been given or dispensed with in accordance with the Act. The offence carries a penalty of \$500 or six months imprisonment. The defendant can rely upon the broad defences prescribed by subsection 95(4) in addition to the general mistake of fact defence in the *Criminal Code* (section 9.2). In any case the prosecution would be obliged to prove that the person possessed a relevant fault element, namely that he or she intended to go through a form or ceremony of marriage.

921. 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 a person who made a reasonable mistake as to whether the other person was a minor. Accordingly strict

liability, and not absolute liability, is the appropriate application. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 6 - Limitation of defence of mistake of fact

923. This item proposes to insert subsection 95(3A) which puts beyond doubt that the defence of mistake of fact applies to an offence against subsection 95(1). This amendment is made necessary by the operation of subsection 95(3), which raises a specified defence that is of the character of a mistake of fact pertaining to the issue of whether the other person was of marriageable age. Subsection 95(3A) confirms that the operation of the *Criminal Code* general mistake of fact defence (section 9.2) also applies to subsection 95(1). It also specifies that section 9.2 does not apply in relation to the specified mistake of fact defences raised by operation of subsection 95(3), namely that there cannot be a mistake of fact defence pertaining to the operation of another defence.

Item 7 - Limitation of defence of mistake of fact

924. This item proposes to insert subsection 95(5) which puts beyond doubt that the defence of mistake of fact applies to an offence against subsection 95(2). This amendment is made necessary by the operation of subsection 95(4), which raise specified defences that are of the character of mistakes of fact pertaining to the issue of whether the other person had attained the age of 18 years or had previously been married, or that the written consent of those person(s) whose consent is required by the Act has been given or dispensed with in accordance with the Act. Subsection 95(5) confirms that the operation of the *Criminal Code* general mistake of fact defence (section 9.2) also applies to subsection 95(2). It also specifies that section 9.2 does not apply in relation to the specified mistake of fact defences raised by operation of subsection 95(4), namely that there cannot be a mistake of fact defence pertaining to the operation of another defence.

Items 8 and 9 – Clarifying reasonable excuse defence: strict liability applied

925. These items propose two amendments to section 105. First, they remove the defence of reasonable excuse from section 105 and recreate it in a new subsection 105(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, and puts it beyond doubt that it is a defence to the offence.

926. The standard note is added after proposed subsection 105(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 subsection 105(2).

927. Second, item 9 inserts proposed subsection 105(3) which applies strict liability to the offence in subsection 105(1) of the Act. Subsection 105(1) provides that a person on whom a notice under section 51 has been duly served shall not fail to comply with the notice. Section 51 concerns the issue by an authorised officer of a notice for production or forwarding of certificates. The offence carries a fine of \$100, and the person can rely on the defence of reasonable excuse. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 10 - Amendment of inappropriate fault element

929. Paragraph 106(b) uses the non-*Criminal Code* fault element “wilfully” in relation to the physical element of conduct, namely making a false statement in a certificate under subsection 112(3). This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes the replacement of “wilfully” in paragraph 106(b) by the

appropriate and equivalent *Criminal Code* fault element, namely intention. It is considered that paragraph 106(b) will continue to operate in the same manner as at present following this amendment.

Schedule 35 - Mutual Assistance in Business Regulation Act 1992

Item 1 - Application of Criminal Code

930. 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.

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

Items 2 and 3 – Clarifying reasonable excuse defence

932. These items propose to remove the defence of reasonable excuse from subsection 13(1) and recreate it in a new subsection 13(1A). 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.

933. The standard note is added after proposed subsection 13(1A) 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 13(1A).

Item 4

934. The amendment proposed by this item is consequential upon the amendments made by items 2 and 3.

Schedule 36 - Mutual Assistance in Criminal Matters Act 1987

Item 1 - Application of Criminal Code

935. 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.

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

Schedule 37 - Native Title Act 1993

Item 1 - Application of all Criminal Code principles except corporate criminal responsibility

937. This item inserts proposed section 8A which applies Chapter 2 of the *Criminal Code* to the Act, subject to subsection 8A(2). Chapter 2 establishes the codified general principles of criminal responsibility. Subsection 8A(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 offences under that Act (section 203FH, which is limited in its application to Part 11 of the Act). 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, and those similar to it, 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. However the exclusion of Part 2.5 is limited to Part 11 of the Act in recognition of the limited scope of section 203FH.

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

Items 2 and 3 – Clarifying reasonable excuse defence: strict liability applied

939. These items propose two amendments to section 171. First, they remove the defence of reasonable excuse from section 171 and recreate it in a new subsection 171(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, and puts it beyond doubt that it is a defence to the offence.

940. The standard note is added after proposed subsection 171(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 subsection 171(2).

941. Second, item 3 inserts proposed subsection 171(3) which applies strict liability to the offence in subsection 171(1) of the Act. Subsection 171(1) provides that a person who has been served in the prescribed way with a summons to appear before the Tribunal to give evidence and has been paid reasonable expenses must not fail to attend as required by the summons or fail to appear and report from day to day unless excused or released from further attendance by the Tribunal. The offence carries a fine of 20 penalty units, and the person can rely on the defence of reasonable excuse. This form of obligation with a low penalty is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 4 and 5 – Clarifying reasonable excuse defence

943. These items propose to remove the defence of reasonable excuse from section 172 and recreate it in a new subsection 172(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, and puts it beyond doubt that it is a defence to the offence.

944. The standard note is added after proposed subsection 172(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 subsection 172(2).

Item 6 - Amendment of inappropriate fault element: clarification of fault element

945. This item proposes two amendments to section 173. First, section 173 applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct, namely giving evidence that is false or misleading in a material particular when appearing before the Tribunal to give evidence. 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 replacement of “knowingly” in section 173 by the appropriate and equivalent fault element, namely intention. It is considered that section 173 will continue to operate in the same manner as at present following this amendment.

946. Second, this item proposes the amendment of section 173 to clarify that the fault element of knowledge applies to the following physical elements of circumstance that the evidence is false or misleading.

947. If this amendment were not made, it is possible that the incorrect interpretation could be made that the relevant fault element is intention. The proposed amendment puts it beyond doubt that knowledge is the appropriate fault element.

Items 7 and 8 - Clarifying reasonable excuse defence

948. These items propose to remove the defence of reasonable excuse from section 174 and recreate it in a new subsection 174(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, and puts it beyond doubt that it is a defence to the offence.

949. The standard note is added after proposed subsection 174(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 subsection 174(2).

Item 9 - Repeal of provision which duplicates a general Criminal Code offence

950. This item proposes the repeal of section 175 which states that a person must not, in complying with a summons under section 156, produce a document which the person knows is false or misleading in a material particular. Section 156 prescribes the powers of a Tribunal and includes a power to summons a person to produce such documents as are referred to in the summons. Section 175 will duplicate the general *Criminal Code* offence provision of producing a false or misleading document in compliance or in purported compliance with a law of the Commonwealth (section 137.2). Section 137.2 is being inserted into the *Criminal Code* by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (“the *Theft Fraud Act*”). Section 137.2 will apply to all conduct under Commonwealth law where a person produces a false or misleading document in compliance or in purported compliance with a law of the Commonwealth.

951. Section 175 therefore will duplicate section 137.1 and this item accordingly proposes the repeal of section 175.

Item 10 - Strict liability applied

952. This item inserts proposed subsection 176(2) which applies strict liability to the offences in subsection 176(1) of the Act. Subsection 176(1) provides that a person must not disclose any material in contravention of a direction made under section 92, 136F or 155. These sections concern directions prohibiting the disclosure of evidence and prescribed information. The offence attracts a fine of 40 penalty units. This is the type of directed 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 relatively low. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 11 - 12 – Clarifying reasonable excuse defence

954. These items propose to remove the defence of reasonable excuse from subsection 203DG(4) and recreate it in a new subsection 203DG(4A). 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.

955. The standard note is added after proposed subsection 203DG(4A) 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 203DG(4A).

Item 13

956. The amendment proposed by this item is consequential upon the amendments made by items 11 and 12.

Marginal note

957. This item amends the heading of subsection 203DG(7) by replacing “Knowingly” with “Intentionally” to reflect the appropriate fault element.

Schedule 38 - Parliamentary Privileges Act 1987***Item 1 - Application of Criminal Code***

958. This item inserts proposed section 3A. Subsection 3A(1) applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility.

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

960. Subsection 3A(2) clarifies that the *Criminal Code* does not apply to an offence against a House of Federal Parliament, which is not a criminal offence for the purposes of the *Criminal Code*.

Schedule 39 - Passenger Movement Charge Collection Act 1978***Item 1 - Application of Criminal Code***

961. 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.

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

Item 2 - Strict liability applied

963. This item inserts proposed subsection 6(2A) which applies strict liability to the offences in subsection 6(2) of the Act. Subsection 6(2) provides that where a charge in respect of the departure of a person from Australia is not paid before the departure,

the person is guilty of an offence. The offence attracts a fine of 1 penalty unit. This is the type of administrative 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 3 and 4 – Clarifying reasonable excuse defence

965. These items propose three amendments to subsection 8(1). First, they remove the defence of reasonable excuse from subsection 8(1) and recreate it in a new subsection 8(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, and puts it beyond doubt that it is a defence to the offence.

966. The standard note is added after proposed subsection 8(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 subsection 8(2).

967. Second, item 3 substitutes “fail” for “refuse” in subsection 8(1). This is necessary for the application of strict liability to subsection 8(1), as to “fail” to comply, unlike refusing to comply, does not necessarily imply fault.

968. Finally, item 4 inserts proposed subsection 8(1B) which applies strict liability to the offence in subsection 8(1) of the Act. Subsection 8(1), as amended by this Bill, provides that person shall not refuse to answer a question or produce a document when required to do so in pursuance of subsection 7(2). This is an obligation with a very low penalty and is therefore the type of offence where strict liability is applied under the existing law. In addition, a member would be able to rely on the defences of

reasonable excuse and mistake of fact. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Items 5 and 6 – Clarifying reasonable excuse defence

970. These items propose to remove the defence of reasonable excuse from subsection 8(3) and recreate it in a new subsection 8(3A). 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.

971. The standard note is added after proposed subsection 8(3A) 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 8(3A).

Item 7 - Strict liability applied

972. This item proposes to insert subsection 8(5) which provides that strict liability is applied to the physical elements of circumstance described in proposed paragraphs 8(5)(a) and (b) and which comprise elements of the offence in subsections 8(3) and (4). Subsections 8(3) and (4) respective provide that a person shall not obstruct or hinder, or assault or threaten, an authorised officer acting in the performance of his or her functions or the exercise of his or her powers under this Act.

973. These physical elements are appropriate candidates for the application of strict liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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 status of the obstructed etc person. Accordingly strict liability, and not absolute liability, is the appropriate application. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 8 – Clarification of fault element

975. This item proposes the repeal and substitution of paragraphs 9(3)(b) and (c) to clarify that the fault element of recklessness applies to the following physical elements of circumstance:

- (a) that the statement referred to in paragraph 9(3)(a) is false or misleading; and
- (b) that the document referred to in paragraph 9(3)(b) is false or misleading in a material particular.

976. If these amendments were not made, it is possible that the incorrect interpretation could be made that the relevant fault element is intention. The proposed amendments put it beyond doubt that recklessness is the appropriate fault element.

Schedule 40 - Privacy Act 1988

Item 1 - Application of all Criminal Code principles except corporate criminal responsibility

977. This item inserts proposed section 3A which applies Chapter 2 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 separate provisions in relation to corporate criminal responsibility in relation to offences under

that Act (subsections 99A(1), (2), (6) and (7)). 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, and those similar to it, 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.

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

Item 2 - Removal and amendment of inappropriate fault elements

979. Subsections 18C(4), 18D(4), 18K(4), 18L(2), 18N(2), 18Q(9), 18R(2) and 18S(3) apply the fault elements of knowledge and recklessness (“knowingly or recklessly”) in relation to their respective physical elements of conduct. 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” from subsections 18C(4), 18D(4), 18K(4), 18L(2), 18N(2), 18Q(9), 18R(2) and 18S(3) and substitution of the appropriate fault element, namely intention. 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 subsections 18C(4), 18D(4), 18K(4), 18L(2), 18N(2), 18Q(9), 18R(2) and 18S(3): see *Criminal Code* section 5.6. It is considered that subsections 18C(4), 18D(4), 18K(4), 18L(2), 18N(2), 18Q(9), 18R(2) and 18S(3) will continue to operate in the same manner as at present following this amendment.

Items 3 and 4 – Clarifying reasonable excuse defence

980. These items propose to remove the defence of reasonable excuse from subsection 46(2) and recreate it in a new subsection 46(2A). 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.

981. The standard note is added after proposed subsection 46(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 46(2A).

Item 5 - Replacing references to certain Crimes Act 1914 provisions

982. Certain *Crimes Act 1914* provisions, including sections 7, 7A and 86, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the references in paragraph (b) of the definition of “credit reporting offence” in subsection 49(4) to sections 7, 7A and 86 of the *Crimes Act 1914*, which concern attempting to commit primary offences, incitement to commit primary offences, and conspiring to commit primary offences, be replaced by references to the *Criminal Code* provisions which deal with these matters (sections 11.1, 11.4 and 11.5). These *Criminal Code* provisions will apply to this Act by virtue of this Bill.

Item 6 - Replacing references to certain Crimes Act 1914 provisions

983. Certain *Crimes Act 1914* provisions, including sections 7, 7A and 86, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001. It will be necessary to replace references to these *Crimes Act* provisions with references to

relevant *Criminal Code* provisions. This item proposes that the references in paragraph (b) of the definition of “tax file number offence” in subsection 49(4) to sections 7, 7A and 86 of the *Crimes Act 1914*, which concern attempting to commit primary offences, incitement to commit primary offences, and conspiring to commit primary offences, be replaced by references to the *Criminal Code* provisions which deal with these matters (sections 11.1, 11.4 and 11.5). These *Criminal Code* provisions will apply to this Act by virtue of this Bill.

Items 7 and 8 – Clarifying reasonable excuse defence: repeal of provision which duplicates a general Criminal Code offence

984. These items propose two amendments to section 65. First, they remove the defence of reasonable excuse from subsection 65(1) and recreate it in a new subsection 65(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, and puts it beyond doubt that it is a defence to the offence.

985. The standard note is added after proposed subsection 65(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 subsection 65(2).

986. Second, this proposes the repeal of existing subsection 65(2) which states that a person shall not, without reasonable excuse, wilfully obstruct, hinder or resist the Commissioner in the performance of his or her functions under this Act. Subsection 65(2) will duplicate the general *Criminal Code* offence provision of obstructing, hindering or resisting a Commonwealth public official (section 149.1). Section 149.1 is being inserted into the *Criminal Code* by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*.

Items 9 and 10 – Clarifying reasonable excuse defence

987. These items propose to remove the defence of reasonable excuse from subsection 66(1) and recreate it in a new subsection 66(1B). 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.

988. The standard note is added after proposed subsection 66(1B) 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 66(1B).

Item 11

989. The amendment proposed by this item is consequential upon the amendments made by items 9 and 10.

Item 12 - Replacing references to certain Crimes Act 1914 provisions

990. Certain *Crimes Act 1914* provisions, including sections 5, 7, 7A and 86, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the references in subsection 99A(9) to sections 5, 7, 7A and 86 of the *Crimes Act 1914*, which concern aiding, abetting, counselling and procuring the commission of primary offences, attempting to commit primary offences, incitement to commit primary offences, and conspiring to commit primary offences, be replaced by references to the *Criminal Code* provisions which deal with these matters (sections 11.1, 11.2, 11.4 and 11.5). These *Criminal Code* provisions will apply to this Act by virtue of this Bill.

Schedule 41 - Proceeds of Crime Act 1987

Item 1 - Application of all Criminal Code principles except corporate criminal responsibility

991. This item inserts proposed section 13A which applies Chapter 2 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 85). 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, and those similar to it, 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.

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

Item 2 - Amendment of inappropriate fault element

993. Subsection 52(1) applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct, namely contravening a restraining order by disposing of, or otherwise dealing with, property. 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 replacement of “knowingly” in subsection 52(1) by the appropriate and equivalent fault element,

namely intention. It is considered that subsection 52(1) will continue to operate in the same manner as at present following this amendment.

Items 3 and 4 – Clarifying reasonable excuse defence

994. These items propose to remove the defence of reasonable excuse from paragraph 68(1)(a) and recreate it in a new 68(1A). 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.

995. The standard note is added after proposed subsection 68(1A) 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 68(1A).

Item 5 - Amendment of inappropriate fault element

996. Subsection 73(7) applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct, namely contravening a monitoring order or providing false or misleading information. 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 replacement of “knowingly” in subsection 73(7) by the appropriate and equivalent fault element, namely intention. It is considered that subsection 73(7) will continue to operate in the same manner as at present following this amendment.

Item 6 - Strict liability applied

997. This item inserts proposed subsection 77(6A) which applies strict liability to the offence in subsection 77(6) of the Act. Subsection 77(6) provides that a financial institution that contravenes subsection 77(1), (2), (3) or (5) is guilty of an offence. Subsections 77(1), (2), (3) and (5) require financial institutions to retain prescribed documents for certain periods and to store them in a way that makes retrieval of the documents reasonably practicable. The offence carries a fine of \$10,000. This offence is a administrative obligation with a relatively low penalty and is therefore the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

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

Item 7 - Strict liability applied

999. This item inserts proposed subsection 78(4) which applies strict liability to the offence in subsection 78(3) of the Act. Subsection 78(3) provides that a financial institution that contravenes subsection 78(1) or (2) is guilty of an offence. Subsections 78(1) and (2) require financial institutions to retain copies of prescribed documents and to maintain a register of such copies. The offence carries a fine of \$10,000. This offence is a administrative obligation with a relatively low penalty and is therefore the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

1000. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Item 8 - Amendment of inappropriate fault element

1001. Subsection 78A(3) applies the fault element of recklessness (or “recklessly”) in relation to the proscribed physical element of conduct, namely contravening subsection (2). Subsection (2) provides that transferor ADI must give

the document to the transferee ADI within the 120-day period beginning 30 days before the transfer. 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 “recklessly” in subsection 78A(3). Upon application of the *Criminal Code*, its default fault provision (section 5.6) will apply the fault element of recklessness to each physical element of circumstance in subsection 78A(3). It is considered that subsection 78A(3) will continue to operate in the same manner as at present following this amendment.

Schedule 42 - Public Order (Protection of Persons and Property) Act 1971

Item 1 - Application of Criminal Code

1002. This item inserts proposed section 5A. Subsection 5A(1) provides that Chapter 2 of the *Criminal Code* applies to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility.

1003. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

1004. Subsection 5A(2) provides that section 10.5 of the *Criminal Code* applies to an offence against section 13F as if it covered conduct that is justified or excused by a law of the Commonwealth, a State or a Territory. This is consequent upon the amendment proposed by item 23, which removes the defence of lawful excuse from section 13F and places reliance upon section 10.5 of the *Criminal Code*. Section 10.5, which is being inserted into the *Criminal Code* by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*, creates a general defence of lawful excuse which will be applicable to all offences against Commonwealth law. However the defence established by section 10.5 is limited to instances where “the offence is justified or excused by a law”. The *Criminal Code*’s Dictionary defines

“law” to be “a law of the Commonwealth, and includes this Code”. It follows that it is necessary to expand the scope of section 10.5 in relation to those offence provisions where a lawful excuse may arise under State or Territory law, and this is achieved by subsection 5A(2) in relation to sections 13F. An example of where this situation might arise is in relation to a State police officer carrying a firearm on court premises while in the course of apprehending an armed offender.

Item 2 – Absolute liability applied

1005. This item proposes to insert subsection 6(1A) which provides that absolute liability is applied to the physical elements of circumstance contained in the offence in subsection 6(1) that the assembly is in a Territory or is wholly or partly on Commonwealth premises and that the person conduct themselves in a Territory or on the Commonwealth premises (as the case may be). Subsections 6(1) proscribes an assembly of persons in a territory or on Commonwealth premises being conducted in a way that gives rise to a reasonable apprehension that the assembly will be carried on in a manner involving unlawful physical violence to persons or unlawful damage to property.

1006. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application..

1007. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 3 - Amendment of inappropriate fault element: lawful excuse defence

1008. This item proposes three amendments to subsection 6(2). First, subsection 6(2) uses the fault element “wilfully” in relation to the physical element of conduct, namely doing an act or thing to another person by way of physical violence or damaging property whilst taking part in an assembly in a Territory or on Commonwealth premises. This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes the replacement of “wilfully” in subsection 6(2) by the appropriate and equivalent *Criminal Code* fault element, namely intention. It is considered that subsection 6(2) will continue to operate in the same manner as at present following this amendment.

1009. The second amendment proposed by this item is to remove the specific defence of lawful excuse from subsection 6(2). Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item. For more details on the operation of the lawful excuse defence see the explanation at item 3 of Schedule 2.

1010. Thirdly, this item reconstructs subsection 6(2) in order to make clear the physical elements and fault elements that comprise this provision.

Item 4 – Absolute liability applied

1011. This item proposes to insert subsection 6(3) which provides that absolute liability is applied to the physical elements of circumstance contained in the offence in subsection 6(2) that the person is in a Territory or on Commonwealth premises. Subsections 6(1) provides that a person in a Territory or on Commonwealth premises,

while taking part in an assembly, does an act or thing by way of physical violence to another person or damage to property is guilty of an offence.

1012. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 31 of Schedule 10.

1013. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 5 - Amendment of inappropriate fault element: lawful excuse defence

1014. This item proposes two amendments to section 7. First, section 7 uses the fault element "wilfully" in relation to the physical element of conduct, namely causing actual bodily harm to another person or causing damage to property of greater value than \$200 whilst taking part in an assembly in a Territory or on Commonwealth premises. This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes the replacement of "wilfully" in section 7 by the appropriate and equivalent *Criminal Code* fault element, namely intention. It is considered that section 7 will continue to operate in the same manner as at present following this amendment.

1015. The second amendment proposed by this item is to remove the specific defence of lawful excuse from section 7. Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item.

Item 6 - Absolute liability applied

1016. This item proposes to insert subsection 7(2) which provides that, for the purposes of an offence against subsection 7(1), absolute liability is applied to the physical elements of circumstance that the person is in a Territory or on Commonwealth premises and that the damage to property is to an extent exceeding \$1,500.

1017. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 31 of Schedule 10.

1018. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Items 7 and 8 – Clarifying reasonable excuse defence: strict liability applied

1019. These items propose two amendments to section 8. First, they remove the defence of reasonable excuse from subsection 8(3) and recreate it in a new subsection 8(3B). 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.

1020. The standard note is added after proposed subsection 8(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 by subsection 8(3B).

1021. Second, item 8 inserts proposed subsection 8(3A) which applies strict liability to paragraphs 8(3)(a) and (b) of the Act. Subsection 8(3) provides that where a direction is given under this section and the assembly, to the number of not less than twelve persons, continues after the expiration of fifteen minutes from the time of the direction, each of those persons who has failed to comply with the direction is guilty of an offence. Paragraphs (3)(a) and (b), to which strict liability is being applied, provide the following physical elements of circumstance:

- (a) a direction is given under this section; and
- (b) the assembly, to the number of not less than twelve persons, continues after the expiration of fifteen minutes from the time of the direction.

1022. These physical elements are appropriate candidates for the application of strict liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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, and the person can rely on the defence of reasonable excuse. However the defence of mistake of fact should also 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 matters in paragraphs (3)(a) and (b). Accordingly strict liability, and not absolute liability, is the appropriate application. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

1023. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Item 9 - Absolute liability applied

1024. This item proposes to insert subsection 9(2) which provides that, for the purposes of an offence against subsection 9(1), absolute liability is applied to the physical element of circumstance that the person is in a Territory or on Commonwealth premises.

1025. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 31 of Schedule 10.

1026. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 10 - Lawful excuse defence

1027. This item proposes to remove the specific defence of lawful excuse from subsection 10(1). Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item.

Item 11 - Clarifying a fault element

1028. This item proposes to amend paragraph 10(1)(d) by replacing the phrase "in a manner likely to" with "being reckless as to whether doing so will". The substituted

phrase, which invokes the *Criminal Code*'s equivalent fault element of recklessness, better applies recklessness to the physical elements of circumstance in paragraph 10(1)(d). It will also bring the terminology of paragraph 10(1)(d) into harmony with the *Criminal Code* and obviate the unnecessary need for future courts to examine whether there is a difference between the old phrase and recklessness.

Item 12 - Absolute liability applied: reasonable excuse defence

1029. This item proposes two amendments to section 10. First, it inserts subsection 10(1A) which provides that, for the purposes of an offence against subsection 10(1), absolute liability is applied to the physical element of circumstance that the person is in a Territory or on Commonwealth premises.

1030. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 31 of Schedule 10.

1031. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

1032. Second, this item follows the amendment proposed by item 12, which removes the defence of lawful excuse from subsection 10(1) and places reliance on the general lawful excuse provision being inserted into the *Criminal Code*. Paragraph 10(1)(a) proscribes a person having in his or her possession a weapon, a missile or a destructive, noxious or repulsive object or substance while taking part in an assembly in a Territory or on Commonwealth premises. Subsection 10(1) presently offers a defence to a contravention of paragraph 10(1)(a) if the defendant has a lawful excuse. Under proposed section 10.5, which is included in the *Criminal Code* as part of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*, there is to be a defence which provides a person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by a law. The proposed defence will cover the situation where a person is for some reason authorised

by law to possess something of the character described by paragraph 10(1)(a), but it does not cover the situation where someone might have some other reasonable excuse for such possession. For example, a member of the public who is peacefully taking part in an assembly for the purposes of section 10 might find a weapon that has been dropped in the course of the assembly. It would be undesirable in those circumstances for the person not to be exempted from the offence if the person merely picked up (and thus possessed) the weapon with the intention of giving it to a member of the Federal Police so that it could be appropriately dealt with. It is therefore appropriate to replace lawful excuse with a reasonable excuse exception. It is likely that those who originally drafted the offence expected it to apply to those circumstances.

1033. The standard note is added after proposed subsection 10(1B) 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 10(1B).

Items 13, 14 and 15 – Clarifying reasonable excuse defence: absolute liability applied

1034. These items propose amendments to section 11. First, they remove the defences of reasonable excuse from subsection 11(1) and paragraph 11(2)(c) and recreate it then a new subsection 11(2B). 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.

1035. The standard note is added after proposed subsection 11(2B) 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 11(2B).

1036. Item 15 inserts subsection 11(2A) which provides that, for the purposes of an offence against subsection 11(1) or (2), absolute liability is applied to the physical element of circumstance that the premises are in a Territory.

1037. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application.

1038. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Items 16, 17 and 18 – Clarifying reasonable excuse defence: absolute liability applied: strict liability applied

1039. These items propose three amendments to section 12. First, they remove the defences of reasonable excuse from subsection 12(1) and paragraph 12(2)(c) and recreate it them a new subsection 12(5). 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.

1040. The standard note is added after proposed subsection 12(5) 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 12(5).

1041. Second, item 18 inserts subsection 12(3) which provides that, for the purposes of an offence against subsection 12(1) or (2), absolute liability is applied to the physical element of circumstance that the premises are Commonwealth premises.

1042. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application.

1043. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

1044. The third amendment made by item 18 inserts proposed subsection 8(3A) which applies strict liability to the physical elements of circumstance identified in proposed paragraphs 12(4)(a), (b) and (c). These paragraphs concern the status of a person who is authorised to direct a person to leave Commonwealth premises where the latter person is trespassing on those premises.

1045. These physical elements are appropriate candidates for the application of strict liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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, and the person can rely on the defence of reasonable excuse. However the defence of mistake of fact should also 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 matters in paragraphs (12(4))(a), (b) and (c). Accordingly strict liability, and not absolute

liability, is the appropriate application. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

1046. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Items 19 and 20 – Clarifying reasonable excuse defence

1047. These items propose to remove the defence of reasonable excuse from subsection 13C(2) and recreate it in a new subsection 13C(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.

1048. The standard note is added after proposed subsection 13C(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 13C(3).

Items 21 and 22 – Clarifying reasonable excuse defence

1049. These items propose to remove the defence of reasonable excuse from subsection 13D(2) and recreate it in a new subsection 13D(2A). 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.

1050. The standard note is added after proposed subsection 13D(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 13D(2A).

Item 23 - Lawful excuse defence

1051. This item proposes to remove the specific defence of lawful excuse from section 13F. Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item.

Item 24 - Strict liability applied

1052. This item proposes to insert subsection 15(1A) which provides that strict liability is applied to the physical element of circumstance of the offence in subsection 15(1) that the way in which the persons conduct themselves gives rise to a reasonable apprehension that the assembly will be carried on in a manner involving unlawful physical violence to persons or unlawful damage to property.

1053. 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 these physical elements, 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 identified physical element. Accordingly strict liability, and not absolute liability, is the appropriate application. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

1054. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Item 25 - Lawful excuse defence: clarification of physical element

1055. This item proposes two amendments to subsection 15(2). First, it removes the specific defence of lawful excuse from subsection 15(2). Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item.

1056. Second, subsection 15(2) is amended to clarify that the property damage described in this provision is the result of the defendant's conduct, and accordingly is

a physical element of circumstance to which the fault element of recklessness will apply by default: *Criminal Code* section 5.6.

Item 26 – Absolute liability applied

1057. This item proposes to insert subsection 15(3) which provides that absolute liability is applied to the physical element of circumstance contained in the offence in subsections 15(1) and (2) that the assembly is in relation to protected premises or a protected person. Subsections 15(1) and (2) proscribe certain conduct arising in the course of assemblies that are being conducted in relation to protected premises or a protected person.

1058. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 31 of Schedule 10.

1059. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 27 - Amendment of inappropriate fault element: lawful excuse defence

1060. This item proposes two amendments to section 16. First, section 16 uses the fault element "wilfully" in relation to the physical element of conduct, namely causing actual bodily harm to another person or causing damage to property of greater value than \$200 whilst taking part in an assembly that is in relation to protected premises or to a protected person. This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements

(subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes the replacement of “wilfully” in section 16 by the appropriate and equivalent *Criminal Code* fault element, namely intention. It is considered that section 16 will continue to operate in the same manner as at present following this amendment.

1061. The second amendment proposed by this item is to remove the specific defence of lawful excuse from section 16. Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item.

Item 28 - Absolute liability applied

1062. This item proposes to insert subsection 16(2) which provides that, for the purposes of an offence against paragraph 16(1)(b), absolute liability is applied to the physical elements of circumstance that the damage to property is to an extent exceeding \$1,500.

1063. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 31 of Schedule 10.

1064. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Items 29 and 30 – Clarifying reasonable excuse defence: strict liability applied

1065. These items propose two amendments to section 17. First, they remove the defence of reasonable excuse from subsection 17(3) and recreate it in a new subsection 17(3B). 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.

1066. The standard note is added after proposed subsection 17(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 by subsection 17(3B).

1067. Second, item 30 inserts proposed subsection 17(3A) which applies strict liability to the physical elements of the offence stated in paragraphs 17(1)(a) and (b) of the Act.

1068. These physical elements are appropriate candidates for the application of strict liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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 identified physical elements. Accordingly strict liability, and not absolute liability, is the appropriate application. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

1069. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Item 31 - Absolute liability applied

1070. This item proposes to insert subsection 18(2) which provides that, for the purposes of an offence against paragraph 18(1)(a), (b), (c) or (d), absolute liability is applied to the physical elements of circumstance that the person to whom the paragraph applies is a protected person and that interference with the discharge of duties of such a person is interference with the free and safe discharge of those duties.

1071. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 31 of Schedule 10.

1072. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Item 32 - Lawful excuse defence

1073. This item proposes to remove the specific defence of lawful excuse from subsection 19(1). Reliance may instead be placed upon the general defence of lawful excuse, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item.

Item 33 - Clarifying a fault element

1074. This item proposes to amend paragraph 19(1)(d) by replacing the phrase "in a manner likely to" with "being reckless as to whether doing so will". The substituted phrase, which invokes the *Criminal Code*'s equivalent fault element of recklessness, better applies recklessness to the physical elements of circumstance in paragraph

10(1)(d). It will also bring the terminology of paragraph 19(1)(d) into harmony with the *Criminal Code* and obviate the unnecessary need for future courts to examine whether there is a difference between the old phrase and recklessness.

Item 34 – Reasonable excuse defence

1075. This item proposes to insert paragraph 19(1A) which provides a defence of reasonable excuse in relation to an offence against paragraph (1)(a). This will replace the present defence of lawful excuse, which is being deleted by item 32.

1076. The offence in paragraph 19(1)(a) proscribes a person who, while taking part in an assembly that is in relation to protected premises or to a protected person, possessing a weapon, a missile or a destructive, noxious or repulsive object or substance without a lawful excuse. Under proposed section 10.5, which is being inserted into the *Criminal Code* by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*, there is to be a defence which provides a person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by a law. The proposed defence will cover the situation where a person is for some reason authorised by law to possess the identified items, but it does not cover the situation where someone might have some other reasonable excuse for possessing such items. For example, a member of the public might, whilst taking part in an assembly, find a weapon that has been dropped. It would be undesirable in those circumstances for the person not to be exempted from the offence if the person merely picked up the weapon with the intention of returning it to the AFP so that it could be put in safe keeping. It is therefore appropriate to replace lawful excuse with a reasonable excuse exception. It is likely that those who originally drafted the offence expected it to apply to those circumstances.

1077. This item also adds the standard note after proposed subsection 19(1A) 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 19(1A).

Items 35, 36 and 37 – Clarifying reasonable excuse defence: absolute liability applied: strict liability applied

1078. These items propose three amendments to section 20. First, they remove the defences of reasonable excuse from subsection 20(1) and paragraph 20(2)(c) and recreate it them a new subsection 20(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.

1079. The standard note is added after proposed subsection 20(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 20(3).

1080. Second, item 37 inserts subsection 20(4) which provides that, for the purposes of an offence against subsection 20(1) or (2), absolute liability is applied to the physical element of circumstance that the relevant premises are protected premises.

1081. This physical element is an appropriate candidate for the application of absolute 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 31 of Schedule 10.

1082. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

1083. The third amendment made by item 37 inserts proposed subsection 20(5) which applies strict liability to the physical elements of circumstance identified in proposed paragraphs 20(5)(a), (b), (c) and (d). These paragraphs concern the status of a person who is authorised to direct a person to leave protected premises where the latter person is trespassing on those premises.

1084. These physical elements are appropriate candidates for the application of strict liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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, and the person can rely on the defence of reasonable excuse. However the defence of mistake of fact should also 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 matters in paragraphs (12(4))(a), (b) and (c). Accordingly strict liability, and not absolute liability, is the appropriate application. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

1085. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Item 38

1086. The amendment proposed by this item is consequent upon changes made by this Bill to sections 7 and 16.

Schedule 43 - Racial Discrimination Act 1975

Item 1 - Application of Criminal Code

1087. This item inserts proposed section 6B which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility.

1088. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

Item 2 - Strict liability applied

1089. This item inserts proposed subsection 27(1A) which applies strict liability to the physical element of circumstance in the offence in subsection 27(1) that a person is exercising or performing any of the powers or functions referred to in the Act. The offence in subsection 27(1) provides that a person shall not hinder, obstruct, molest or interfere with a person exercising or performing any of the powers or functions referred to in the Act. The offence carries a fine of \$1000 in the case of a natural person or \$5000 in the case of a body corporate. Strict liability, and not absolute liability, is appropriate in this instance because the prosecution should not be obliged to prove that the defendant had turned his or her mind towards the question whether the other person was exercising or performing any of the powers or functions referred to in the Act, and yet the defendant should be afforded the defence of mistake of fact (which is achieved by the application of strict liability). The basis for applying strict liability to the physical element of circumstance is reinforced by the low penalty applicable to a contravention of subsection 27(1). For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

1090. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Items 3 and 4 – Clarification of exception to the offence

1091. These items propose to remove the exception of “except in the performance of a duty under or in connection with this Act or in the performance or exercise of such a function or power” from subsection 27F(1) and recreate it as subsection 27F(3A). The rationale for this amendment is to prevent future interpretation that the exception 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 an exception to the offence. The standard note concerning the imposition of an evidential burden on the

defendant by subsection 13.3(3) of the *Criminal Code* is added. Item 4 proposes the insertion of a note after subsection 27F(3) which makes it clear that the defendant bears an evidential burden in relation to a defence raised under subsection 27F(3). Subsection 13.3(6) of the *Criminal Code* provides that an evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matters exists or does not exist (as the case may be).

Item 5 - Excuse defence

1092. This item amends subsection 27F(3) to preserve defences based on duty and the performance of functions.

Schedule 44 - Service and Execution of Process Act 1992

Item 1 - Application of Criminal Code

1093. This item inserts proposed section 8A which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility.

1094. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

Item 2 - Amendment of inappropriate fault element

1095. Paragraph 84(3)(b) applies the fault element of knowledge (or “knowingly”) in relation to the proscribed physical element of conduct, namely giving a false or misleading answer to any inquiry made by a magistrate under subsections 84(1) or (2). 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 replacement of “knowingly” in paragraph 84(3)(b) by the appropriate and equivalent fault element, namely intention. It is considered that paragraph 84(3)(b) will continue to operate in the same manner as at present following this amendment.

Item 3

1096. The amendment proposed by this item is related to the amendment made by item 5. The word “refuse”, which is generally interpreted to be a fault-based physical element of conduct, is removed in order to facilitate the application of strict liability to the offence in subsection 103(1) which also encompasses failure (a term more consistent with the application of strict liability). This amendment will not change the scope of the offence in subsection 103(1) because to refuse to comply with a requirement is a subset of the broader concept of failing to comply.

Item 4 – Penalty

1097. This item proposes to amend the penalty applicable to the offence in subsection 103(1) from 12 to 6 months imprisonment. This amendment is necessary to facilitate the application of strict liability to the offence in subsection 103(1), as 6 months imprisonment is an appropriate upper benchmark for strict liability offences.

Item 5 - Strict liability applied

1098. This item inserts proposed subsection 103(1A) which applies strict liability to the offence in subsection 103(1) of the Act. Subsection 103(1), as amended by this Bill, provides that a person must not fail to comply with a suppression order. The offence carries an amended penalty of 6 months imprisonment, and the defendant can rely upon the broad defences available in subsection 103(2) as well as the general mistake of fact defence. This form of obligation is the type of offence where strict liability is applied under the existing law. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

1099. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Schedule 45 - Sex Discrimination Act 1984

Item 1 - Application of Criminal Code

1100. This item inserts proposed section 13A which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility.

1101. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

Item 2 - Removal of ancillary provision duplicating the Criminal Code

1102. This item proposes to amend subsection 86(1) by removing the reference to causing or permitting to be published or displayed an advertisement prescribed by this subsection. This conduct is ancillary to the primary physical element of conduct described in subsection 86(1). Reliance will instead be placed upon the relevant general ancillary provision in the *Criminal Code*, namely section 11.2 (complicity). This ancillary provision is present in Chapter 2 of the *Criminal Code*, which is being applied to this Act by this Bill and thus will be made applicable to this Act simultaneous with the amendment proposed by this item.

Items 3 and 4 – Clarifying reasonable excuse defence: strict liability applied

1103. These items propose two amendments to section 87. First, they remove the defence of reasonable excuse from section 87 and recreate it in a new subsection 87(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, and puts it beyond doubt that it is a defence to the offence.

1104. The standard note is added after proposed subsection 87(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 subsection 87(2).

1105. Item 4 also inserts proposed subsection 87(3) which applies strict liability to the offence in subsection 87(1) of the Act. Subsection 87(1) imposes an obligation to disclose the source of certain actuarial or statistical data. The offence carries a fine of \$1000 for a natural person and \$5000 for a body corporate, and the person can claim a defence if he or she has a reasonable excuse. This is the type of directed 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 presence of a defence of reasonable excuse, and the penalty, which in this case is very low. For more details on the operation of strict liability see the explanation item 6 of Schedule 2.

1106. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Item 5 - Strict liability applied

1107. This item inserts proposed subsection 92(1A) which applies strict liability to the offences in subsection 92(1) of the Act. Subsection 92(1) provides that where a complaint alleging the commission of an unlawful act has been lodged, a person shall not make a record of, or communicate to any other person, any particulars of the complaint until one of alternative circumstances prescribed in paragraphs 92(1)(a), (ab) or (b) have come to pass. The offence carries a fine of \$1000 for a natural person and \$5000 for a body corporate. This is the type of administrative 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. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

1108. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Item 6 - Strict liability applied

1109. This item inserts proposed subsection 95(2) which applies strict liability to the physical element of circumstance in the offence in subsection 95(1) that a person is exercising a power or performing a function under the Act. The offence in subsection 95(1) provides that a person shall not insult, hinder, obstruct, molest or interfere with a person exercising a power or performing a function under the Act. The offence carries a fine of \$1000 in the case of a natural person or \$5000 in the case of a body corporate.

1110. 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 identified physical element of circumstance. Accordingly strict liability, and not absolute liability, is the appropriate application. For more details on the operation of strict liability see the explanation at item 6 of Schedule 2.

1111. The standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is also added after this provision.

Items 7 - 9 – Clarification of exception to the offence

1112. These items propose to remove the exception of “except in the performance of a duty under or in connection with this Act or in the performance or exercise of such a function or power” from subsection 112(1) and recreate it as subsection

112(3AA). The rationale for this amendment is to prevent future interpretation that the exception 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 an exception to the offence. The standard note concerning the imposition of an evidential burden on the defendant by subsection 13.3(3) of the *Criminal Code* is added.

1113. Item 8 proposes the insertion of a note after subsection 65ZB(3) which makes it clear that the defendant bears an evidential burden in relation to a defence raised under subsection 65ZB(3). Subsection 13.3(6) of the *Criminal Code* provides that an evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matters exists or does not exist (as the case may be).

Schedule 46 - Statutory Declarations Act 1950

Item 1 - Application of Criminal Code

1114. 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.

1115. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

Item 2 - Amendment of inappropriate fault element

1116. Section 11 uses the fault element “wilfully” in relation to the physical element of conduct, namely making a false statement in a statutory declaration. This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes the replacement of

“wilfully” in section 11 by the appropriate and equivalent *Criminal Code* fault element, namely intention. It is considered that section 11 will continue to operate in the same manner as at present following this amendment.

Schedule 47 - Telecommunications (Interception) Act 1979

Item 1 - Application of Criminal Code

1117. 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.

1118. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

Items 2 and 3 – Clarifying reasonable excuse defence

1119. These items propose to remove the defence of reasonable excuse from section 106 and recreate it in a new subsection 106(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, and puts it beyond doubt that it is a defence to the offence.

1120. The standard note is added after proposed subsection 106(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 subsection 106(2).

Items 4 to 7 – Clarifying reasonable excuse defence: penalty: amendment of inappropriate fault element

1121. These items propose three amendments to section 107. First, they remove the defences of reasonable excuse from subsection 107(1) and paragraph 107(2)(a) and recreate them in a new subsection 107(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.

1122. The standard note is added after proposed subsection 107(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 107(3).

1123. Secondly, paragraph 107(2)(a) uses the non-*Criminal Code* fault element “wilfully” in relation to the physical element of conduct, namely obstruct, hinder or resist a person in connection with the performance or exercise of the Ombudsman's functions or powers under Part VIII. This is equivalent to applying the *Criminal Code* fault element of intention. The *Criminal Code* allows the use of new fault elements (subsection 5.1(2)) and the present offence would possibly still operate in the same manner following application of the *Criminal Code*. However it is also possible that future courts may attempt to distinguish wilfulness from intention on the basis that wilfulness appears to differ from the basic *Criminal Code* fault element. Accordingly this item proposes the replacement of “wilfully” in paragraph 107(2)(a) by the appropriate and equivalent *Criminal Code* fault element, namely intention. It is considered that paragraph 107(2)(a) will continue to operate in the same manner as at present following this amendment.

1124. The third amendment proposed by this item is consequent upon the amendment being effected by items 4 - 6. It proposes to insert the penalty presently applicable to an offence against subsection 107(1), namely 6 months imprisonment, after subsection 107(1). This is intended to assist the correct interpretation that subsection 107(1) creates a criminal offence and that the penalty applicable to an offence against this subsection is the penalty described.

Schedule 48 - Transfer of Prisoners Act 1983

Items 1 and 2 - Replacing references to Crimes Act 1914 ancillary provisions

1125. These items modify paragraph 27(b) and insert paragraph 27(c), which introduces the *Criminal Code* ancillary provisions for the purposes of this provision. Paragraph 27(c) is designed to replace paragraph 27(b) on 15 December 2001.

Schedule 49 - War Crimes Act 1945

Item 1 - Application of Criminal Code

1126. This item inserts proposed section 3A which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility.

1127. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

Item 2 - Replacing references to certain Crimes Act 1914 provisions

1128. Certain *Crimes Act 1914* provisions, including sections 5, 7 and 86, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions. This item proposes that the references in subsection 9(2) to sections 5, 7 and 86 of the *Crimes Act 1914*, which concern aiding, abetting, counselling and procuring the commission of primary offences, attempting to commit primary offences, and conspiring to commit primary offences, be replaced by references to the *Criminal Code* provisions which deal with these matters (sections 11.1, 11.2 and 11.5). These *Criminal Code* provisions will apply to this Act by virtue of this Bill.

Item 3 – Absolute liability applied

1129. This item proposes to insert subsection 9(3) which provides that absolute liability is applied to the physical elements of circumstance contained in the offence in subsections 9(1) that are identified in proposed paragraphs 9(3)(a) and (b).

1130. These physical elements are appropriate candidates for the application of absolute liability because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, 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. The defence of mistake of fact should not be available to the defendant and accordingly absolute liability, and not strict liability, is the appropriate application. For more details on the operation of absolute liability see the explanation at item 31 of Schedule 10.

1131. The standard note referring to section 6.2 of the *Criminal Code*, which governs absolute liability, is also added after this provision.

Schedule 50 - Witness Protection Act 1994

Item 1 - Application of Criminal Code

1132. This item inserts proposed section 3A which applies Chapter 2 of the *Criminal Code* to all offences against the Act. Chapter 2 establishes the codified general principles of criminal responsibility.

1133. The standard note concerning Chapter 2 of the *Criminal Code* setting out the principles of criminal responsibility is also added after this provision.

Items 2 and 3 – Clarifying reasonable excuse defence

1134. These items propose to remove the defence of reasonable excuse from subsection 19(5) and recreate it in a new subsection 19(6). 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.

1135. The standard note is added after proposed subsection 19(63) 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 19(6).

Item 4 - Penalty

1136. This amendment is consequential upon the amendment made by item 210A, and amends the wording that applies the relevant penalty to this provision in order to clarify its meaning.

Item 5 - Lawful authority defence

1137. This item proposes to remove the specific defence of lawful authority from subsection 22(1). Reliance may instead be placed upon the general defence of lawful authority, which is being inserted into the *Criminal Code* and will be applicable to this Act simultaneous with the amendment proposed by this item.

Schedule 51 – Amendments commencing on the date mentioned in subsection 2.2(2) of the *Criminal Code*

Commonwealth Places (Application of Laws) Act 1970

Item 1 - removal of reference to section 4 of the Crimes Act 1914

1138. Section 4 of the *Crimes Act 1914* applies the common law general principles of criminal responsibility to all Commonwealth offences. It will be replaced by Chapter 2 of the *Criminal Code*. The reference to section 4 will no longer be appropriate.

Item 2 - Replacing references to certain Crimes Act 1914 provisions

1139. Certain *Crimes Act 1914* provisions, including sections 5, 7, 7A and 86, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001. These

provisions concern aiding, abetting, counselling and procuring the commission of primary offences, attempting to commit primary offences, inciting another person to commit primary offences and conspiring to commit primary offences. Replacement references to relevant *Criminal Code* provisions are to be inserted by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (item 143 of Schedule 2). The references ensure that applied State offences operate under their own principles of criminal responsibility. This is appropriate because the State offences are not designed to operate under those principles.

Item 3 - Replacing references to certain Crimes Act 1914 provisions

1140. Certain *Crimes Act 1914* provisions, including sections 14 and 15D, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001. Sections 14 and 15D concern the burden of proof placed on a defendant who relies on an exception to an offence or a defence of lawful authority. These matters are dealt with in Division 13 of the *Criminal Code*, which will apply to this Act on the date specified in subsection 2.2(2) of the *Criminal Code*, namely 15 December 2001, simultaneous with the commencement of this item: see clause 2(3). Accordingly this item proposes the deletion of references to sections 14 and 15D in clause 1 of the Schedule to this Act.

Crimes Act 1914

Item 4 - Repeal

1141. This item repeals sections 4, 5, 7, 7A, 14 and 15D of the Act, which concern the application of the common law to principles of criminal responsibility, the ancillary offences of aiding and abetting, attempt and incitement of the commission of primary offences, and the burden of proof placed on a defendant who relies on an exception to an offence or a defence of lawful authority. These sections are being progressively disapplied in relation to offences against Commonwealth law (see item 1 of Schedule 1) but are required to continue in operation until 15 December 2001 in relation to offences to which the *Criminal Code* has not yet been applied. Chapter 2 of

the *Criminal Code* will be applied to all offences against Commonwealth law on 15 December 2001 (see subsection 2.2(2) of the *Criminal Code*) and consequently the need for sections 5, 7, 7A, 14, 15D and 86 will disappear on that date.

1142. Further, this item proposes the repeal of section 3BB which is being inserted into the Act by item 1 of Schedule 1 above. Section 3BB disapplies sections 4, 5, 7, 7A, 14, 15D and 86 of the *Crimes Act 1914* in relation to each offence to which Chapter 2 of the *Criminal Code* has been applied. As stated above, sections 4, 5, 7, 7A, 14, 15D and 86 are scheduled for repeal on 15 December 2001 and consequently section 3BB will not be required beyond that date.

Transfer of Prisoners Act 1983

Item 5 - Replacing references to certain Crimes Act 1914 provisions

1143. This item proposes the repeal of paragraph 27(b), which contains references to some *Crimes Act* provisions. Certain *Crimes Act 1914* provisions, including sections 7, 7A and 86, are scheduled for progressive disapplication in relation to offence provisions to which the *Criminal Code* applies, and ultimately for repeal on 15 December 2001. It will be necessary to replace references to these *Crimes Act* provisions with references to relevant *Criminal Code* provisions, which is achieved by the amendment in item 2 of Schedule 48. This item does not come into force until the date specified in subsection 2.2(2) of the *Criminal Code*, namely 15 December 2001, because these *Crimes Act* provisions will be required to continue in operation until that date in relation to this Act.